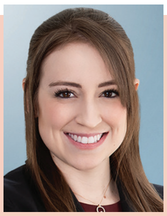
By Dawn B. Williams and Laura M. Wall

Attacking Damage Models in Life Insurance and Annuity Consumer Class Actions



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Comcast Corp. v. Behrend was heralded by defense attorneys as a watershed case that could change class action jurisprudence and was dismissed by plaintiffs' counsel as merely an anti-trust decision that would have little effect. 133 S. Ct. 1426 (2013). With respect to life insurance and annuity consumer class actions, the truth lies somewhere in the middle.

This article reviews some of the ways that damage models have been articulated in life insurance and annuity class actions in recent years, how defense counsel have attacked those models, and with what success. We will conclude with insights about the most effective arguments to use in defending against classwide damage theories.

While class actions against the issuers of life insurance and annuities run the gamut from employment actions to Employee Retirement Income Security Act (ERISA) litigation, this article focuses primarily on class actions brought by consumers alleging improprieties in the sale or administration of the policies. When viewed through that lens, class actions brought over the last 20 years share many common characteristics, including the damage models articulated.

A Brief Recap of *Comcast v. Behrend*

Comcast Corp. v. Behrend involved a putative class action alleging antitrust violations on behalf of millions of Comcast subscribers. The plaintiffs initially proffered four separate theories of injury, although the court ultimately rejected three of them. Importantly, the plaintiffs' expert created a model to calculate damages on a classwide basis, which incorporated all four theories of liability and did not isolate the approved theory. The district court certified the class, and on appeal, the Third Circuit affirmed. In the Supreme Court, the majority found that certification of the class was improper because the "model failed to measure damages resulting from the particular antitrust injury on which [plaintiffs'] liability in th[e] action [wa]s premised." *Comcast*, 133 S. Ct. at 1433. As a result, the Court determined that the predominance requirement of Federal Rule of Civil Procedure 23(b)(3) was not satisfied because individual damage calculations would inevitably overwhelm questions common to the class. *Id.*

The federal appellate courts agree on at least two of the key holdings of *Comcast*: (1) a "rigorous analysis" of predominance is required, and (2) a class representative's theory of damages must be tied to her theory of liability. *Comcast* also seemingly held that "damages [must be] capable of measurement on a classwide basis." *Id.* But some subsequent circuit court decisions have found that individualized damage calculations alone will not defeat certification. *See Sykes v. Mel S. Harris and Assoc., LLC*, 780 F.3d 70, 81–82 (2d Cir. 2015); *Nguyen v. Nissan North America, Inc.*, 932 F.3d 811, 817 (9th Cir. 2019).

The theories advanced in class action litigation are often more nuanced than those that might be proffered in individual cases. Class action plaintiffs must be able to allege a plausible classwide method of proving damages to attain class certification.

District courts have varied in interpreting and applying *Comcast*. For example, in *Hamilton v. Wal-Mart Stores, Inc.*, the court found that plaintiffs must offer *some* kind of "workable method" for calculating classwide damages at the class certification or decertification stage. 2019 WL 1949457, at *13–14 (C.D. Cal. Mar. 4, 2019). Conversely, in *Grace v. Apple*, the court opined that even flawed models could be accepted at the certification stage, as long as they were tied to a liability theory. 328 F.R.D. 320, 341 (N.D. Cal. 2018).

Recent Challenges to Damage Models

The theories advanced in class action litigation are often more nuanced than those that might be proffered in individual cases. Class action plaintiffs must be able to allege a plausible classwide method of proving damages to attain class certification. In an individual lawsuit over the propriety of an annuity sale, for example, a plaintiff might seek damages for the allegedly unsuitable nature of the policy for him or her. The plaintiff might introduce evidence about his or her business acumen, risk adversity, and contemporaneous investments to prove that the policy was not the right fit for his or her current needs.

In a class case, however, those individual inquiries would likely defeat class certification. Thus, class counsel in life insurance and annuity class actions have resorted to crafting unique damage models that they claim are not based on individual class member characteristics but are supported by common proof based on relatively ascertainable data. It is defense counsel's responsibility to expose the holes in that approach.

Life insurance and annuity consumer class actions fall broadly into two categories: attacks on the sale of policies (*i.e.*, the policies were misrepresented, key information was omitted, or the products were defective), and attacks on the administration of the policies (*i.e.*, the way that the company administered the policy was not in accordance with its contractual obligations). The two are sometimes related; for example, a plaintiff may claim that the company improperly administered the policy if the way that it was represented in the sales illustration or marketing material is inconsistent with the way that the company has treated the policyholder. However, given the different claims often articulated in the two types of cases—fraud and misrepresentation claims for the former, and breach of contract claims for the latter—it is analytically helpful to review them separately.

Sales Practices Class Actions

In class actions, attacking the sales of life insurance and annuity policies, usually brought under fraud, misrepresentation, or Racketeer Influenced and Corrupt Organizations (RICO) Act theories, there are a number of models that have been articulated. These include the "worth less," "model investment," and expectation theories.

The "Worth Less" Theory

A model grounded in the "worth less" theory attempts to quantify how much less the life insurance or annuity policy was worth on the day that it was purchased than it would have been worth if all the missing policy attributes had been as they were promised by the company, or how much less it was worth if those promised attributes were missing altogether. As one court described it, "the relevant inquiry… focuses most appropriately on what a willing buyer would pay for a product in the absence of that fraud." *Walker v. Life Ins. Co. of the SW*, 2013 WL 11308061, at *5 (C.D. Cal. Nov. 4, 2013) (declining to decertify a life insurance policyholder class and distinguishing *Comcast*). The critical issue with respect to this model is quantifying what the policy was "worth" on day one.

Walker is instructive. The U.S. District Court for the Central District of California initially certified a class of indexed universal life policyholders who claimed that the company had misrepresented or omitted a variety of material terms and declined to decertify, despite *Comcast* having been decided in the intervening time, based on an expert opinion of damages that compared and averaged a variety of products in an attempt to achieve a "day-one" value. *Walker*, 2013 WL 11308061, at *5. The court required that the model focus on the "buyer side" and not the seller side, rejecting the contention that the insurer's "internal pricing strategies and cost analyses" were relevant to the analysis. *Walker v. Life Ins. Co. of the SW*, slip. op. at 2 (Dkt. 221) (C.D. Cal. May 4, 2012). After a jury trial and then a bench trial on the California unfair competition law claim, the court found that the expert's approximations were divorced from reality and could not serve as the basis for classwide damages. *Walker v. Life Ins. Co. of the SW*, slip. op. at 46–49 (Dkt. 791) (C.D. Cal. Apr. 14, 2015).

As in a number of other "worth less" models, the expert performed Monte Carlo simulations to estimate future policy performance and then discounted the future values back to achieve a so-called "day-one value." In *Walker*, the expert analyzed the risk of policy lapse against those simulations, but the court faulted him for failing to consider "any other insurance policies." *Id.* at 46. Even if the policies had a risk of lapse, if it was the same risk as other life insurance policies, that would not make that risk a "defect" or something that detracted from the value of the policies. Moreover, in many of the expert's projections, the policies fared as well or better than the non-guaranteed projections provided to the class members in their illustrations, meaning that it could not constitute classwide proof of damage. *Id.* The expert also did not consider measuring hypothetical future performance against the "guaranteed" projections provided in the illustrations, which some policyholders may have relied on in making their purchasing decisions. *Id.* at 48. The court concluded, "this theory that the policies are worth less than they paid for them is dependent upon acceptance of their contention that there was an undisclosed risk," and because the expert's models attempting to show that there was such a risk could not serve as classwide proof, there was no classwide injury. *Id.* at 63.

Similar theories were propounded in many of the "bonus" annuity class actions. In *Negrete v. Allianz Life Ins. Co. of N. Am.*, the defendants sought to exclude a plaintiffs' expert who conducted a similar Monte Carlo simulation of policy values. 2011 WL 4852305 (C.D. Cal. Oct. 13, 2011). Defendants challenged the expert's valuation methodology, noting that the expert valued only very limited features of the annuities and one possible outcome, undervaluing the annuity. *Id.* at *3. Among other arguments, the defendant also attacked the fit of the model to the alleged wrongdoing and to fixed annuities in general (which are not sold based on a market "price"); the speculative nature of the expert's model; the use of risk-free rates to simulate growth and risky rates to discount, which necessarily devalued any annuity subject to the model; and the failure to compare the annuity to other annuities, which rendered his calculation meaningless. *Id.* The court found, at the class certification stage, that the expert's calculations were sufficiently reliable and relevant and any ultimate issues with the methodology was "within the province of the jury." *Id.* at *7–8.

This theory continues to be propounded in life insurance and annuity class actions. *See Ogles v. Security Benefit Life Ins. Co.*, 2019 WL 3066439, at *4 (D. Kan. July 12, 2019) (dismissing putative annuity class action; plaintiff alleged that due to the "fraudulent design" of the annuities, he was "damaged when he purchased the annuity that was worth less than the premiums paid"); *Clinton v. Security Benefit Life Ins. Co.*, Complaint (Dkt. 1) ¶181 (S.D. Fla. Nov. 20, 2019) (annuity class action claiming that the annuities were "worth less than they paid for them on the date of issuance").

The "Model Investment" Theory

The "model investment" theory uses an alternative benchmark investment—sometimes termed the "well-run" or "model" investment—and compares the performance of that vehicle with the performance of the life insurance or annuity.

This theory was propounded in *Abbit v. ING USA Annuity*, in which a nationwide class alleged that the insurer uniformly breached its fixed annuity contracts by embedding a "hidden derivatives structure to transfer risks to plaintiff" in the annuity policies, despite representations that the annuities were safe. 2015 WL 7272220 (S.D. Cal. Nov. 16, 2015). The plaintiffs' expert purported to quantify the damage to class members by comparing the annuities' performance with two alternative mutual funds. *Id.* at *13.

One of the primary attacks against this type of model is that the alternative selected, whether it be a mutual fund or a portfolio of stocks and bonds, is unlikely to be what any given class member would have selected, particularly since life insurance and annuities are generally considered to be relatively safe investments. Significantly for class certification, whether the alternative aligns with what any given class member might have wanted is an individual inquiry. *See Fernandez v. UBS AG*, 2018 WL 4440498, at *22 (S.D.N.Y. Sept. 17, 2018) (rejecting a benchmark investment theory because there was no way to know whether such an investment would have been suitable for members of the proposed class). Moreover, what might have happened with a wholly theoretical investment is entirely hypothetical and relies on a variety of assumptions that may be divorced from reality.

Life insurance policies and annuities are difficult to compare to non-insurance investments, due to their risk transfer component. One cannot appropriately compare the performance of the investment component of a universal life or indexed annuity to the investment performance of a "pure investment product," since there is inevitably a tradeoff in the investment component of the life or annuity product to provide the death benefit or lifetime income options, or both. If the damage model suffers from this problem, one goal of attacking the damage model should be to make a record of the factual and analytical problems with any comparison. The analysis might focus on the features of the product at issue that may be left out of the value analysis entirely by the model.

Those arguments have had some traction. Foreshadowing *Comcast*, the U.S. District Court of the Central District of California found that the comparison of annuities to alternative investments in mutual funds did not "fit" the plaintiffs' theory of liability:

> Plaintiffs do not allege that defendant delivered to them a financial product that was inferior to what plaintiffs agreed to purchase, nor do plaintiffs allege that defendant breached any of the terms of the annuity contract. In other words, plaintiffs do not allege that defendant failed to give them what they expected to get.

In re: Midland Nat'l Life Ins. Co. Annuity Sales Practices Litig., slip op. at 51–52 (C.D. Cal. Feb. 25, 2008) (the tentative civil minutes were never formally adopted as the Court instituted parallel proceedings and the case was then settled). Because the Court deemed the alternative-investment theory to be benefit-of-the-bargain damages, it tentatively found that such damages could not be awarded in a case claiming fraud. *Id.* at 52.

Notably at least one federal court post-*Comcast* has indicated that such a model was "plausible," even though it "entertain[ed] concerns as to the methodology." *Abbit*, 2015 WL 7272220, at *14. *See also Beeson v. Lion Ct. Holdings Inc.*, 2018 WL 1312430, at *15 (Mar. 14, 2018) (unpublished opinion in a non-class case holding that "California law authorizes the use of a model portfolio to calculate damages in appropriate cases"). In *Abbit*, the defendants argued that the damage calculation would require individualized and fact-specific determinations relating to the financial circumstances and objectives of each class member and the performance of the annuity. *Id.* at *13 (citing *Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087 (9th Cir. 2010) (reversing denial of certification in an annuity class action)). The court disagreed.

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Critically, the courts in both *Abbit* and *Yokoyama* characterized the individual issues as affect the "amount" of damages, not the "fact" of damages. *See Yokoyama*, 594 F.3d at 1094 ("In this circuit, however, damage *calculations* alone cannot defeat certification.") (emphasis added). Similarly, in a federal securities class action challenging a life insurer's statements regarding its financial condition, the court distinguished *Comcast* and held that because the challenges to the damage model attacked the "calculation" of damages, "denial of class certification solely on the basis of individual damages calculations would be an abuse of discretion." *City of Sterling Heights Gen. Employees' Retirement Sys. v. Prudential Financial, Inc.*, 2015 WL 5097883, at *13 (D.N.J. Aug. 31, 2015). But the federal circuit courts have rejected the notion that a class cannot be certified when only the calculation of damages present individual issues, despite a fairly clear statement in *Comcast* that damages must be "capable of *measurement* on a classwide basis," 133 S. Ct. at 1433 (emphasis added). It is critical, therefore, that defense counsel clearly and explicitly frame their attack on plaintiffs' methodologies as being something other than an attack on the amount of damages in the aggregate or the calculation of damages for individual class members, whether characterizing it as injury in fact, damage causation, or the fundamental unreliability or inapplicability of the model, given the facts of the case as demonstrated by consumer preferences and other factors.

Comparison of a Policy as Represented with a Policy as Is

Recoverable damages may include "the difference between what Plaintiffs thought they were getting and what they actually got." *In re Lutheran Brotherhood Variable Ins. Prods. Co. Sales Practices Litig.*, 2004 WL 909741, at *2 (D. Minn. Apr. 28, 2004) (declining to decertify a vanishing premium class action). This is sometimes characterized as "expectation" damages, and thus sometimes limited to breach of contract claims, though it has not uniformly been so characterized. While some plaintiffs have attempted to illustrate this through the "worth less" theory, or the "model investment" theory, there are other ways that this theory might be expressed. For example, in the *Lutheran Brotherhood* case (some of the reasoning of which was later discredited by the Eighth Circuit), the court opined that because plaintiffs were led to believe that their premiums would vanish and bought a product with a cash value that was less than they thought it would be, the difference between what class members thought they were going to get might be the amount of premiums that they had to pay after the alleged "vanish" date, or the difference between the cash value as illustrated and the cash value as realized. *Id.* at *9. Similarly, in a case alleging that the bonus on an annuity caused the issuer to lower later credited interest rates, a court decided that "injury and loss here are determinable by comparing actual returns to the returns which would have been achieved had the alleged misrepresentations been true." *In re Nat'l W. Life Ins. Deferred Annuities Litig.*, 268 F.R.D. 652, 666 (S.D. Cal. 2010).

One defense to this model—that plaintiffs should get what they were promised—is to illustrate that the policies performed as expected. When a defendant can show that the plaintiffs received everything that they were promised, either those in the policy or in other representations, there are simply no damages attributable to the allegedly wrongful conduct. In *Quinn v. Morgan Stanley*, for example, a putative class of life insurance beneficiaries claimed that the company incorrectly calculated the death proceeds. 2007 WL 9735870 (D. Utah 2007), *aff'd* 281 F. App'x 771 (2008). The court found not only that the insurer had paid them what they were entitled, but more than it would have paid under one theory proposed by the plaintiffs. *Id.* at *9. *See* 281 F. App'x at 779 ("In short, Nationwide overpaid each of the plaintiffs and, thus, plaintiffs are unable to establish any damages arising out of Nationwide's allegedly tardy payments"). *See also Koger v. Hartford Life Ins. Co.*, 28 S.W.3d 405, 413 (Mo. Ct. App. 2000) ("Koger has suffered no damage as he has been made whole.").

Some courts at the class certification stage have resisted the defendant's argument that the plaintiffs did in fact get what they were promised, and often, they got more. Courts have opined that even if policies are performing well, they might have done better if the performance was as represented. *See id.* at 666–67 ("The fact that Plaintiffs' accounts increased in value does not mean that the Plaintiffs would not have received more value absent Defendants alleged reduction in the credited interest rate."); *Abbit*, 2015 WL 7272220, at *7; *Otto v. Variable Annuity Life Ins. Co.*, 730 F. Supp. 145, 148 (N.D. Ill. 1990) (finding, in an annuity class action, when faced with competing declarations, a material issue of fact remained pertaining to whether the defendant's method of crediting interest actually resulted in greater gains than plaintiff's proffered theory). For example, in *Vaccarino v. Midland Nat'l Life Ins. Co.*, the court found that a model purporting to identify the "lower spread" required to provide a bonus and the resulting lower interest credits was sufficient, at the class certification stage, to support a breach of contract, though not a fraud, claim. 2014 WL 572365 (C.D. Cal. Feb. 3, 2014). When faced with the defendant's arguments that it was illogical to segregate one variable from the spread, and that spread compression would likely result in numerous class members incurring no damage, the court simply said that those questions went to the merits of the damage model, and they did not affect whether the damages would be susceptible of measurement across the class, as required by *Comcast*. *Id.* at *12.

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Suitability

Though unsuitability is often alleged in life insurance and annuity class actions, it is done more as an atmospheric incendiary. Class counsel generally will avoid linking their damage model to any alleged unsuitability. The reason is evident: whether a product is suitable for any given consumer is an inherently unique question that involves investigation of each person's distinct attributes, including that person's financial situation and needs, investment goals, risk avoidance sensitivity, and how each product that he or she may have considered might meet some of those needs and desires.

To illustrate, a New York federal court refused to certify a class of securities purchasers who claimed that the defendant broker-dealers failed to conduct a suitability analysis. *Fernandez v. UBS AG*, 2018 WL 4440498 (S.D.N.Y. Sept. 17, 2018). Relying on *Comcast*, the court found that any damage model tethered to the plaintiffs' theory—that they were injured because a suitability analysis was not performed—would require inquiry into "(1) what clients would have received if UBS had performed a suitability analysis and recommended a suitable investment, less (2) what they actually received from their investments in the Funds." *Id.* at 11, 21. That was not the damage model proposed by the plaintiffs (and thus, it fell short under *Comcast*), and any model that attempted to do so would require "consideration of many client-specific factors including, without limitation, the client's age, assets, tax status, annual income, net worth, investment objectives, risk tolerance, liquidity needs, investment time horizon, and concentration of investments—all as of the date of the recommendation." *Id.* at 22. Such inquiries would be individualized, and class certification was therefore inappropriate.

The alleged unsuitability of the policy may also be untethered to the alleged damage that the plaintiffs suffered, rendering any damages predicated on unsuitability legally deficient. In *Robertson v. Metlife Securities, Inc.*, the Second Circuit lamented that the case was a "sad case," in which the plaintiff's brokers absconded with the proceeds of her variable annuity, but affirmed the district court's dismissal of the action at the pleading stage because the plaintiff simply could not connect the harm—the loss of her funds—to the alleged unsuitability of the annuity. 2019 WL 3026775, at *2 (2d Cir. July 11, 2019) ("she does not allege that [the annuitant]'s loss occurred as a result of the characteristics that made the annuity unsuitable. For example, [the annuitant] did not lose her money because the annuity's 'moderate risk profile' exposed her to too much risk").

Policy Administration Class Actions

In class actions attacking the administration of life insurance and annuity policies, often brought as breach of contract, breach of the covenant of good faith and fair dealing, or sometimes fraud or misrepresentation claims, the damage model is typically an attempt to quantify the difference between the "obligation" to the policyholder and reality.

Coors v. Security Life of Denver Ins. Co., albeit an individual case, provides a straightforward example. In *Coors*, due to a scrivener's error, the plaintiff's life insurance policy included an expense charge of $.131 per $1,000 of basic benefit when it was supposed to read $.9 per $1,000. 112 P.3d 59 (Colo. 2005). The insurer had been charging the $.9, and when it realized its mistake, it sent a letter to the insured seeking to reform the contract. The insured sued, and the court found that there was a breach of contract. For damages, the court awarded the cumulative amount that the expense charge had been overstated for the period that the policy was in force, as well as the surrender fee that had been charged upon surrender. *Id.* at 64–65. Thus the damages were the difference between what the insurer was obligated to charge ($.131/$1000), and what it did charge ($.9/$1000). *See also Humphrey v. United Way of the Texas Gulf Coast*, 2010 WL 4791486, at *3–4 (S.D. Tex. Nov. 14, 2010) (involving an ERISA class action in which damage model sought to replicate benefits promised by plan).

A direct way to defend against these allegations is showing that the plaintiffs' expectations have no basis. In an ERISA class action, the U.S. District Court for the District of New Jersey rejected the plaintiffs' contention that they could measure damages as the difference between the charge that they argued they should receive, versus the charge that they incurred. *Franco v. Ct. Gen. Life Ins. Co.*, 299 F.R.D. 417 (D.N.J. 2014). The court disagreed, finding that the "plain language of the plan" provided the way that the charge should be calculated, and it was different than what plaintiff proposed. *Id.* at 429 ("In short, there continues to be a disconnect between plan language and the method proposed by [] Plaintiffs to determine the class members' damages in a cohesive manner"). Thus, the damage theory did not satisfy *Comcast*. Similarly, in *Keife v. Metro. Life Ins. Co.*, the court found that the damages to which plaintiffs claimed entitlement were simply not authorized by the language of the policies. 931 F. Supp. 2d 1100, 1109 (D. Nev. 2013).

Defendants can also attack this type of claim by illustrating how plaintiffs have erred in their calculation of the "entitlement" to which they claim, or by identifying that what the entitlement should be is fraught with individual issues. In many cost of insurance (COI) cases, for example, plaintiffs explain their damage model as essentially the cost of insurance that "should have been charged," versus what was charged, but their model may not be nuanced enough to include the factors that they allege are appropriate to consider in the COI that "should have been charged." Using *Comcast*, defense counsel have challenged those models, explaining that it is often not the case that plaintiffs contend that no increase at all was appropriate, and thus, a simple approach, such as simply refunding the entire COI increase, is not tied to the theory of liability. Those attacks have been met with mixed outcomes. *See, e.g., Fleisher v. Phoenix Life Ins. Co.*, 2013 WL 12224042, at *15 (S.D.N.Y. July 12, 2013) (determining that damages to be awarded would simply be a refund of the entire COI increase).

> Both before and after Comcast, courts have echoed the refrain that individualized damage calculations will not defeat class certification. Plaintiffs will undoubtedly characterize attacks on their model as undermining the ability to "calculate" damages.

Recap: How to Attack these Damage Models

In light of *Comcast* and the developments in case law that followed, there are several ways for defense counsel to attack the damage models proffered by plaintiffs in life insurance and annuity consumer class actions.

Illustrate the ways in which the damages model does not fit with the liability theory. This is the basic premise of *Comcast* and should be the ultimate goal when attacking plaintiffs' damage model in a class case. *See Koger v. Hartford Life Ins. Co.*, 28 S.W.3d 405, 412–13 (Mo. Ct. App. 2000) (granting summary judgment in putative class case; the named plaintiff claimed that a letter sent by the life insurer was fraudulent, but he did not rely on the letter and did not seek damages based on any alleged representations in letter). One way to do this is to contrast the experience of the plaintiffs with the damage model articulated. For example, in *Walker*, the expert could not explain why he did not analyze illustrations under guaranteed rates, and the court found that there was no reason to assume that all class members would have disregarded the guaranteed rates and instead relied solely upon the discretionary rates, particularly given the cautionary language of the disclosure materials. *Walker*, slip op. at 48–49 (Apr. 14, 2015).

Disaggregate plaintiffs' liability and damage theories. Plaintiffs will try to make their theory of liability and theory of damage sound simple and connected, but it rarely is. One way to illustrate the ill "fit" between the damage model and liability theory is to disaggregate them: show how, for example, plaintiffs are only moving for certification of one aspect of a claim, or one feature of a product, and that their damage model would ascribe loss to all potential theories or all product features. *See, e.g., Comparetto v. Allstate Ins. Co.*, 2013 WL 11727235, at *9 n.6 (C.D. Cal. Nov. 20, 2013) (denying certification of putative life insurance agent class action in which "Plaintiffs' proposed model for calculating damages does not attempt to isolate the loss in value caused only by the conduct underlying the claims in the causes of action for which certification is sought").

Challenge the robustness of the plaintiffs' model. The utter lack of a damage model, or the patent insufficiency of the one proposed, can defeat class certification. *See Nat'l W. Life Ins. Co. v. Rowe*, 164 S.W.3d 389, 391-92 (Tex. 2005) (reversing certification of a class of life insurance holders who purchased child rider coverage because, among other things, the trial court "gave no meaningful explanation for how it would try damages" other than to note that it might be the subject of expert testimony). One court faced with an annuity class action declined to certify the class in the absence of a methodology: "Without such a theory, the Court cannot certify plaintiffs' proposed class." *Vaccarino v. Midland Nat'l Life Ins. Co.*, 2013 WL 3200500, at *14 (C.D. Cal. June 17, 2013). The court found that it was not "facially apparent from the plaintiffs' theory of liability" that the damages would be readily ascertainable classwide, nor were other expert models in other annuity cases tied to the particular mechanics of the annuities at issue in the case. *Id.* It is usually wise to retain a defense expert qualified to attack the specific theories being advanced.

Reframe the "damage calculation" narrative. Both before and after *Comcast*, courts have echoed the refrain that individualized damage calculations will not defeat class certification. Plaintiffs will undoubtedly characterize attacks on their model as undermining the ability to "calculate" damages. However, the fact of damage is something that must be provable on a classwide basis. As in *Robertson*, for example, when plaintiffs the allege suffering damage that simply has not arisen from a defendant's challenged conduct, there can be no recovery. 2019 WL 3026775, at *2. That can be couched in any number of ways, such as an attack on "causation" (the defendant's actions did not cause the harm), or on injury (plaintiff has suffered no injury due to defendant's conduct), or on the fact of (as opposed to the amount of) damages.

Try, and try again. Many of the cases analyzed in this article deal with the class certification stage because that is when many of these battles are fought. But given that courts are often willing to apply less rigorous standards at the certification stage than they might apply at summary judgment or in a motion *in limine*, counsel should continue to attack plaintiffs' damage theories throughout the litigation. For example, in some cases, it may be appropriate to attack an expert's methodology as relying on demonstrably false assumptions concerning the putative class. That position may be dismissed at the class certification stage as a merits issue, but if the false assumptions rise to a certain level, the attack should amount to debunking the essential reliability of the expert's model, or demonstrating a lack of a sufficient causal connection between the expert's methodology and the realities of the putative class. Even if defendants are not able to defeat class certification, counsel may be able to push the model, the expert sponsoring the model, or counsel, or a combination of these, into taking positions that are factually unsustainable on summary judgment, cross examination at trial, or in other later post-class certification phases of a case.