Comcast: One Year Later

(January 9, 2015) - Last year, the Supreme Court made clear in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1427 (2013), that courts analyzing the predominance requirement for class actions under Rule 23(b)(3) must apply a "rigorous analysis" to determine whether the requirement is met. In *Comcast*, the Court applied this rigorous analysis to the issue of damages. It concluded that the district court had erred in failing to consider the viability of the plaintiffs' damages theory at the threshold. And the Court ultimately held that the class should not have been certified because the proposed damages testimony did not match the plaintiffs' theory of liability in the case, noting that plaintiffs' damages expert had assumed four distinct antitrust injuries when the district court had certified only one of those theories for class treatment.

Almost immediately in the wake of *Comcast*, the lower courts erupted into a debate over whether damages must always be considered in the predominance analysis. As one relatively early decision summarized, appellate and district court decisions applying *Comcast* could already be "divided into three, distinct groups." *Jacob v. Duane Reade, Inc.*, 293 F.R.D. 578, 581 (S.D.N.Y. 2013). The first consists of "courts distinguishing *Comcast*, and finding a common formula at the class certification stage, and thus, predominance, satisfied." *Id.* The second includes "courts applying *Comcast* and rejecting class certification on the ground that no common formula exists for the determination of damages." *Id.* The third comprises "courts embracing a middle approach whereby they employ Rule 23(c)(4) [which governs issues classes] and maintain class certification as to liability only, leaving damages for a separate, individualized determination." *Id.*

Some of the more closely followed post-*Comcast* decisions have fallen in the third group, holding that the presence of individualized damages is irrelevant to the predominance consideration because, under Rule 23(c)(4), the court can certify the question of liability as long as common questions predominate as to that issue alone, and leaving damages questions for another day. *See, e.g.*, *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 860 (6th Cir. 2013) (on remand for further consideration in light of *Comcast*) ("[N]o matter how individualized the issue of damages may be, determination of damages may be reserved for individual treatment with the question of liability tried as a class action."). In the view of these courts, *Comcast* is satisfied as long as the plaintiffs have proposed (or at least hypothesized) a theory of damages that matches the theory of liability – with the details to be worked out later, if at all, in the event of a plaintiff verdict on the issue of liability. *See, e.g.*, *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 800 (7th Cir. 2013) (on remand for further consideration in light of *Comcast*) (holding, where damages were proposed to be resolved in individual hearings if necessary after a common trial on liability, that "[u]nlike the situation in *Comcast*, there is no possibility in this case that damages could be attributed to acts of the defendants that are not challenged on a class-wide basis; all members of the mold class attribute their damages to mold and all members of the control-unit class to a defect in the control unit").

This rush to embrace issues classes as a means to avoid the rigorous analysis of damages prescribed by *Comcast* is troubling. The analysis called for by *Comcast* requires not only a match between theories of liability and damages, but also identification – "at the class-certification stage" – of a method of resolving damages that makes class adjudication appropriate. 133 S. Ct. at 1433. And class adjudication may remain inappropriate notwithstanding the bifurcation of damages into individualized phases if bifurcation is either inappropriate or inefficient – possibilities that so far have been severely underanalyzed by decisions applying *Comcast* and certifying classes notwithstanding individualized damages issues.

It has long been recognized, for example, that the use of issues classes to bifurcate is not appropriate unless the district court judge can "carve at the joint" – in other words, that the issues can be divided in a manner that does not allow the "same issue [to be] reexamined by different juries," in violation of the Seventh Amendment. *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1302-03 (7th Cir. 1995). Seventh Amendment problems are most acute where the issue of liability is itself bifurcated – where, for example, a class jury decides negligence, and individual juries in later proceedings decide issues of comparative fault. *Id.* at 1303.

At first glance, bifurcating the issue of damages would not seem to present this problem, as courts choosing this path routinely announce that the issue of liability is a common one. These claims are debatable, however, where courts certify liability classes that almost certainly include large numbers of class members with no injury. Courts have justified such overbroad certifications on the theory that plaintiffs with no injury will have no damages and thus can be sorted out in individual damages proceedings. The Sixth Circuit, for example, adopted precisely this analysis in the *Whirlpool* litigation, in which the plaintiff claimed that her washing machine developed mold but the record suggested that much of the class had never experienced a similar problem. *See* 722 F.3d at 854-55. Other courts have more expressly deemed it appropriate to "preserve [the defendant's] opportunity to raise any individualized defense it might have at the damages phase of the proceedings," *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1168 (9th Cir. 2014), without analyzing whether there is any impermissible overlap between the bifurcated issues.

It is at least arguable that decisions like these are simply relabeling liability issues as "damages" issues in order to justify class treatment of the remaining common issues on the (mistaken) theory that resolution of those common issues will be conclusive on the question of liability. In the washing-machine cases, for example, the reality is that the absence of injury is a question of liability, not damages, and later consideration of the injury question could well require reexamination of liability – particularly in cases where the absence of injury was predicated on a claim that the class member misused the product.

Courts using issues classes have also largely refused to give serious consideration to the question whether leaving individualized damages issues for later resolution actually offers any efficiency benefit. In low-value consumer cases in particular, the cost of litigating each individualized damages hearing in any form could often exceed the value of any potential recovery. In *Lilly v. Jamba Juice Co.*, for example, the plaintiffs sought recovery for themselves and a putative class on the theory that Jamba Juice had misrepresented kits for making smoothies at home as using flavors that were "all natural." No. 13-cv-02998-JST, 2014 WL 4652283, at *1 (N.D. Cal. Sept. 18, 2014). The district court determined that the issue of restitution could not be determined on a classwide basis because each class member likely derived some value from the product, a question that would have to be resolved on an individualized basis. *Id.* at *10. The court nevertheless certified the class on the question of liability, believing that *Comcast* has no application where "classes [a]re certified only for liability purposes rather than for purposes of considering damages." *Id.* at *11.

But assuming a plaintiff verdict and the need for follow-on litigation of damages issues, the costs of litigation would easily swamp the value of any recovery. On an individual basis, determining the value received by each consumer would require a subjective inquiry, probably in the form of testimony from the class members and, in many cases, friends or family members who consumed the smoothies. Litigation of that issue for even an hour would incur costs and fees that are orders of magnitude higher than the total cost of the kits themselves – much less the alleged loss in value attributable to any misrepresentation regarding the "all natural" character of the smoothie flavors. To the credit of the *Jamba Juice* court, it at least indicated some awareness of this problem – more than most courts exhibit – but simply wished the problem away. Specifically, the court speculated – without identifying any basis for its hope – that "[s]ome of the difficulties in determining individual damages may fall away after liability is determined, depending upon which claims (if any) are successful, and which type of relief the class is entitled to." *Lilly*, 2014 WL 4652283, at *11.

A related efficiency concern even in cases with claims potentially worth more than a few dollars is that participation rates are unlikely to justify the investment in the common phase of the litigation. It is well recognized that participation rates are low even in successful consumer class settlements where no participation beyond the submission of a claims form is required. Bifurcation plans that contemplate actual participation of class members in any substantial form, whether by appearance to testify or even by submission of detailed affidavits – are likely to drive down already anemic participation in class proceedings.

In many cases, of course, these problems never come home to roost because a decision certifying a class typically promotes settlement, a fact no doubt on the mind of the judges who praise the virtues of issues classes. But hopes of prompting a settlement should not drive courts to ignore the duty announced in *Comcast* to rigorously analyze the propriety of class treatment. For one thing, as the Supreme Court has observed in other cases, certified classes often impose risks far out of proportion to their merit, which in turn result in settlements that probably significantly overstate the value of the class claims. *AT&T Mobility LLC v.*

Concepcion, 131 S. Ct. 1740, 1752 (2011) ("Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims."). Thus, particularly in cases involving large numbers of class members with no injury, the decision to treat "no injury" members as members who simply have no damages could result in settlement numbers that greatly exceed any amount arguably due to the few class members with legitimate grievances.

Moreover, not every case is settled, and a court that tries liability only to have to resolve individualized damages with no realistic plan to do so has done no service to anyone. Indeed, with increasing awareness of the difficulties noted above in litigating individualized damages issues, defendants in at least some cases may be more likely to litigate common "liability" phases – precisely what happened in the *Whirlpool* case. The practical difficulties of litigating individualized damages never materialized because the defendant prevailed in the liability phase, but as more defendants decide not to settle in cases with complex and individualized damages issues, courts may come to regret kicking the issue of damages down the road for the sake of facilitating class litigation of liability questions.

Courts have taken these practical problems seriously in other contexts, as illustrated by the Third Circuit in a pair of recent ascertainability rulings. *See Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013); *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583 (3d Cir. 2012). As the Third Circuit explained in requiring plaintiffs to identify objective and administratively feasible methods of ascertaining class members at the class certification stage, "[i]f class members are impossible to identify without extensive and individualized fact-finding or 'mini-trials,' then a class action is inappropriate" because its supposed efficiency benefits disappear. *Carrera*, 727 F.3d at 303-04 (citation and internal quotation marks omitted). In *Carrera*, the principal issue was the method by which class members would prove that they had purchased multivitamins – presumably an issue that would not have to be resolved until after litigation of a "common" liability issue was complete. *See id.* at 309-10. Nevertheless, the Third Circuit made clear that there is no point in litigating common issues only to later confront individualized issues that would make class resolution impossible; thus, "'[a] party's assurance to the court that it intends or plans to meet the requirements'" is not an appropriate substitute for showing a feasible method of identifying class members at the threshold class certification stage. *Id.* at 306 (quoting *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 318 (3d Cir. 2008)).

The same rationale should apply with respect to damages. A plaintiff who concedes that damages are individualized and thus could only ever be resolved by means of "individualized fact-finding or 'mini-trials'" should be put to the burden of showing that individualized litigation of those issues is actually administratively feasible. *Comcast* appears to demand as much, and as a practical matter proceeding to class litigation serves no purpose without such a showing.

By Geoffrey M. Wyatt

Counsel Geoffrey M. Wyatt is part of Skadden, Arps, Slate, Meagher & Flom's Mass Torts, Insurance and Class Actions practice. He is based in Washington, D.C.

End of Document