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7th Circuit (Easterbrook) Reminds that *Comcast v. Behrend* Does Not Require Proof of Classwide Damages

After a two-week hiatus, spurred by the holiday season and by your author's work revising an article that has been conditionally accepted for publication in the Indiana State Bar Association's *Res Gestae* magazine, the Hoosier Litigation Blog returns with an intersting cases from the Seventh Circuit. *In re IKO Roofing Shingle Products Liability Litigation* is delivered to us by the hand of the estimable Judge Frank H. Easterbrook. With this decision, we get another look at the Supreme Court's decision in *Comcast Corp. v. Behrend*. Without further delay, let us embark on today's discussion.

As a prefatory note, there are generally five or so kinds of cases that you will see the *In re* nomenclature to introduce the title: bankruptcy, paternity cases, probate estates, lawyer disciplinary matters, and, as we have here, multidistrict litigation cases. Multidistrict litigation cases, or MDLs as they are generally referred to, is a mechanism for handling a great many cases filed around the same time across the country that pertain to the same basic issues. A good example was the 2010 BP oil spill. There were well over 100 cases filed within a month relating to that issue. Those cases were pulled into an MDL, whereby a panel of federal judges determines the procedures to be utilized in handling the case. Typically, the MDL panel will assign the case to a specific judge. MDL matters can take decades

to fully resolve. An example is the Ford-Firestone tire cases that were assigned to then-Chief Judge Sarah Evans Barker in the Southern District of Indiana.

As I noted, this case began its journey to the Seventh Circuit through an MDL. In 2009 the MDL panel consolidated the pretrial proceedings and assigned the matter to the Central District of Illinois. The basic issue is the allegation that IKO Manufacturing misrepresented its asphalt roofing shingles as organic. Specifically, IKO is alleged to have falsely told customers that the shingles met a specific industry standard that it is alleged they did not. I use alleged repeatedly and uncharacteristically, because this case is not on appeal from a merits decision where a jury or judge has determined the issues. It arose on a procedural matter and so the actual merits of the case have not been decided–hence, alleged.

After consolidation, the plaintiffs sought to certify a class action. This leads to one last wrinkle occasioned by the MDL aspect of the case. The MDL panel assigned the matter to then-Chief Judge Michael P. McCuskey. As the district's chief judge, he reassigned the matter to Judge Harold A. Baker. Thus, on appeal there was an issue of whether Judge Baker had the authority to preside over the case. As Judge Easterbrook, writing the appellate decision, noted, "Unfortunately, Judges McCuskey and Baker failed to recognize that [28 U.S.C.] § 1407(b) gives the [MDL] Panel exclusive power to select the judge." The real problem arose because, even though the MDL eventually reassigned the matter to Judge Baker, it did so two weeks after Judge Baker decided the class certification motion that is the issue of the appeal.

This is ultimately a serious problem only "[i]f the problem deprived the court of subject-matter jurisdiction[.]" We've previously discussed subject-matter jurisdiction on the HLB. For our purposes here, it is sufficient to say simply that subject-matter jurisdiction means whether the particular court has authority to decide the specific case in front of it. If the problem deprives the court of subject-matter jurisdiction, then the Seventh Circuit, on appeal, must vacate the order and every other order that Judge Baker had made in the case for the last four years. Interpreting § 1407, the court concluded that the MDL's assignment is not an issue of subject-matter jurisdiction; each of the cases was properly in federal court and, indeed, properly in the Central District of Illinois. That is, "[i]n the Supreme Court's current terminology, § 1407(b) creates a case-proceeding rule rather than a jurisdictional one. One vital difference between the two is that the litigants may waive or forfeit the benefits of case-processing rules, while jurisdictional rules must be enforced by the judiciary on its own initiative[.]" Because none of the litigants protested Judge Baker's role as the presiding judge, the issue has been forfeited.

The court's analysis was a bit more in-depth, but the result remains the same, as does the basic reasoning.

With the propriety of Judge Baker's status as presiding judge established, the court turned to his decision to deny class certification. This brings us back to a favorite topic of the HLB and your author: misinterpretation of the Supreme Court decision *Comcast Corp. v. Behrend*. This is now the fifth HLB post discussing *Comcast* (a complete list is in the sources below). At issue here is that Judge Baker concluded that because the shingles, due to various weather conditions, would have different failure rates; indeed, some would fail due to tornadoes or hurricanes, regardless of whether they had passed the organic standards test. Judge Baker read *Comcast* "to require proof 'that the plaintiffs will experience a common damage and that their claimed damages are not disparate.'" In short, Judge Baker read *Comcast* to require common proof of damages. Oddly, Judge Baker also read *Wal-Mart Stores, Inc. v. Dukes* to stand for the same proposition. Misreading *Comcast* makes sense. Indeed, the ability to misread it is about the only thing that makes sense in the case when you consider that the Supreme Court used the decision to grant, vacate, and remand (GVR) three court of appeals decisions that were not implicated by a plain reading of *Comcast*. (I have discussed these issues at length and encourage you to read the posts listed in the sources below). But *Dukes*, clearly does not stand for the proposition. As Judge Easterbrook wrote:

> Yet *Wal-Mart* has nothing to do with commonality of damages. It dealt instead with the need for conduct common to members of the class, and it concerned Rule 23(a)(2) rather than Rule 23(b)(3). Plaintiffs in *Wal-Mart* contended that discretionary acts by managers of more than 2,000 local stores produced discriminatory effects. When writing that commonality under Rule 23(a)(2) requires proof of the same injury, the Court observed that each store was managed independently; it held that when multiple managers exercise discretion, conditions at different stores do not present a common question. In that situation damages differ, to be sure, but only because the underlying conduct differs. In a suit alleging a defect common to all instances of a consumer product, however, the conduct does not differ.

Returning to *Comcast*, Judge Easterbrook noted, "*Comcast*, by contrast, does discuss the role of injury under Rule 23(b)(3), though not in the way the district court thought." Oddly, Judge Easterbrook sought to distinguish *Comcast* on the grounds that it was an antitrust case instead of resorting to the language of *Butler v. Sears, Roebuck & Co. II*, in which Judge Posner wrote:

> As we explained in *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 491-92 (7th Cir. 2012), . . . a class action limited to determining liability on a class-wide basis, with separate hearings to determine—if liability is established—the damages of individual class members, or homogeneous groups of class members, is permitted by Rule 23(c)(4) and will often be the sensible way to proceed.

That portion of *Butler II*, followed the long-established class-action rule that damages need not be proven on a classwide basis. Nevertheless, Judge Easterbrook undertook the effort to explain why *Comcast* is limited to antirtust, and similar theory based, suits.

> [In *Comcast*,] Plaintiffs filed an antitrust suit and specified four theories of liability. The district judge certified a class limited to one of these four. The plaintiffs' damages expert, however, estimated harm starting with the assumption that all four theories had been established. The Court held that this made class treatment inappropriate: without a theory of loss that matched the theory of liability, the class could not get anywhere.
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> That would be equally true in a suit with just one plaintiff. In antitrust law, damages are limited to the sort of injury that flows from unlawful conduct. Competition creates benefits for consumers and harm for producers at the same time, while monopoly causes harm to consumers and some producers. It is essential to distinguish the encouraged injuries (to producers, from competition) from the forbidden ones (to consumers, from monopoly). That requires matching the theory of liability to the theory of damages. Comcast explained: "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."

Judge Easterbrook distinguished *Comcast* from this case because the plaintiffs here provide two theories of damages that match the theory of liability. The first theory is simply that the buyer is injured the second s/he receives a tile that did not meet the standard that it was marketed to meet. This theory is measured by "the difference in market price between a tile as represented and a tile that does not satisfy the D225 standard."

> The second theory is that purchasers whose tiles actually failed are entitled to recover damages, if nonconformity to the D225 standard caused the failure. That sort of remedy would require buyer-specific hearings along the lines discussed in *Butler II*.

Here we see an invocation of the *Butler II* approach, but only after the court has undergone the process of distinguishing *Comcast* as an antitrust case in which the theory of liability necessarily flows from proof of damages. *Butler II* makes clear that there is no need to distinguish *Comcast* on these grounds: proof of classwide damages is simply not a requirement.

Ultimately, the court, on appeal, vacated the trial court's decision denying class certification because the trial court applied the wrong standard. The Seventh Circuit, however, did not order that the class be certified; the procedural posture of the case did not allow such an order. Nevertheless, the court did add further dirt to the grave of those who seek to invoke *Comcast* for the broad proposition that the ability to prove classwide damages are a prerequisite to class certification.

Join us again next time for further discussion of developments in the law.

Sources

- *In re IKO Roofing Shingle Prods. Liab. Litig.*, ---F.3d---, No. 14-1532, 2014 WL 2958615 (7th Cir. July 2, 2014) (Easterbrook, J.).
- *Comcast Corp. v. Behrend*, 569 U.S. ___, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013).
- *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011).
- *Butler v. Sears, Roebuck & Co. II*, 727 F.3d 796 (7th Cir. 2013) (Posner, J.), *cert. denied*.
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