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Expert Analysis

Class-Action Issues in the Supreme Court: *Comcast Corp. v. Behrend*

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The U.S. Supreme Court has heard a number of cases this term that will affect plaintiffs' ability to successfully bring and maintain federal class-action lawsuits.

In *Oxford Health Plans LLC v. Sutter,* 133 S. Ct. 786 (2012), and *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 594 (2012), the Court has heard argument but not yet issued opinions concerning the availability of class procedures for parties to commercial and/or consumer contracts that provide for mandatory arbitration and waiver of class provisions.[1]

In *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 133 S. Ct. 1184 (Feb. 27, 2013), and *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (March 27, 2013), the Court considered the extent to which a district court must resolve at the class-certification stage issues that are prerequisites to class certification when these issues also go to the merits of the plaintiffs' claims.[2]

On March 27 the Supreme Court issued its decision in *Comcast*. The Court addressed whether the district court's order granting certification to a class of more than 2 million plaintiffs was improper because the plaintiffs had (according to the defendants) failed to establish that damages could be measured on a class-wide basis.

In a 5-4 decision, the court held that the plaintiffs' class action "was improperly certified under Rule 23(b)(3)," stating that "[b]y 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."[3]

This decision, which confirms that the district courts must conduct a "rigorous analysis" to establish that the "predominance" requirement of Federal Rule of Civil Procedure 23(b)(3) has been satisfied before a class may be certified (even if that analysis overlaps with the merits of the plaintiffs' claims), could make it substantially more expensive and difficult for plaintiffs to obtain class certification in the future.

BACKGROUND AND PROCEDURAL POSTURE

In 2003, cable television subscribers sued Comcast Corp. and its subsidiaries in the U.S. District Court for the Eastern District of Pennsylvania on the basis of allegations that the defendants participated in a "clustering" scheme with other cable providers, pursuant to which each provider concentrated its operations within particular geographic regions.[4] The plaintiffs alleged that this scheme "harmed subscribers in the Philadelphia cluster by eliminating competition and holding prices for cable services above competitive levels," in violation of Sections 1 and 2 of the Sherman Act.[5]

The plaintiffs sought certification of a class of more than 2 million current and former Comcast subscribers under Federal Rule of Civil Procedure 23(b)(3), which requires that "questions of law or fact common to the class members predominate over any questions affecting individual members."[6]

In granting class certification, the District Court held that the damages resulting from the defendants' alleged antitrust violations were "measurable 'on a class-wide basis' though the use of a 'common methodology,'" and that the plaintiffs had therefore satisfied Federal Rule of Civil Procedure 23(b)(3).[7]

However, the District Court rejected three of the four damages theories proposed by the plaintiffs (holding that they could not be determined on a class-wide basis) and limited its certification order to the one remaining theory (the "overbuilder" theory).[8]

In affirming the District Court's certification order, a divided panel of the 3rd U.S. Court of Appeals refused to consider the defendants' arguments regarding the sufficiency of the evidence supporting the plaintiffs' damages theory, stating that "in its view, such an 'attack on the merits of the methodology had no place in the class certification inquiry.'"[9]

THE SUPREME COURT'S DECISION IN *COMCAST*

In the majority opinion written by Justice Antonin Scalia, the court began its analysis by reiterating its recent guidance in *Wal-Mart Stores Inc. v. Dukes*, 131 S. Ct. 2541 (June 20, 2011) that:

- Federal Rule of Civil Procedure 23 "does not set forth a mere pleading standard."
- The plaintiff must "be prepared to prove that there are *in fact* ... common questions of law or fact" in order to satisfy Rule 23(a) and obtain class certification.
- The "rigorous analysis" that must be undertaken to determine whether the prerequisites of Rule 23(a) have been satisfied "will frequently 'overlap with the merits of the plaintiff's underlying claim.'"[10]

The court then stated that these same "analytical principles" must be applied in determining whether the predominance requirement of Rule 23(b)(3) has been satisfied.[11]

With these principles in mind, the court evaluated whether the evidence submitted by the plaintiffs demonstrated that their damages could be measured and proved on a class-wide basis. The court found that "the model failed to measure damages resulting from the particular antitrust injury on which petitioners' liability in this action is premised."[12]

Instead, the model measured damages with the assumption that each of the plaintiffs' four theories of antitrust impact applied, even though the District Court had rejected three of those theories.[13]

The court stated that "[i]n 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."[14]

The court therefore concluded that "[q]uestions of individual damages calculations inevitably overwhelm questions common to the class" and that class certification was improvidently granted.[15]

THE DISSENT

In their dissent, Justices Ruth Bader Ginsburg and Stephen Breyer state, among other things, that the court's decision "should not be read to require, as a prerequisite to certification, that damages attributable to a class-wide injury be measurable 'on a class-wide basis.'"[16]

According to the dissent, the predominance requirement in Rule 23(b)(3) can be satisfied "even if damages are not provable in the aggregate" (as long as liability questions common to the class predominate) and the *Comcast* case is unique because "the need to prove damages on a class wide basis through a common methodology was never challenged" by the plaintiffs.[17] Justice Ginsburg and Justice Breyer therefore caution that "[t]he court's ruling is good for this day and case only."[18]

CONCLUSION

Although the dissent has attempted to limit the reach of the majority's decision in *Comcast* to "this day and case only," the decision is clearly significant for parties and their counsel in class-action lawsuits.[19]

Comcast reinforces the Court's holding in *Dukes* that district and circuit courts cannot refuse to rigorously analyze whether the prerequisites of Rule 23 have been satisfied on the ground that this analysis would involve an inquiry into the merits of the plaintiffs' claims. This should come as welcome news to defendants in these cases.

The holding in *Comcast*, which confirms that this "rigorous analysis" must encompass the predominance requirement in Rule 23(b)(3), as well as the various requirements of Rule 23(a), is likely to result in plaintiffs and defendants making more detailed evidentiary presentations at the class-certification stage (resulting in what could amount to mini-trials). This could make it more expensive and potentially more difficult for plaintiffs to obtain class certification in the future.[20]

In* Amgen *and Comcast, the court considered the extent to which a district court must resolve at the class-certification stage issues that are prerequisites to certification when these issues also go to the merits of the plaintiffs' claims.

NOTES

[1] Oral argument was held Feb. 27 in the *American Express* case and March 25 in the *Oxford Health Plans* case.

[2] As the authors have previously commented, the decisions in these cases have the potential to continue a trend developed over the past several years that has made it more difficult for plaintiffs to commence and/or maintain class actions. *See* Jason M. Halper and Ryan J. Andreoli, *Arbitration Clauses & Class Certification Standards: How the Supreme Court is Limiting Plaintiffs' Ability to Maintain Class Actions,* Bloomberg BNA: Class Action Litig. Rep., 14 CLASS 87 (Jan. 25, 2013). The court issued its decision in the *Amgen* case Feb. 27. *See Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184 (2013). The authors have commented on that decision separately. *See* Jason M. Halper and Ryan J. Andreoli, *Class Action Issues in the Supreme Court: Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, N.Y. L.J., Apr. 3, 2013, at 4.

[3] *Id.* at *5. Justices Anthony Kennedy, Clarence Thomas, Samuel Alito and Chief Justice John Roberts joined Justice Antonin Scalia's majority opinion, from which Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor and Elena Kagan dissented.

[4] 2013 WL 1222646, at *2.

[5] 15 U.S.C. § 1. *Id.*

[6] *Id.* at *3 (*quoting* Fed. R. Civ. P. 23(b)(3)).

[7] *Id.* at *3 (*quoting Behrend v. Comcast Corp.*, 264 F.R.D. 150, 154 [E.D. Pa. 2010], *aff'd*, 655 F.3d 182 (3d Cir. 2011).

[8] *Id.* To establish their damages at the class-certification hearing, the plaintiffs relied exclusively on the expert testimony of Dr. James McClave, who "designed a regression model comparing actual cable prices in the Philadelphia [designated market area] with hypothetical prices that would have prevailed but for petitioners' allegedly anticompetitive activities." *Id.* at *3. However, McClave's model combined the damages resulting from all four of the theories advanced by the plaintiffs and did not isolate the damages resulting from their "overbuilder" theory, which asserted that Comcast's activities reduced competition from companies that build competing cable networks in geographic areas where an incumbent cable company already operates (*i.e.*, "overbuilders"). *Id.*

[9] *Id.* (*quoting Behrend v. Comcast Corp.*, 655 F.3d 182, 207 ([3d Cir. 2011]). In particular, the defendants argued that McClave's model was deficient because it "failed to attribute damages resulting from overbuilder deterrence, the only theory of injury remaining in the case." *Id.* at *3. The 3rd Circuit rejected this argument, stating that "at the class certification stage [we do not require that plaintiffs] tie each theory of antitrust impact to an exact calculation of damages, [but instead that they] assure us that if they can prove antitrust impact, the resulting damages are capable of measurement and will not require labyrinthine individual calculations." *Id.* at *3 (*quoting Comcast*, 655 F.3d at 206).

[10] 2013 WL 1222646, at *4 (*quoting Dukes*, 131 S. Ct. at 2551-52) (emphasis in original).

[11] *Id.* It is significant that Justice Scalia repeatedly criticized the 3rd Circuit for refusing to consider what it perceived to be the "merits" of the plaintiffs' claims on the plaintiffs' motion for class certification, stating (among other things) that the 3rd Circuit's "reasoning flatly contradicts our cases requiring a determination that Rule 23 is satisfied, even when that requires inquiry into the merits of the claim." *Id.* at *5 (*citing Dukes*, 131 S. Ct. at 2551-52 & n.6).

[12] *Id.* at *6.

[13] *Id.*

[14] *Id.* at *7. The court pointed out that under McClave's model, "cable subscribers in Gloucester County may have been overcharged because of petitioners' alleged elimination of satellite competition (a theory of liability that is not capable of classwide proof); while subscribers in Camden County may have paid elevated prices because of petitioners' increased bargaining power vis-à-vis content providers (another theory that is not capable of class-wide proof); while yet other subscribers in Montgomery County may have paid rates produced by the combined effects of multiple forms of alleged antitrust harm; and so on. The permutations involving four theories of liability and 2 million subscribers located in 16 counties are nearly endless." *Id.* at *6.

[15] *Id.* at *5.

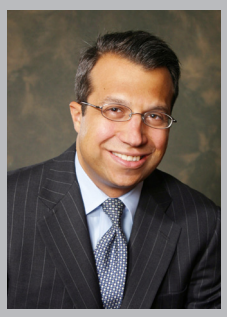
[16] 133 S. Ct. 1426, at *9.

[17] *Id.*

[18] *Id.* The dissent also criticizes the majority for: revising the question on which the court granted *certiorari* in order to reach its intended result, and reviewing and "overturn[ing] two lower courts' ... factual findings" that the limitation of proof to the "'overbuilder' theory" would not affect McClave's damages model. *Id.* at **8, 11-12.

[19] In fact, *Comcast* has already affected multiple appellate and district court decisions addressing class-certification issues. The court granted *certiorari* in *Whirlpool Group v. Glazer*, No. 12-322, 2013 WL 1285305 (U.S. April 1, 2013), and *RBS Citizens N.A. v. Ross*, No. 12-165, 2013 WL 1285303 (U.S. Apr. 1, 2013), in which the 6th and 7th circuits affirmed a lower court's class-certification order as consistent with *Dukes*. *See Glazer v. Whirlpool Corp. (In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*), 678 F.3d 409, 421 (6th Cir. 2012); *Ross v. RBS Citizens, N.A.*, 667 F.3d 900, 910 (7th Cir. 2012). In each case, the Supreme Court's order granting *certiorari* simultaneously vacated the judgment of the appellate court and remanded "for further consideration in light of *Comcast*," implicitly refuting the dissent's narrow interpretation of *Comcast*'s holding. In addition, *Comcast* has been cited in two recent district court decisions denying class certification (either in whole or in part). *See Roach v. T.L. Cannon Corp.*, No. 3:10-0591, 2013 WL 1316452 at *3 (N.D.N.Y. Mar. 29, 2013) ("Due to the Supreme Court's recent holding in *Comcast* ... and for the reasons discussed below, the court finds that plaintiffs' have failed to adequately demonstrate that the proposed class ... can be certified under Rule 23"); *Martins et al. v. 3PD Inc.*, No. 11-11313, 2013 WL 1320454 at *8 (D. Mass. Mar. 28, 2013) (citing *Comcast* in denying class certification as to certain counts). Finally, defendants in previously certified class actions have begun citing *Comcast* in motions for reconsideration of class-certification orders. *See, e.g., Jacob et al. v. Duane Reade Inc. et al.*, 1:11-00160, No. 109 (S.D.N.Y. Apr. 4, 2013).

[20] It is significant that the *Comcast* decision does not address whether the standards for admissibility of expert evidence imposed by Fed. R. Evid. 702 and *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), apply at the class-certification stage. Although the court's decision in *Dukes* suggests that these standards should apply in class-certification proceedings, the question has not yet been conclusively resolved. *See* 14 CLASS 87, at 4 n.2.



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