COMCAST V. BEHREND: THE CLASS ACTION CHANNEL IS STILL SCRAMBLED

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CLASS ACTION – FRCP RULE 23 – CLASS CERTIFICATION – The United States Supreme Court in recent years has placed a significant number of hurdles in the path of plaintiff's looking to certify their claims as class actions. While the Court's latest decision further erodes the plaintiff's ability to gain certification, a significant number of questions have been left unanswered and a considerable amount of judicial refinement is going to be necessary before it can be determined if class actions remain a viable form of litigation. – *Comcast Corp v. Behrend*, 133 S. Ct. 1426 (U.S. 2013).

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INTRODUCTION

In 1966, the United States Supreme Court amended Rule 23 of the Federal Rules of Civil Procedure.[1] While class action litigation finds its earliest roots in America jurisprudence as far back as 1842[2] and formally became available to plaintiffs in the original Federal Rules of Civil Procedure adopted 1938,[3] the 1966 amendment greatly simplified the process for gaining certification.[4] This amendment opened the door to an explosion of class actions in the late 1980s and early 1990s,[5] but with this expansion came a great deal of criticism.[6] Critics have accused class actions of being a judicially created form of extortion, forcing defendants to either settle their claims or risk going bankrupt.[7] Additionally, exponential attorneys' fees led many to view the class action as simply a method for lawyers to get increasingly rich at the expense of the plaintiffs, who often saw pennies on the dollar for their claims.[8] What was once viewed as a large jump forward in promoting judicial efficiency quickly became viewed as a judicial evil.[9]

Concerned with the abuses in the class action system, the United States Supreme Court, over the past fifteen years, has revised its stand on Rule 23. The class certification step, once viewed as perfunctory in the class action process, now requires strict scrutiny. In 2013, the Supreme Court, following the lead of several of their previous opinions in the three previous years, dealt yet another blow to plaintiffs seeking class certification in *Comcast v. Behrend*.[10] In *Comcast*, the Court articulated that simply showing questions common to the class would no longer be sufficient to satisfy the class certification inquiry. Now, plaintiffs must present common *answers* to their common questions through evidence common to the class. This "common answers" standard has greatly swung the judicial pendulum back in the direction of the defendants, and has made the class certification inquiry a much more demanding standard.

This case note will examine the effect that *Comcast* has had on the certification stage of the class action mechanism. First, the note will examine the

1. Robert G. Bone, *Walking the Class Action Maze: Toward A More Functional Rule 23*, 46 U. Mich. J.L. Reform 1097, 1101 (2013).

2. Susan T. Spence, *Looking Back… In a Collective Way A Short History of Class Action Law*, 11-AUG Bus. L. Today 21, 23 (July/August 2002).

3. Charles E. Clark, *The Federal Rules of Civil Procedure 1938-1958*, 58 Colum. L. Rev. 435, 24 (1958).

4. Robert H. Klonoff, *The Decline of Class Actions*, 90 Wash. U. L. Rev. 729, 736 (2013).

5. *Id.*

6. *Id.* at 737

7. *Id.*at 738.

8. Klonoff, *The Decline of Class Actions* at 737.

9. *Id.* at 737-38

10. *Comcast Corp v. Behrend*, 133 S. Ct. 1426 (2013).

history of the class action and the evolving history of the mechanism throughout time. Next, the note will provide some context on the modern day Rule 23 and how a plaintiff attempts to certify a class under the Rule. Then, a full review of the facts, procedural history, and analysis of the case beginning with the certification ruling in the United States District Court for the Eastern District of Pennsylvania, to the Third Circuit Court of Appeals, and finishing with the United States Supreme Court. Finally, the note will conclude with an examination of the impact of *Comcast* and the many lingering questions that remain following the holding which leave us channel surfing as to the future of class litigation in the federal courts.