Securities Reform Act Litigation Reporter

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Highlights

The most noteworthy decisions this month are the following:

• In *Comcast Corp. v. Behrend,* No. 11-684 (U.S. March 27, 2013), a divided Supreme Court ruled 5 to 4 that certification of an antitrust class action was not proper because plaintiffs failed to establish that damages caused by actionable antitrust injury were capable of measurement on a class-wide basis.

• In *Standard Fire Ins. Co. v. Knowles,* No. 11-1450 (U.S. March 19, 2013), the Supreme Court considered the effect of a precertification stipulation that a plaintiff "and the class he seeks to represent … will not seek damages that exceed $5 million in total." The Court unanimously held that such a stipulation "does not resolve the amount-in-controversy question" for purposes of the Class Action Fairness Act of 2005 ("CAFA") because "a named plaintiff cannot bind precertification class members."

• In *AT&T Mobility v. Conception,* No. 09-893 (U.S. April 27, 2011), in the latest of a series of decisions dealing with the enforceability of arbitration agreements, the U.S. Supreme Court in its 2011 decision in the *AT&T Mobility LLC v Concepcion* case held that the Federal Arbitration Act preempts state laws that refuse to enforce class action waivers in consumer arbitration agreements as unconscionable or against public policy.

• In *Federal Housing Finance Agency v. UBS Americas Inc.*, No. 12-3207-cv (2nd Cir. April 5, 2013), Judge Chin, writing for the Second Circuit Court of Appeals, affirmed the right of a federal agency to bring an action to recover against a bank for fraud against the government. The relevant statute extended the statute of limitations period

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The Impact of *Comcast Corp. v. Behrend* on Securities Class Actions

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On March 27, 2013, the U.S. Supreme Court issued its long-awaited decision in *Comcast Corp. v. Behrend*, 569 U.S. __ (2013), 2013 U.S. LEXIS 2544 (U.S. Mar. 27, 2013) ("*Comcast*"). In a 5-4 decision written by Justice Scalia, the Supreme Court overturned the Third Circuit's decision affirming an order certifying an antitrust class under Federal Rule of Civil Procedure 23(b)(3), holding that the plaintiffs failed to establish that damages could be proved on a class-wide basis. In so holding, the Court reinforced its earlier decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), that class certification under Rule 23 requires a "rigorous analysis," and also opened the door to more in-depth analysis of a plaintiff's expert opinions regarding damages at the class certification stage. The decision does not resolve, however, the issue of how to apply at the class certification stage the standards established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), regarding the admissibility of expert opinions. This article discusses some of *Comcast*'s possible impact on securities class actions.

Case Background

The defendants-petitioners, Comcast Corporation and its subsidiaries ("Comcast"), provide cable television services to residential and commercial customers. From 1998 to 2007, Comcast engaged in a series of transactions that the parties described as "clustering," which is a cable provider's strategy of concentrating operations in a particular region with the goal of increasing its share of subscribers in that region. Comcast pursued this clustering strategy by acquiring competitor cable providers in the targeted region, and then swapping its own systems outside of the region for competitors' systems located within the region. As a result of these clustering transactions, Comcast greatly increased its share of subscribers in the targeted regions.

The plaintiffs-respondents ("Respondents") are subscribers to Comcast's cable services. They filed an antitrust class action alleging that as a result of clustering in the Philadelphia region, Comcast obtained a monopoly, or attempted to obtain a monopoly, on cable services in the region in violation of both Section 1 and Section 2 of the Sherman Act.

Respondents sought to certify a class under Federal Rule of Civil Procedure 23(b)(3), which permits certification only if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members." In their effort to establish class-wide injury, Respondents proposed four theories of antitrust impact. The District Court rejected three of the theories as being incapable of determination on a class-wide basis. However, the District Court accepted the fourth theory—that clustering increased Comcast's bargaining power relative to content providers (the "overbuilder-deterrence" theory)—as being capable of class-wide proof of impact. The District Court further found that the damages resulting from the overbuilder-deterrence impact could be calculated on a class-wide basis. To establish damages, Respondents relied on testimony from an economist, Dr. James McClave, who designed a regression model comparing actual cable prices in the Philadelphia region with hypothetical prices that would have prevailed but for Comcast's allegedly anticompetitive activities. Critically, when he testified, Dr. McClave acknowledged that his model did not isolate damages resulting only from the impact of overbuilder-deterrence, but rather provided an estimate of aggregate damages for all four of the theories of antitrust impact initially proposed by Respondents. Nonetheless, the District Court certified the class.

On appeal to the Third Circuit, Comcast argued that the class was improperly certified because Dr. McClave's model failed to attribute damages resulting specifically from overbuilder deterrence, as opposed to one or more of Respondents' other theories of antitrust impact. The Third Circuit refused to consider the argument because, in it its view, such an "attac[k] on the merits of the methodology [had] no place in the class certification inquiry." *Comcast Corp. v. Behrend*, 655 F.3d 182, 207 (3d Cir. 2011),

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rev'd, 2013 U.S. LEXIS 2544 (U.S. Mar. 27, 2013). The court explained that at the class certification stage, Respondents were not required to "tie each theory of antitrust impact to an exact calculation of damages . . . ." *Id*. at 206. Accordingly, the Third Circuit affirmed certification.

Circuit Court Judge Jordan issued a separate opinion concurring in the judgment but dissenting in part. Specifically, Judge Jordan disagreed with the majority's conclusion regarding class-wide proof of damages, arguing that, "Dr. McClave's testimony is incapable of identifying any damages cause by reduced overbuilding" in the relevant market, and that "[c]onsequently, his testimony is irrelevant and should be inadmissible at trial, pursuant to [Rule 702 and *Daubert*], as lacking fit." *Id*. at 215 (dissenting with respect to class-wide damages).

The Supreme Court's Decision in *Comcast*

The Majority Opinion

The Supreme Court reversed. Justice Scalia's majority opinion began by reiterating the command from *Dukes* that "certification is proper only if 'the trial court is satisfied, after a rigorous analysis, that [Rule 23's] prerequisites . . . have been satisfied.'" *Comcast*, 2013 U.S. LEXIS 2544, at *3. Such an analysis, the *Dukes* Court explained, "'will entail overlap with the merits of the plaintiff's underlying claim.'" *Dukes*, 131 S. Ct. 2541, at *2551. The Court admonished the Third Circuit for its refusal 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." *Comcast*, 2013 U.S. LEXIS 2544, at *3.

Applying *Dukes* to the plaintiffs' damage model in *Comcast*, the majority "start[ed] with an unremarkable premise. If respondents prevail on their claims, they would be entitled only to damages resulting from reduced overbuilder competition" (*id*. at *14)—the only antitrust impact theory accepted for class-action treatment by the District Court. To establish a class-wide measurement of damages, the model must "measure only those damages attributable to that theory." *Id*. at *14-15. Justice Scalia chided the Court of Appeals because it said that it "saw no need … to 'tie each theory of antitrust impact" to a calculation of damages, and for finding it "unnecessary to decide 'whether the methodology [was] a just and reasonable inference or speculative.'" *Id*. at *16. Justice Scalia rejected this approach because "arbitrary" measurements unmoored from the theory of liability "would reduce Rule 23(b)(3)'s predominance requirement to a nullity." *Id*. At a minimum, to the extent that courts may have interpreted *Dukes* to apply only to Rule 23(a), the *Comcast* Court made clear that these same "analytical principles govern Rule 23(b)" as well. *Id*. at *13. Indeed, the Court stated that "Rule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a)." *Id*.

The Court next turned to the fatal flaw in the plaintiffs' damage model, concluding (or "finding," in the dissent's view) that "the model failed to measure damages resulting from the particular antitrust injury on which petitioner's liability in this action is premised." *Id*. at *16. Plaintiffs' expert, Dr. McClave, used standard econometric regression analyses to measure the rate inflation in the Philadelphia cable market. Assuming that Comcast exercised monopoly power, Dr. McClave identified four means by which Comcast's alleged monopoly power affected cable rates. To calculate damages, he compared cable rates in the Philadelphia market to rates in other markets in which "none of the four distortions" existed. In its certification decision, however, the District Court found that three of the four liability theories were not suitable for class treatment. The problem, according to the Court, was that the model still "assumed the validity of all four theories of antitrust impact . . . ." *Id*. at *17. Dr. McClave conceded "that the model calculated damages resulting from 'the alleged anticompetitive conduct as a whole,'" and as a result, identified damages "that are not the result of the wrong." *Id*. The model failed to account for the "nearly endless" permutations involving "four theories of liability and 2 million subscribers located in 16 counties." *Id*. at *19-20. Because the damages model made no attempt to measure damages attributed to the single class-wide theory alone, the model could not "possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3)." *Id*. at *15. In language that should reverberate in securities class actions, the Court concluded:

> "The first step in a damages study is the translation of the *legal theory of the harmful event* into an analysis of the

> economic impact of *that event*. . . . The District Court and the Court of Appeals ignored that first step entirely."

Id. at *20 (citations omitted). Plaintiffs' failure to focus on the proper event doomed their effort to certify the class. The Court concluded that the class was "improperly certified under Rule 23(b)(3)" and reversed. *Id*. at *13, *21.

The Dissenting Opinion

The dissent, written jointly by Justice Ginsburg and Justice Breyer (joined by Justice Sotomayor and Justice Kagan), advanced three primary arguments. First, it would have dismissed the writ of certiorari as improvidently granted because the Court reformulated the question presented, which caused the parties to focus their briefing on the admissibility of Dr. McClave's opinion, even though Comcast did not object to the admissibility of Dr. McClave's damages model under Federal Rule of Evidence 702 or *Daubert*. Comcast sought review of the following question: "[W]hether a district court may certify a class action without resolving 'merits arguments' that bear on [Federal Rule of Civil Procedure] 23's prerequisites for certification, including whether purportedly common issues predominate over individual ones under Rule 23(b)(3)." *Comcast*, 2013 U.S. LEXIS 2544, at *21. The Court, however, granted review of a different question: "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." *Id*. This reformulation caused the parties to shift their focus to the admissibility of expert testimony. However, in the lower court proceedings, Comcast never challenged the admissibility of Dr. McClave's testimony or expert report. Accordingly, the dissent argues, the writ of certiorari should have been dismissed because it involved an issue which Comcast had already forfeited. The majority chose instead to deal with this procedural problem by reformulating the question presented again—this time by asking whether Respondents "failed to show that the case is susceptible to awarding damages on a class-wide basis." *Id*. at *23.

Second, the dissent tries to limit the majority's holding, stating that that the majority's opinion "breaks no new ground on the standard for certifying a class action under [Rule] 23(b)(3)," and the 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.'" *Id*. at *24-25. The dissent reasoned, "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." *Id*. at *25. That is, "[r]ecognition that individual damages calculations do not preclude class certification under Rule 23(b)(3) is well nigh universal." *Id*. at *26. The dissent also proclaimed that the majority's decision "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." *Id*. at *28.

Finally, the dissent disagreed with the Court's decision to override what it described as factual determinations by the District Court left undisturbed by the Third Circuit, which "found McClave's econometric model capable of measuring damages on a class-wide basis, even after striking three of the injury theories." *Id*. at *34. It explained, in sum, that "Dr. McClave's model does not purport to show precisely *how* Comcast's conduct led to higher prices in the Philadelphia area. It simply shows *that* Comcast's conduct brought about higher prices. And it measures the amount of subsequent harm." *Id*. at *37.

Comcast Does Not Resolve the Issue of the Appropriate Application of _Daubert_ at the Class Certification Stage

The Court's decision did not directly address an issue that—because of the original reformulation of the question presented—was the focal point of much of the briefing: whether a district court must undertake a full *Daubert* evidentiary analysis at the class certification stage to determine the admissibility of an expert opinion that damages may be proved on a class-wide basis. Unfortunately, this issue remains unresolved, as discussed above.

A ruling from the Supreme Court on this issue could have resolved the inconsistency in how lower courts are applying *Daubert* in the class certification context even after *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). For example, the Seventh Circuit has held that where the admissibility of

expert testimony "critical" to class certification is challenged, the court must conduct a full *Daubert* analysis prior to denying certification. *Messner v. Northshore Univ. Health Sys*., 669 F.3d 802 (7th Cir. 2012). Similarly, the Ninth Circuit has recognized the need for a full *Daubert* analysis of the admissibility and reliability of the plaintiff's expert testimony in the context of class certification. *Ellis v. Costco Wholesale Corp*., 657 F.3d 970 (9th Cir. 2012).

But the Eighth Circuit went the opposite way in a decision rendered after *Dukes*, *In re Zurn Pex Plumbing Products Liability Litigation*, 644 F.3d 604 (8th Cir. 2011), *cert. dismissed*, 2013 U.S. LEXIS 2737 (U.S. April 11, 2013). In that case, the court held that a full *Daubert* analysis is not necessary at the class certification stage, and instead approved of a district court's use of a limited, "'tailored' *Daubert*" analysis. *Id*. at 612. The court rationalized the use of a less-than-complete *Daubert* analysis because "[t]he main purpose of *Daubert* exclusion is to protect juries from being swayed by dubious scientific testimony. That interest is not implicated at the class certification stage where the judge is the decision maker." *Id*. at 613.

Comcast's Impact on Class Certification in Securities Class Actions

Although Comcast did not resolve the inconsistent approaches courts are taking with respect to *Daubert* on class certification, the Supreme Court has already sent a clear message that courts must undertake a searching inquiry into Rule 23(b)(3)'s predominance criterion in all class actions, regardless of subject matter. Within days of its decision in *Comcast*, the Court vacated and remanded for reconsideration two cases in light of *Comcast*—*Whirlpool v. Glazer*, No. 12-322 (U.S. Apr. 1, 2013), a products liability case, and *Ross v. RBS Citizens, N.A*., No. 12-165 (U.S. Apr. 3, 2013) , a wage and hour class action. Given the Court's quick application of *Comcast* to two non-antitrust cases, there is no doubt that courts now are required to conduct a searching predominance analysis in deciding class certification motions in federal securities class actions.

Moreover, defendants in federal securities class actions will seek to apply *Comcast* broadly. Such arguments will be bolstered by the fact that damages analyses in securities cases are similar to damages in antitrust cases in that both rely heavily on econometric models that are designed to separate price effects based on actionable and not-actionable conduct or factors. As a result, we are likely to see the debate between *Comcast*'s majority and dissenting opinions play out again and again in securities class actions. Defendants will implore district courts to conduct rigorous analyses of the "theory" underlying plaintiffs' damage models, and plaintiffs will take up the invitation of Justices Ginsberg and Breyer to marginalize the 5-4 decision in *Comcast*, and to relegate decisions about the efficacy and accuracy of plaintiffs' damage modeling to summary judgment or trial. By not giving courts clear direction in how to apply *Daubert* on class certification motions, the application of *Comcast* will be left to district and appellate judges who are as divided in their views about class action procedure as the Supreme Court was in *Comcast*. Given this continuing ambiguity, and the Court's increased emphasis on the need to conduct a rigorous analysis under Rule 23(b)(3), district courts are likely to see more vigorous class certification proceedings as plaintiffs, defendants and economists bring more resources to bear on the role of damages and predominance of common issues in class certification motions.

Comcast *Will Accelerate and Multiply Challenges to Plaintiffs' Damages Expert in Class Certification Proceedings*

Comcast will likely embolden defendants in securities class actions to oppose class certification by mounting frontal attacks on the plaintiffs' expert's class-wide damage theories. This includes, of course, prompting some defendants who previously might have stipulated to certification (or refrained from contesting damages) to be more aggressive in resisting certification.

As noted above, in some circuits district courts are already required to conduct a *Daubert* inquiry at the class certification stage. In these courts, *Comcast*'s effect may only be to reinforce current law, with a little more gusto. But in circuits that have shied away from *Daubert* analysis in Rule 23 proceedings due to the warnings against deciding the merits in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), and *Blackie v. Barrack*, 524 F.2d 891 (9th Cir. 1975), the courts may be more likely to undertake a *Daubert* analysis because the authority

of *Blackie v. Barrack*, previously undermined in *General Telephone Co. v. Falcon*, 457 U.S. 147 (1982), and *Dukes v. Walmart*, was weakened yet again in *Comcast*, perhaps mortally. Plaintiffs may disagree and argue that *Amgen, Inc. v. Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184 (2013), holds otherwise, but in *Amgen* the Court concluded that proof of materiality was not a predicate to certification because it is a common question to be adjudged by an objective standard, not because it would constitute "'a preliminary inquiry into the merits of a suit.'" *Amgen*, 133 S. Ct. at 1195 (quoting *Eisen*). In consequence, the once-powerful vaccine *Eisen* and *Blackie* afforded plaintiffs against searching certification analysis is now largely dead, and trial courts' fear of deciding Rule 23 questions merely because they *also* tread on the merits will diminish, if not disappear. That was clearly one major objective of the *Comcast* majority in criticizing the Third Circuit panel for refusing even to scrutinize the expert's opinion on damages. *See Comcast*, 2013 U.S. LEXIS 2544, at *3.

In sum, defendants will be more likely to assert formal objections to the admissibility of the damages expert's opinions based on Rule 702 and *Daubert*. Even though *Comcast* ultimately did not decide the *Daubert* issue, the dissent's pointed references to Comcast's failure to contest the admissibility of the expert's damages model will make defense lawyers more strongly inclined to raise *Daubert* and Rule 702 challenges to plaintiffs' damage experts in future Rule 23(b)(3) certification proceedings. This, combined with the Court's specific admonition that courts must carefully evaluate whether damages are subject to common determination under Rule 23(b)(3), is likely to increase the frequency with which courts must address *Daubert* issues at the class certification stage.

***Plaintiffs Will Attempt to Distinguish and Minimize* Comcast**

Another target of the Court was the multiplicity of fuzzy plaintiffs' damage theories, backed by a patina of support in the scientific or economic community, that do not relate directly and precisely to plaintiffs' theories of liability. This was the case in *Comcast*—the Court did not hold that Dr. McClave's economic and statistical tools were inadequate to the task of estimating damages, but that the data that were used did not purport to measure the results of the liability events that were being litigated. *Id*. at *19-20.

Thus, *Comcast* obviously does not spell the end of securities class actions. To the contrary, plaintiffs will offer a distinction to repel arguments against certification. Unlike many antitrust, products liability, wage and hour, and consumer cases where damages are inherently individualized, in securities cases the financial and economic corollary to the fraud-on-the-market theory is that in an efficient market every unit of a class of securities is affected *identically* by the penetration of new material information. In consequence, the magnitude of the impact on each unit of a security not only will be common, but will be subject to precise measurement using accepted econometric models. At a *theoretical* level, plaintiffs will argue, this commonality makes securities fraud damages uniquely suitable for class-wide treatment.

Comcast holds that plaintiffs' economic *theory* of damages "'must be consistent with'" plaintiffs' available theories of liability. *Id*. at *15 (citation omitted). "'The first step in a damages study is the translation of the *legal theory of the harmful events* into an analysis of the economic impact of *that event*.'" *Id*. at *20 (emphasis added, citation omitted). At least since the 1988 decision in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), there has been no question that plaintiffs in securities cases are entitled to a presumption of reliance when alleging fraud committed in efficient capital markets. As the Supreme Court later explained:

> The Court in *Basic* sought to alleviate those related concerns by permitting plaintiffs to invoke a rebuttable presumption of reliance based on what is known as the 'fraud-on-the-market' theory. According to that theory, 'the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations.' Because the market 'transmits information to the investor in the processed form of a market price,' we can assume, the Court explained, that an investor relies on public misstatements whenever he 'buys or sells stock at the price set by the market.'

Erica P. John Fund v. Halliburton, 131 S. Ct. 2179, 2185 (2011) (internal citations omitted). The fraud-on-the-market theory of reliance is itself derived from research concerning financial markets and

economics (although the efficient capital markets hypothesis is itself under increasing academic attack). Economists have been developing and refining, and federal courts have been reviewing, statistical damage theories in securities cases at least since Judge Sneed's concurrence in *Green v. Occidental Petroleum Corp*., 541 F.2d 1335, 1341-46 (9th Cir. 1976). *See In re Enron Corp. Sec. Derivative & "ERISA" Litig*., 529 F. Supp. 2d 644, 720 (S.D. Tex. 2006) ("Judge Sneed's concurrence prefaced a significant trend of courts' requiring more sophisticated damages calculations with analysis of how factors that impact stock price, including ones unrelated to the fraud, and of how to exclude general factors such as overall stock price decline, or factors that impact the particular industry or company that are not fraud related, in an effort to base damages only on those factors that actually relate to the alleged fraudulent activity").

The principal technique economists use to measure securities fraud damages is aptly named an "event study." *See In re Imperial Credit Indus. Inc. Sec. Litig*., 252 F. Supp. 2d 1005, 1014 (C.D. Cal. 2003) (excluding expert's damage estimates for failure to conduct an event study). In very brief summary, "An event study is a statistical regression analysis that examines the effect of an event on a dependent variable, such as a corporation's stock price." *Id*. A properly conducted event study theoretically should eliminate all non-fraud related impacts on market price such as general economic, market, industry and non-fraud events or information, leaving a class-wide damage estimate based solely on the inflation caused by material misrepresentations or omissions. Numerous courts have shown that failure to construct a proper event study to eliminate non-fraud influences from damage calculations should result in exclusion of expert opinions. *See*, *e.g*., *Oscar Private Equity Inves. v. Allegiance*, 487 F.3d 261 (5th Cir. 2007) (expert's event study that did not segregate non-fraud effects held inadmissible). Applying the lessons of *Comcast*, it follows that failure to construct a proper event study should also lead to denial of class certification.

Recalling that Rule 23(b)(3) requires a plaintiff to show only that "questions . . . common to the class predominate over any questions affecting only individual members," plaintiffs can be expected to argue that *Comcast* is of no moment in securities litigation because they already possess well-vetted economic and statistical theories and tools *capable* of measuring—on a common, class-wide basis—the damages suffered by individual shareholders. Rather than present full-blown expert damage reports that actually calculate damages, plaintiffs may instead present evidence of the methods and models available to the task, arguing that they are not required to prove damages at class certification. This argument should fail, however, because the same could have been said about the regression analyses that Dr. McClave used to measure antitrust injury in *Comcast*. The *Comcast* majority did not hold that plaintiffs can satisfy their burden under Rule 23(b)(3) by presenting evidence of the tools and models that *could* be used; they required that the model actually measure the *particular* injury on which plaintiff's liability is premised. 2013 U.S. LEXIS 2544, at *15-16. The thrust of the majority's opinion was to force courts to drill well below the surface and to determine what it is that the model purports to measure.[2]

Just how deep courts must go is indicated in the Court's last footnote, where it "add[s]" that even if the model had identified only subscribers injured due to overbuilding—the single anticompetitive act on which liability could be proved on a class-wide basis—"it still would not have established the requisite commonality of damages unless it plausibly showed that the extent of overbuilding would have been the same in all [affected] counties," or that the extent did not alter the impact. *Id*. at *20 n.6. Clearly, the Court has in mind a deeply probing analysis of the fit between damage models and plaintiffs' liability allegations, and will essentially require plaintiffs to present comprehensive expert damage reports at class certification. This will provide additional ammunition for defendants to use in challenging whether the models are sufficiently reliable that proof of damages will be subject to common proof. At a minimum, any model used by

[2] Some might conclude that if the plaintiffs in *Comcast* had not specified the mechanisms by which Comcast's alleged monopolistic conduct caused antitrust injury, the mismatch between liability theory and damage measurement would not have appeared, and the dissent's conclusion that the model reasonably measured the general impact of Comcast's monopolization activity might have prevailed. Because of the requirement that a plaintiff must prove anticompetitive conduct to obtain or maintain monopoly power, this option may not have been available to the plaintiffs in *Comcast*.

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plaintiffs will be required to account for differences between class members based on different experience in dates of purchase and sale, as affected by changes in the material facts affecting stock price over time.

A New Class Certification Battleground

It is at this point that we would expect the "theory vs. factual determination" debate from *Comcast* to be played out repeatedly in certification proceedings throughout the country.

An atypically simple securities case might involve a single misrepresentation that commences a class period, and a single disclosure of the truth that concludes it, with no other conflating factors. Defendants may not have much to work with to attack an event study performed under this simple scenario. But as the general economic, market, industry and firm-specific factors materially affecting the price of securities multiply, securities cases look more and more like the complicated fact scenario and overlapping liability theories in *Comcast* that led to the flawed expert report.

To take the most obviously analogous example to the antitrust claims in *Comcast*, consider securities cases in which plaintiffs allege multiple misrepresentations and omissions over a period of months involving several different subjects. In such cases, plaintiffs' expert typically back-casts an inflation "ribbon" based on price impacts from the alleged corrective disclosures. After *Comcast*, counsel for defendants are likely to attempt to establish in opposing certification—as Comcast's counsel did in *Comcast*—that the expert has not reasonably and reliably calculated the amount of share price inflation attributable to the correct set of misrepresentations. To the extent that plaintiffs estimate a backwards-looking inflation ribbon based on price drops resulting from alleged disclosures, defendants may also challenge the selection and correlation of such disclosures. *See, e.g.*, *In re Williams Sec. Litig.*, 558 F.3d 1130, 1139 (10th Cir. 2009) (holding expert testimony inadmissible for failing to correlate price changes to corrective disclosures of "material, new, company-specific and fraud-related information"). In addition, defendants may challenge whether the price decline at the time of the alleged corrective disclosure is an appropriate measure of the inflation at purchase resulting from the alleged misrepresentation or omission.

Comcast, then, gives defendants an argument to resist certification, particularly in cases where it is difficult to tease out the price effect of allegedly unlawful misrepresentations from the many daily effects of numerous innocent factors related to general economic, industry-specific, and firm-specific events. *See, e.g.*, *Fener v. Belo Corp.*, 560 F. Supp. 2d 502 (N.D. Tex. 2008) (denying class certification because plaintiff's expert failed to prove that price decline was not caused by other negative, non-fraud-related information"). When you add to the mix the necessity of dealing with many permutations of trading—"in-and-out" traders, investors who buy at different times in during the class period, investors who purchase different types of securities, and when the mix of material information available to the market is different—the prospects for reasonably and reliably estimating damages on a class-wide basis dim considerably.

As in *Comcast,* in securities cases complexity itself may become the enemy of certification, leading plaintiffs to plead shorter class periods, more narrowly defined classes, and limited liability allegations. If *Comcast* has a broad impact, damages exposures may be reduced as damages models are designed to withstand more rigorous scrutiny of whether they closely fit plaintiffs' theories of liability and conform to *Daubert* standards. Time will tell whether *Comcast*'s impacts ultimately will extend to seeing fewer securities actions in general, increasing the number of cases in which certification is denied, reducing the number of securities cases that settle, and reducing the average or median settlements in those cases that do.

Future Issues in Class Certification Proceedings in Securities Class Actions

In sum, *Comcast* is likely to spawn a new wave of dueling class certification decisions around the country based on the complexity and difficulty of estimating the causal effect of fraud on share price in securities cases. Some of the questions and issues to be addressed—by commentators, litigants, and court decisions to come—include the following:

- Will courts decide that the practical effect of the rigorous analysis required of economic modeling by *Comcast* under Rule 23(b)(3) is

to mandate full *Daubert* hearings in connection with certification proceedings?

- In coordination with their oppositions to class certification, will defendants more frequently file motions for summary judgment attacking the damages element of class plaintiff claims, in order to compel courts to conduct a full *Daubert* analysis?
- At what point does a securities case become so complex that it becomes impossible to develop a reliable damages model that can reasonably isolate and quantify fraud effects for differently situated investors who bought and sold throughout a class period?
- Will securities plaintiffs feel compelled to commission substantial expert analysis of the damage caused by the defendants' alleged misrepresentations *prior* to filing of a complaint, to avoid the land mines that destroyed the *Comcast* class? Will they be forced to simplify and reduce the number and variety of misrepresentations *and omis*sions that they allege in their complaints to facilitate more reliable modeling, with a view to the ability to certify the case, so they are not ultimately "hoisted with their own petard," as the plaintiff in *Comcast* was?
- How else might plaintiffs adapt their modeling so that juries can reasonably estimate damages when they find defendants liable for some, but not all, alleged misrepresentations and omissions? Will these difficulties force plaintiffs and courts to bifurcate liability and try damages after liability has been established, and will bifurcation violate the Seventh Amendment right to a jury trial?
- Will defendants in some cases refrain from proposing their own expert estimates of damages, and instead focus their damages strategy entirely on disqualifying the plaintiffs' expert in hopes of defeating class entirely?
- When defendants contest whether an expert's model removes the effect of all non-fraud factors, is this a challenge to the fit between the "theory" of liability and the theory of damages, as the majority in *Comcast* holds, or is it a factual determination left to summary judgment and trial, as the dissent in *Comcast* contends?

Conclusion

Although *Comcast* did not resolve the issue of whether district courts must conduct a full-blown *Daubert* analysis in the context of motions seeking class certification under Rule 23(b)(3), it will push plaintiffs and defendants in securities cases to litigate more frequently the admissibility and meaning of plaintiffs' expert's damage models in the certification context. Defendants will look for mismatches between plaintiffs' theories of liability and damages methodologies and exploit complexities and uncertainties, and plaintiffs will continue to resist *Daubert* hearings in certification contexts, likely taking up the call of the *Comcast* dissent to argue that the theory of fraud-on-the-market liability perfectly meshes with their econometric modeling. Reasonable people, and judges, may disagree on whether an issue is a question about a model's theory, or a decision on the merits of the evidence. *Comcast* may not have provided the means to resolve this debate, but it certainly will lead to expansion of challenges to damage experts in federal securities class actions.

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