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Comcast Corp. et al. v. Behrend et al.: Continued Rigor in Class Certification

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On March 27, 2013, the US Supreme Court issued its second opinion in two years underscoring that lower courts must conduct a "rigorous analysis" into the efficacy of economic models for showing that damages attributable to a class-wide injury can be measured on a class-wide basis. Before certifying a class under Federal Rule of Civil Procedure Rule 23(b)(3), a court must conduct such an inquiry even though the inquiry may delve into the merits of the case. This time, the Court made this clear in the context of requiring purported class plaintiffs in an antitrust case to tie their damages model closely to a particular theory of class-wide harm in order to obtain class certification.

Background

In *Comcast Corp. et al. v. Behrend et al.*,[1] the district court and Third Circuit certified a class of more than two million current or former Comcast subscribers who sought damages for alleged violations of Sections 1 and 2 of the Sherman Act. Comcast allegedly "clustered" its operations by acquiring competitor cable providers in the Philadelphia Designated Market Area (DMA) and swapping out its own systems outside that DMA.[2] Respondents alleged that, through this practice, Comcast obtained a nearly 70 percent market share in the Philadelphia DMA.[3]

The plaintiffs alleged that the clustering scheme harmed consumers by reducing competition and increasing prices for cable services, and sought to certify a class under Rule 23(b)(3), which requires a showing that "questions of law or fact common to class members predominate over any questions affecting only class members."[4] The district court held that to meet this requirement, plaintiffs were required to show that (1) the fact of individual injury from the alleged antitrust violation could be demonstrated at trial based on evidence that was common to the class and (2) the damages resulting from that injury were measurable on a "class-wide basis" using a "common methodology."[5]

To show that damages could be calculated on a class-wide basis, the plaintiffs relied on a regression model that compared actual cable prices in the Philadelphia DMA with the hypothetical

prices that would have been charged but for Comcast's alleged anticompetitive conduct.[6] Respondents initially alleged four theories to show how the alleged antitrust violations injured purported class members. The district court found just one of these theories susceptible to proof on a class-wide basis: that Comcast's alleged anticompetitive conduct suppressed entry by "overbuilders," companies that build competing cable networks in areas already served by an incumbent cable company.[7] The district court certified a class based on the plaintiffs' economic model, and the Third Circuit affirmed.

Majority Opinion

In a 5-4 decision, the Supreme Court reversed the certification decision. Writing for the majority, Justice Scalia observed that the plaintiffs' model failed to identify the specific theories of injury from the alleged anticompetitive conduct, notwithstanding the district court's holding that only one of the theories, injury through deterrence of overbuilding, could be proven on a class-wide basis.[8] A model that does not differentiate between antitrust impacts "cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3)."[9]The Court wrote:

> In light of the model's inability to bridge the differences between supra-competitive prices in general and supra-competitive prices attributable to the deterrence of overbuilding, Rule 23(b)(3) cannot authorize treating subscribers within the Philadelphia cluster as members of a single class. Prices whose level above what an expert deems "competitive" has been caused by factors unrelated to an accepted theory of antitrust harm are not "anticompetitive" in any sense here.[10]

The Court criticized the Third Circuit's refusal to consider petitioner's argument that the class was certified improperly because the model could not distinguish damages attributable to the overbuilding theory from damages attributable to the other theories. Instead, the Third Circuit had held it had "not reached the stage of determining on the merits whether the methodology is a just and reasonable inference or speculative."[11] The Court emphasized that a lower court must be willing to probe behind the pleadings and conduct a rigorous analysis of the prerequisites of class certification, even if the analysis would require reaching the merits of the claim. The Court concluded: "By refusing to entertain arguments against respondents' damages model that bore on the propriety of class certification, simply because those arguments would also be pertinent to the merits determination, the Court of Appeals ran afoul of our precedents requiring precisely that inquiry."[12]

Dissent

Justices Breyer and Ginsburg wrote a joint dissenting opinion, which Justices Kagan and Sotomayor joined. Much of the dissent focused on what the dissenters viewed as an improvident grant of the writ of certiorari, arguing that the majority opinion addresses a question different from the question on which the Court had granted certiorari. The dissent focused on the question

whether plaintiffs must offer common proof of the *quantum* of injury suffered by individual plaintiffs. That must be distinguished from proof that each member of a class has suffered *some* injury (or "impact"), which must be capable of proof on a class-wide basis for a class to be certified. The dissenters wrote that "the model need not "show precisely *how* Comcast's conduct led to higher prices in the Philadelphia area" but simply show "*that* Comcast's conduct brought about higher prices."[13]

The dissent also asserts that "the [majority] opinion breaks no new ground" on the class certification standard:

> The Court's ruling is good for this day and case only. In the mine run of cases, it remains the "black letter rule" that a class may obtain certification under Rule 23(b)(3) when liability questions common to the class predominate over damages questions unique to class members.[14]

The dissent further emphasizes that "when adjudication of questions of liability common to the class will achieve economies of time and expense, the predominance standard is generally satisfied even if damages are not provable in the aggregate."[15]

Implications

Although the *Comcast* decision is fairly narrow, it continues the Supreme Court's trend of requiring lower courts to apply substantial analytical rigor to evaluating proposed methods of proving class-wide impact at the class certification stage. In a 2011 decision, *Wal-Mart Stores, Inc. v. Dukes*, the Court reversed a grant of class certification in an employment discrimination case and held that Rule 23 "does not set forth a mere pleading standard" and a party seeking class certification "must affirmatively demonstrate his compliance with the rule—that is, he must be prepared to prove that there are in fact sufficient numerous parties, common questions of fact, etc.," even if doing so requires a court to delve into the merits.[16]

The level of proof demanded of plaintiffs at the certification stage has obvious and crucial implications for a defendant's level of exposure. If class certification is denied, defendants may have an opportunity to settle with individual plaintiffs. If certification is granted, however, the cost of settlement may greatly increase, leaving the defendant no choice but to engage in protracted litigation, often with potentially huge exposure.

After *Comcast*, defendants opposing class certification in antitrust and other cases have even more incentive to scrutinize closely proposed damages models and aggressively challenge whether they are actually capable of demonstrating class-wide damages based on proof that is common to the class. Trial courts will be increasingly likely to recognize that any cursory review of a proffered economic model that smacks of "kicking the can down the road" is likely to face close scrutiny on appeal.

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[1] 569 U.S. _, No.11-864, slip op. at 1 (2013).

[2] *Id*. at 2.

[3] *Id*. at 3.

[4] *Id*. at 2.

[5] *Id*. at 3.

[6] *Id*. at 4.

[7] *Id*. at 3.

[8] *Id*. at 9.

[9] *Id*. at 7.

[10] *Id*. at 10.

[11] 655 F.3d 182, 207 (3d. Cir. 2011).

[12] *Id*. at 6-7.

[13] *Id*. at 11.

[14] 569 U.S. _, No.11-864, slip op. at 5.

[15] *Id*. at 3, 4 (Breyer and Ginsburg, JJ., dissenting).

[16] 564 U.S. __, 131 S. Ct. 2541, 2551 (2011).

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