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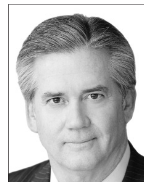
ANTITRUST TRADE AND PRACTICE

Expert Analysis

'Comcast Corp. v. Behrend': Yet More Rigor for Certifying Class Actions



By **Shepard Goldfein** And **James Keyte**

Consistent with recent Supreme Court precedent on class actions,[1] *Comcast v. Behrend*[2] has now made clear that the rigorous analysis required for class certification applies not only to issues of liability, but also to the subjects of causation and damages. And while *Comcast* will always be known as a "damages" class action opinion, its most lasting legacy may revolve around what the majority had to say about causation and disaggregation of damages.

With Justice Antonin Scalia delivering the majority opinion, the court in *Comcast* reversed a Third Circuit decision that had upheld a district court's certification of a class of two million former and current Comcast cable subscribers. Finding that plaintiffs' damages model did not and could not establish antitrust injury and damages through common proof, the court held that, as a matter of law, the proposed class failed to establish that "questions of law or fact common to class members predominate over any questions affecting only individual members" as required under Federal Rule of Civil Procedure 23(b)(3).[3]

A spirited dissent, however, vigorously disagreed with the majority's application of the predominance requirement to the particular facts of the case and also maintained that the majority's procedural handling of the case—namely its "misguided reformulation" of the question presented—compelled dismissal of the writ of certiorari as improvidently granted.

Proposed Theories of Injury

The factual and procedural background of *Comcast* is as follows. For a decade beginning in 1998, Comcast—a cable provider offering services to, among others, citizens of Philadelphia and the surrounding area—entered nine agreements to acquire competing cable providers in Philadelphia and/or swap Comcast's systems outside Philadelphia for competitors' systems within Philadelphia. Comcast's share of the Philadelphia market eventually approached 70 percent, and a putative class sued Comcast under sections 1 and 2 of the Sherman Act, alleging that Comcast's acquisitions and swaps were part of a "clustering" strategy designed to gain market power in the Philadelphia area.

Plaintiffs claimed that these clustering transactions harmed subscribers in Philadelphia by diminishing competition and raising prices above competitive levels, and proffered four distinct theories of causal antitrust injury.[4] Those theories proposed that: (i) the acquisitions made it more difficult for customers to compare prices; (ii) the acquisitions made it more difficult for direct broadcast satellite companies to obtain access to sports content, which deterred entry into the Philadelphia market; (iii) the acquisitions enabled Comcast to obtain content at lower prices and then raise its own price; and (iv) other potential cable entrants ("overbuilders" who would have brought down prices) decided not to enter because of Comcast's clustering transactions.

In support of class certification, plaintiffs submitted a damages expert report that, employing a standard regression analysis, compared cable prices in Philadelphia to benchmark cable prices in areas unaffected by the alleged anticompetitive conduct and where Comcast had a lower market share. The model sought to estimate cable prices in Philadelphia "but for" Comcast's allegedly anticompetitive conduct, and found that Philadelphia

SHEPARD GOLDFEIN *and* JAMES KEYTE *are partners at Skadden, Arps, Slate, Meagher & Flom.* PETER MCCORMACK, *an associate at the firm, assisted in the preparation of this column.*

prices were 11 percent to 17 percent above the benchmark prices. Thus, the expert quantified damages as the difference between the benchmark prices and the actual Philadelphia prices, roughly $875 million. Under this approach, the model concededly did not "isolate damages resulting from any one theory of antitrust impact."[5]

In the midst of evolving circuit law on class certification,[6] both the district court and the Third Circuit affirmed the certification of the class, but in the process narrowed the basis of class-wide injury. At the outset, the district court held a four-day evidentiary hearing, complete with competing expert witness testimony on both class certification and merits issues, to determine whether certification was proper. Carefully weighing the evidence, the court concluded that plaintiffs' expert adequately demonstrated that antitrust injury was "capable of proof at trial through evidence common to the class rather than individual to its members," and that damages were measurable "on a class-wide basis" using a "common methodology."[7] Critically, however, the court only accepted the overbuilder deterrence theory of antitrust injury.

Comcast appealed to the U.S. Court of Appeals for the Third Circuit, contending that certification was improper because plaintiffs' damages model failed to limit damages to the only remaining viable theory of antitrust injury and did not measure damages on a class-wide basis. The Third Circuit rejected the argument, finding that plaintiffs were not required to "tie each theory of antitrust impact to an exact calculation of damages"[8] at the class certification stage, and explaining that such a requirement would invite the court prematurely to evaluate the merits of a damages model.

The Third Circuit interpreted Rule 23(b)(3) as requiring plaintiffs only to "assure us that if they can prove antitrust impact, the resulting damages are capable of measurement and will not require labyrinthine individual calculations."[9] Thus, the district court did not need to assess the merits of the methodology on which the expert's damages model was predicated. Rather, as long as the damages model was capable of apportioning damages class-wide and the evidence showed that a class action was a superior method of fairly and efficiently adjudicating the controversy, the district court was within its discretion. Under this more relaxed damages standard, the Third Circuit saw no reason to disturb the judgment of the district court.

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More Rigorous Standard

Comcast appealed the Third Circuit's opinion, and the Supreme Court granted certiorari. The question on appeal appeared to center around the applicability of the *Daubert*[10] standard at the class certification stage, but the court's majority opinion sharpened (or, in the dissent's view, expanded) the focus to the degree of rigor required under Rule 23(b)(3) with respect to antitrust injury and damages.

Far from a "mere pleading standard," the court explained, the rules governing class certification require plaintiffs affirmatively to demonstrate, by a preponderance of the evidence, that it satisfies each element of Rule 23. The court highlighted that this analysis may demand an examination behind the pleadings and into the merits of plaintiffs' claim, because class certification considerations frequently "overlap with the merits of the plaintiff's underlying claim" and "are enmeshed in the factual and legal issues comprising the plaintiff's cause of action."[11]

According to the majority, the court below committed error by refusing to consider Comcast's arguments attacking the substance of the plaintiff' expert damages model. As Justice Scalia reasoned, the Third Circuit's interpretation of Rule 23(b)(3) as requiring a court to evaluate only whether a damages model is capable of quantifying damages class-wide at the class certification stage—without considering whether the model's methodology and conclusions are in fact speculative or arbitrary—reduced the requirement "to a nullity."[12]

Applying the more rigorous standard, the court held that certification was improper because the class expert's damages model did not isolate damages flowing from "reduced overbuilding competition," the only remaining theory of antitrust injury, but rather "assumed the validity of all four theories of antitrust impact initially advanced by the [plaintiffs]."[13] Because the expert's model did not calculate damages that were "the result of the wrong," common issues of liability did not predominate, but instead were necessarily overwhelmed by individualized questions. As a result, the proposed class did not satisfy Rule 23(b)(3) and was improperly certified.

Despite Scalia's characterization of the majority opinion as a "straightforward application of class-certification principles," a vociferous dissent decried that the court's procedural missteps "infected" the entire case. The dissent highlighted that the court granted review of a different question than the one Comcast proposed, and then changed the question again at oral argument, after realizing that Comcast had waived any evidentiary objection by failing to raise it below.[14] Thus, the focus of the dispute was shifted from whether a court can certify a class without considering relevant merits arguments, to the admissibility of expert testimony in the class certification context, to (without any notice) whether damages in this case were measurable on a class-wide basis. The dissent argued that the majority's alterations of the question presented deprived the class of "an unclouded

opportunity to air the issue…decide[d] against them,"[15] and accordingly would have dismissed the writ of certiorari as improvidently granted.

Seeking to blunt the impact of the court's opinion by limiting its application, the dissent also emphasized that the court's opinion should not be read as requiring class plaintiffs to show, in every case involving Rule 23(b)(3), that damages are measurable on a class-wide basis. Rather, the dissent recounted that in most cases, "liability questions common to the class [will] predominate over damages questions unique to class members," citing precedent observing that predominance does not require commonality as to all questions.[16] Indeed, the dissent argued that in most cases (especially antitrust cases), predominance is often "readily met" even in the presence of individualized damages calculations.

Finally, the dissent criticized the majority for rejecting the district court's thorough factual findings about the expert's regression model in favor of its own findings. In particular, the dissent maintained that the court incorrectly began its analysis by concluding that plaintiffs could only recover damages caused by overbuilder deterrence. While true as an ultimate merits matter, the dissent believed that the majority's approach underscored its misunderstanding of the role of the damages report at this stage of the antitrust case. Namely, the purpose of the model was not precisely to link liability to damages, but rather to show that Comcast's conduct led to higher prices and to quantify those damages, regardless of the particular steps connecting the basis of liability to that harm—a subject presumably left for the merits.[17]

In any event, the dissent found that the damages model could in fact measure damages caused by overbuilding alone: "By showing that [Comcast's conduct increased its market share by deterring overbuilders from entering Philadelphia, Comcast's] proof tends to show the same in respect to other entrants. The overbuilders' failure to enter deprives the market of the price discipline that their entry would have provided…."[18] In the dissent's view, this was enough to uphold the district court's factual findings and certification of the class.

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Impact on Class Certification

While Comcast has generated considerable disagreement about whether the court reached the "right" result, what matters now is how the case will impact class action certification moving forward. Although several issues in this area persist, such as the unresolved role of *Daubert* in class certification in light of *Comcast*, a few takeaways emerge. Most importantly, it is now clear that Rule 23(b)(3) requires a "rigorous analysis" not only of issues of liability, as was abundantly clear before the opinion, but also issues of causation and damages. Although the dissent estimated that "[i]n the mine run of cases" common questions of liability will predominate individualized issues of damages,[19] trial courts must now conduct a rigorous analysis of each or risk being reversed. This means that a court cannot simply hinge its opinion on overwhelmingly common questions of liability, but must articulate findings concerning the damages model as well.

How much the courts must delve into merits-related facts and economics concerning causation and damages no doubt will turn on the particulars of each case. Indeed, in *Comcast*, as the majority acknowledges, the damages model may have sufficed if the expert report sought to show that prices were higher in Philadelphia than the benchmark counties because of the absence of overbuilders and nothing else. At a more general level, class plaintiffs must now be especially careful to align theories of liability with theories of causation and damages, and be prepared to explain how common evidence can be used to prove each at trial.

Finally, while *Comcast* arose in the class certification setting, the reasoning of the majority also will result in practitioners exploring whether, as a matter of causal antitrust injury, plaintiffs must limit their claims to injuries and damages that flow solely from the antitrust misconduct at issue.

1. See *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541 (2011).
2. 133 S. Ct. 1426 (2013).
3. A class action plaintiff "must affirmatively demonstrate [] compliance with Rule 23," including each element of Rule 23(a) and at least one of the three provisions of Rule 23(b). *Dukes*, 131 S. Ct. at 2551. One of those provisions, Rule 23(b)(3), is often referred to as the predominance requirement.
4. A private antitrust plaintiff must show its harm is "of the type the antitrust laws were intended to prevent and that flow[] from that which makes defendants' acts unlawful." *Atl. Richfield v. USA Petrol.*, 495 U.S. 328, 324 (1990) (citation omitted).
5. 133 S. Ct. at 1431.
6. After the district court certified the class and the Third Circuit denied Comcast's appeal, the Third Circuit decided *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305 (3d Cir. 2008), which applied Rule 23's rigorous analysis to expert opinions. Id. at 323–24. In light of *Hydrogen Peroxide*, the district court granted Comcast's motion to reconsider class certification.
7. 133 S. Ct. at 1430 (citing *Behrend v. Comcast*, 264 F.R.D. 150, 154 (E.D. Pa. 2010)).
8. Id.
9. Id.
10. *Daubert v. Merrell Dow Pharm*, 509 U.S. 579 (1993).
11. 133 S. Ct. at 1432.
12. Id. at 1433.
13. Id. at 1434.
14. Id. at 1436 (Ginsburg and Breyer, JJ., dissenting).
15. Id.
16. Id. at 1437.
17. Id. at 1440.
18. Id.
19. Id. at 1437.

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