Supreme Court Reverses Class Certification in *Comcast Corp. v. Behrend* in 5-4 Decision

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March 27, 2013. In a majority opinion authored by Justice Scalia, the Supreme Court rejected certification of an antitrust class action in *Comcast Corp. v. Behrend*, 516 U.S. ___ (2013). Chief Justice Roberts and Justices Kennedy, Thomas, and Alito joined the majority opinion, holding that it was error for the lower courts to refuse to scrutinize plaintiffs' proffered damages model because such an inquiry would impermissibly invade the merits at the class certification phase.

In the district court plaintiffs argued that defendant cable companies' conduct in the Philadelphia area violated Sections 1 & 2 of the Sherman Act under four distinct theories. Plaintiffs then offered a regression analysis developed by an economist who estimated that the combined effect of the four types of behavior on the plaintiff class over more than a decade totaled some $875 million. On the basis of this opinion, plaintiffs argued that they had sustained their burden of demonstrating that both antitrust injury ("impact") and damages could be determined using class-wide proofs.

The district court held that only one of the four theories was capable of proof on a class-wide basis and that individual issues predominated with respect to the other three theories. At an evidentiary hearing on the certification issue, plaintiffs' expert admitted that his model did not isolate the damages attributable to any of the individual theories of anti-competitive conduct—including the one theory later certified by the district court. Defendants did not object to the expert's testimony or file a *Daubert* objection. On interlocutory appeal a split panel of the Third Circuit affirmed.

The question certified by the Supreme Court was:

> Whether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis.

The Court held that the "rigorous analysis" standard applied to the Rule 23(a) class prerequisites by the Court in *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147 (1982), and *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. ___ (2011) (which the majority cited no less than seven times in a 10+ page slip opinion), also applies to Rule 23(b)(3). This is the first time the Court has extended the "rigorous analysis" standard to Rule 23(b), though many lower courts have done so. According to the Court, "[i]f anything, Rule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a)."

Starting with the "unremarkable premise" that, if successful, the plaintiffs would only be able to recover on the single theory that the district court certified, the Court went on to hold that "[i]t follows that a model purporting to serve as evidence of damages in this class action must measure only those damages attributable to that theory." Since plaintiffs' damages model did not do so, the Court held that the case was improperly certified.

Since numerous cases—including several Supreme Court cases—have held that a "merits-type" inquiry cannot be avoided if it overlaps certification issues, the actual holding of the case is not all that remarkable. (Indeed, the Third Circuit opinion's focus on avoiding a merits inquiry appeared even to contradict that court's own *In re Hydrogen Peroxide Antitrust Litigation* opinion, 552 F.3d 305 (3d Cir. 2008), which it described as "seminal" in the first sentence. *Behrend v. Comcast Corp*., 655 F.3d 182 (3d Cir. 2011).) It might best be understood as "ratcheting up" a bit the necessity of proving at the

certification phase that damages can reliably be calculated on a class-wide basis using a common methodology, at least in antitrust cases where plaintiffs concede the point (see fourth bullet point, *infra*).

The dissent, co-authored by Justices Ginsburg and Breyer and joined by Justices Kagan and Sotomayor, started out addressing perhaps the most interesting aspect of the case: given the certified question's focus on admissibility, why did Comcast's failure to raise a *Daubert* or Federal Rule of Evidence 702 objection not render the question presented moot? By definition, plaintiffs *had* introduced admissible evidence (since it was admitted). The dissent argued that the appeal should have been dismissed as improvidently granted. The majority, however, chose to focus on the last clause of the question presented ("…to show that the case is susceptible . . ."), and held that—even though it may have been admitted into evidence—the expert's analysis failed to constitute affirmative evidence that damages for the only certified theory of liability could be assessed on a class-wide basis.

***Practice Pointers*:**

- Plaintiffs proposing alternative theories of liability need to present at the certification phase proof that impact (antitrust cases) and damages (potentially all cases, but see *infra*) can be assessed on a class-wide basis *for each theory*, in the event the court declines to certify one or more of the theories;

- While plaintiffs have the burden of proof on the Rule 23 requirements, defendants might be best served by requesting an evidentiary hearing (witness the admission relied on by the Court);

- Defendants came within one vote of losing this appeal by failing to make a *Daubert* objection to plaintiffs' expert. Part of the *Daubert*/Rule 702 inquiry involves whether the opinion testimony would be "helpful" and "fits" the issues presented. Here—even if the expert's methodology was otherwise scientifically valid—its admissibility could have been challenged on these grounds, at least conditionally; and

- Plaintiffs may have too-readily conceded that they bore the burden of proving that damages could be determined on a class-wide basis, using a common methodology. The dissent cites numerous authorities contradicting this proposition, and argues that given the concession by plaintiffs, "[t]he Court's ruling is good for this day and case only."