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Supreme Court Reverses Massive Antitrust Class Action Against Comcast

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On March 27, 2013, the U.S. Supreme Court, by a vote of 5-4, reversed a sprawling class action encompassing more than 2 million current and former Comcast subscribers who alleged violations of federal antitrust laws. *See Comcast Corp. v. Behrend*, No. 11-864, 569 U.S. ___ (2013). In so doing, the Court resolved two critical questions for class action practitioners, concluding that: (1) the “rigorous analysis” requirement enunciated in *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541 (2011), applies to both the Rule 23(a) factors, *as well as* the Rule 23(b) prerequisites; and (2) there must be a method put forth by plaintiffs sufficient to calculate damages on a classwide basis in Rule 23(b)(3) class actions.

In *Comcast*, the plaintiffs alleged that Comcast entered into unlawful swap agreements in violation of federal antitrust laws, which caused injury by eliminating competition and causing prices to remain above competitive levels. *Comcast*, slip op. at 2. While the plaintiffs proposed four theories of antitrust impact, each of which supposedly increased cable rates, the district court limited them to “the theory that Comcast engaged in anticompetitive clustering conduct, the effect of which was to deter the entry of overbuilders in the Philadelphia DMA.” *Id.* at 3 (internal quotation marks and citation omitted). The district court proceeded to certify the class, finding that damages based on this theory — overbuilder-deterrence impact — could be calculated on a classwide basis, even though the model employed by plaintiffs’ expert “did not isolate damages resulting from any one theory of antitrust impact.” *Id.* at 4. The Third Circuit affirmed the class certification ruling, but the U.S. Supreme Court reversed. *Id.* at 4, 6.

Rigorous Analysis and Merits Inquiry Apply to Rule 23(b)(3)

In reversing the lower courts’ decisions, the U.S. Supreme Court, in an opinion authored by Justice Scalia, reiterated its command that “a party seeking to maintain a class action ‘must affirmatively demonstrate his compliance’ with Rule 23.” *Comcast*, slip op. at 5 (quoting *Dukes*, 131 S. Ct. at 2551). The Court emphasized that Rule 23 requires not only affirmative proof that “‘there are *in fact* sufficiently numerous parties, common questions of law or fact,’ typicality of claims or defenses, and adequacy of representation, as required by Rule 23(a),” but also that the party “satisfy through evidentiary proof at least one of the provisions of Rule 23(b).” *Id.* at 5-6 (citation omitted).

Consistent with this principle, the Court also reaffirmed its instruction in *Dukes* that such an analysis of each of the Rule 23 prerequisites must be “rigorous,” which may require a trial court “‘to probe behind the pleadings,’” and which “will frequently entail ‘overlap with the merits of the plaintiff’s underlying claim.’” *Id.* (citations omitted). In so doing, the Court made clear that these “analytical principles” are not just limited to Rule 23(a); rather, they also “govern Rule 23(b).” *Id.* at 6. After all, the Court reasoned, limiting this framework to Rule 23(a) would make little sense given that “Rule 23(b)(3)’s predominance criterion is even more demanding than Rule 23(a)” and is an “‘adventurous innovation’” that “is designed for situations ‘in which class-action treatment is not as clearly called for.’” *Id.* (citations omitted). In light of these distinctions — and the unique “procedural safeguards” reserved for Rule 23(b)(3) class actions — the

Court confirmed that a trial court has a “duty to take a ‘close look’ at whether common questions predominate over individual ones.” *Id.* (citation omitted).

Applying these principles, the Court held that the lower courts erred in rejecting Comcast’s arguments against the plaintiffs’ damages model just because they overlapped with the merits of the underlying antitrust claims. *Id.* at 6-7. As such, the Supreme Court determined that that the class of Comcast subscribers was “improperly certified under Rule 23(b)(3)” and reversed the intermediate appellate court’s ruling. *Id.*

Damages Must Be Capable of Classwide Determination in Rule 23(b)(3) Class Actions

In reversing the lower courts’ rulings in the *Comcast* case, the Supreme Court also confirmed that damages must be “capable of measurement on a classwide basis.” *Comcast*, slip op. at 7. According to the Court, the damages model put forth by the plaintiffs, which “assumed the validity of all four theories of antitrust impact initially advanced by plaintiffs,” *id.* at 9, fell well short of this standard because it “failed to measure damages resulting from the particular antitrust injury on which [the defendants’] liability [was] premised.” *Id.* at 8. The district court only accepted one of the four theories of antitrust impact (the reduced overbuilder competition) and, thus, any damages awarded to the class had to be attributed to that theory alone. Because the proffered damages model was not so limited, the Supreme Court concluded that “[q]uestions of individual damage calculations [would] inevitably overwhelm questions common to the class,” defeating predominance and rendering classwide treatment improper. *Id.* at 7, 8.

Today’s Supreme Court decision is welcome news for defendants given the recent weakening of class action standards by some federal courts. By clarifying that a trial court must apply a “rigorous analysis” to each of the Rule 23 prerequisites, including predominance — even where such analysis entails an overlap with the merits underlying the plaintiff’s claims — the Court has indicated that lax class certification standards have no place in federal class action practice. In addition, those lower courts that have resisted the Supreme Court’s recent class certification decisions may be more inclined to deny class certification in cases involving individualized damages determinations.

Focus will now turn to *Whirlpool v. Glazer*, Supreme Court case number 12-322, in which the defendants have asked the Supreme Court to reverse a ruling by the U.S. Court of Appeals for the Sixth Circuit that affirmed certification of a class of washing machine owners alleging a defect that affected only a small minority of the class members’ machines. The Supreme Court held the petition in abeyance pending resolution of *Comcast*, and it recently recirculated the petition for consideration at the Supreme Court’s next conference, on March 29. The Court could decide to grant the petition for plenary review; it could also grant the petition and summarily remand the case for further consideration in light of *Comcast*; or it could deny the petition outright. A decision on the petition could be announced as early as April 1.