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An important Litigation law update from the law firm of Jackson Walker.

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Supreme Court Rules Class Certification Requires Evidence of Damages Supported by a Valid Legal Theory

Effectively equates "rigorous analysis" with "merits analysis"

By David Moran and Bill Cobb

On March 27, 2013, in *Comcast Corp. v. Behrend*, the United States Supreme Court reaffirmed that district courts must perform a "rigorous analysis" of whether a putative class meets the predominance requirements of Federal Rule of Civil Procedure 23(b)(3)—even if that entails delving into the merits of the plaintiffs' claims.

The named plaintiffs—and putative class representatives—were subscribers to Comcast's cable-television services. They alleged that Comcast's practice of clustering operations violated antitrust law by creating unlawful monopolies that drove up prices for subscribers in the Philadelphia cluster.

The plaintiffs sought certification under Federal Rule of Civil Procedure 23(b)(3), which requires that "questions of law or fact common to class members predominate over any questions affecting only individual members."

At the district court, the plaintiffs advanced four theories of injury; however, the district court held only one was susceptible to class-wide proof, the "overbuilder theory." In certifying the class the district court held that a damages model supplied by plaintiffs' expert provided an adequate way to measure class-wide damages. Critically, however, that damage model was not specific to the "overbuilder" theory and instead included all four theories of injuries put forth by Plaintiffs.

On appeal to the Third Circuit, Comcast argued that the class was improperly certified because plaintiffs' damage model was not specifically tied to the "overbuilder" theory. A divided Third Circuit refused to entertain this argument on the basis that it would require delving into the merits of plaintiffs' case and damages theory.

In a 5-4 decision, the Supreme Court reversed the Third Circuit finding that its refusal to delve into the merits flatly contradicted the Supreme Court's prior holdings that the rigorous analysis required for class certification may require looking beyond the pleadings to assess the impact of merits issues on class certification. Further, the Court ruled that a damage theory not directly linked to the class allegation of liability could not satisfy the predominance requirement. The Court held:

Respondents' class action was improperly certified under Rule 23(b)(3). By refusing 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, the Court of Appeals ran

afoul of our precedents requiring precisely that inquiry. And it is clear that, under the proper standard for evaluating certification, respondents' model falls far short of establishing that damages are capable of measurement on a classwide basis. Without presenting another methodology, respondents cannot show Rule 23(b)(3) predominance: Questions of individual damage calculations will inevitably overwhelm questions common to the class.

The *Comcast* decision continues the Supreme Court's line of recent decisions strengthening the procedural protections for class action defendants by making it clear that trial courts may not find predominance without analyzing the merits of the class plaintiffs' claims. This decision also requires the trial court to find that class plaintiffs have specifically linked their liability theories to a certifiable damage theory. Finally and perhaps most important, the Supreme Court has made clear that in cases where damages will be overwhelmingly individualized, a class cannot be certified, even if there is a common liability theory.

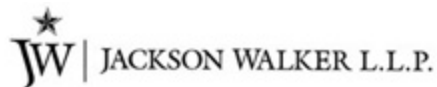
CLICK HERE to read a copy of the Opinion.

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