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Road to class certification gets bumpier

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The road to class certification for an antitrust plaintiff just got bumpier. Over the past several years, the U.S. Supreme Court has persistently chipped away at the path's once-smooth surface. The latest hazard for class-action plaintiffs arrived in the court's March 27 decision in *Comcast Corp. v. Behrend*, 2013 DJDAR 4027, which reversed

certification of a class of over 2 million Comcast subscribers seeking federal antitrust relief.

The private-attorney general approach of deterring antitrust conduct through class actions is certainly effective at creating litigation. Indeed, there can be no dispute that the market to lead the charge against companies accused of antitrust (or other) wrongdoing is vigorously competitive. Over the past several years, however, the Supreme Court has expressed concern with both the costs and possible abuses inherent in class actions in general, and antitrust class actions in particular. The result is a series of decisions that have raised both substantive and procedural requirements for antitrust class action plaintiff attorneys enticed by treble damages and the prospect of generous attorney fees.

The court's *Comcast* decision helps class-action defendants in at least two ways. First, the court reiterated - so there can be no doubt - that the "rigorous analysis" requirement that courts must follow when reviewing class certification requests applies to all of the class-action standards. This includes Federal Rule of Civil Procedure 23(b)(3)'s requirement for opt-out class actions that "the questions of law or fact common to class members predominate over any questions affecting only individual members." Indeed, the court emphasized that "[i]f anything, Rule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a)."

Relatedly, the court criticized the courts below for limiting their analysis to avoid an overlap on merit issues. At one time, expressing concerns about stepping on the merits in a class certification ruling was a common refrain. But that argument should die with this decision. The majority in *Comcast* was very clear that a court must rigorously analyze the class certification factors no matter how close to the merits it takes them.

Second, the court seems to require that damages must be "capable of measurement on a classwide basis" because otherwise "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class." This assertion, however, may generate future dispute and controversy as the four-justice dissent declares that "the opinion breaks no new ground on the standard for certifying a class action," and the decision "should not be read to require, as a prerequisite to certification, that damages attributable to a classwide injury be measurable 'on a class-wide basis.'" The parties did not contest the district court ruling below that to meet the predominance requirement plaintiffs had to show that damages were measurable on a class-wide basis.

Case Background

Class action plaintiffs sued Comcast under the antitrust laws for a practice known as "clustering." Under this practice, a cable operator will geographically consolidate their operations by acquiring cable systems through acquisitions and swaps in regions where they already have a significant presence. To do so, they will often give up other holdings scattered across the country. The Federal Communications Commission and federal antitrust authorities approved the transactions at issue here, but plaintiffs sued, claiming that they were anticompetitive.

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The relevant transactions involve Comcast's clustering in what is known as the Philadelphia Designated Marketing Area, a media-research-defined region related to the scope of broadcast signals. As a result of clustering transactions, Comcast's share of subscribers in that area went from 23.9 percent in 1998 to 77.8 percent in 2002, finally settling at 69.5 percent in 2007. In 2003, a group of Comcast subscribers sued Comcast on behalf of a class of subscribers under Sections 1 and 2 of the Sherman Act, for market allocation, monopolization and attempted monopolization. More specifically, class action plaintiffs alleged that through its clustering, Comcast harmed its customers by eliminating competition, raising entry barriers to potential competition, maintaining increased prices for cable services above market rates, and depriving subscribers of the lower prices that would result from effective competition.

At the center of the class certification issues were plaintiffs' four theories of antitrust harm, only one of which was accepted as capable of class-wide proof by the courts below: Comcast's activities reduced the level of competition from "overbuilders," which are companies that build competing cable networks in areas where an incumbent cable company already operates.

The problem for plaintiffs was that plaintiffs' expert created a damages model that didn't isolate the "overbuilders" antitrust theory; it instead incorporated all four theories. Nevertheless, the model sufficiently satisfied both the trial and appellate courts, both of which shied away from fully analyzing the methodological attack on the merits.

The Supreme Court Decision

This methodological problem, however, was enough to defeat class certification at the Supreme Court. In a 5-4 decision authored by Justice Antonin Scalia, the court applied its own rigorous analysis and concluded that "a model purporting to serve as evidence of damages ... must measure only those damages attributable to that theory. If the model does not even attempt to do that, it cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3)." Despite the urging of four justices not to do so, the court made its own substantive determination that the damages methodology was insufficient to satisfy the predominance requirement for class certification: "In light of the model's inability to bridge the differences between supra-competitive prices in general and supra-competitive prices attributable to the deterrence of overbuilding, Rule 23(b)(3) cannot authorize treating subscribers within the Philadelphia cluster as members of a single class." This Supreme Court decision involved more than just class certification. If the dissent had its way, the court would have dismissed the writ of *certiorari* as improvidently granted. That is because the court initially accepted review on the question of "whether a district court may certify a class action without resolving whether the plaintiff class had introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis." It became apparent, however, that this issue wasn't squarely presented because Comcast did not ever object to the plaintiffs expert's testimony in the trial court - thus effectively waiving the argument. The majority, however, against the objection of four justices, decided to rule on the issue that was developed by Comcast - whether the expert testimony was sufficient for class certification.

We can expect several consequences from this decision. First, any opening for a party to postpone resolution of class-certification issues for later in the case is dead. When the court says "rigorous analysis," it really means it, even if ultimate merit issues overlap.

Second, courts will be much more likely to require that damages attributable to class-wide injury be measurable on a class-wide basis. The dissent asserts that this issue wasn't decided by the court, but it is a dissent for a reason. Lower courts may not uniformly agree how to handle this issue. But in the meantime, class action plaintiff attorneys should present evidence that class-wide injury is measurable class-wide, and if class action plaintiffs fail to do so, defendants should challenge class certification, citing *Comcast*.

Third, experts will do more of their work earlier in the case, and it is possible that class certification briefing may have to occur later, so plaintiffs have more time to try to meet their increased burdens.

Finally, the court's discussion of the fit between the theories of liability and damages will find its way into antitrust cases at summary judgment and trial, as well as class certification.

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