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Is the Supreme Court Needlessly Using *Comcast Corp. v. Behrend* to Vacate Certified Classes?

Our loyal readers were probably wondering why I did not provide a post last week. I apologize. I had hoped to be able to complete a post prior to departing for a conference on Thursday afternoon. Alas, the week got away from me. In consideration of our loyal readers who missed out, I am providing two posts today and shall be back on the regular schedule at the end of the week. The second of today's posts is dedicated to last week's Indiana Supreme Court decision in the case *City of Indianapolis vs. Buschman* – holding that tort claims notice substantially complied with Indiana Tort Claims Act despite listing "No Injuries" and bringing a subsequent personal injury claim. This post, however, is a bit of a departure from our typical discussions on the Hoosier Litigation Blog.

This post is dedicated to a discussion of the Supreme Court of the United States' (SCOTUS) decision in *Comcast Corp. v. Behrend*. More specifically, it is a focus on the Court's recent use of *Behrend* to vacate class certification orders in a handful of cases. The impetus for this discussion stems from last week's grant of *certiorari* by the SCOTUS in the Seventh Circuit case *Butler v. Sears, Roebuck and Co*. We previously discussed the *Butler* case in the post entitled *7th Circuit Provides*

Much Needed Clarification of Class Action "Predominance" Requirement: Butler v. Sears. As the title may well indicate, it was this author's belief that the *Butler* decision was a very useful and much needed guide for the predominance requirement of Rule 23(b)(3) class certification. Despite the case's utility and sound reasoning, the SCOTUS vacated the opinion without providing any guidance in its place.

The entire decision by the SCOTUS in vacating the *Butler* decision is listed below.

> The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Seventh Circuit for further consideration in light of *Comcast Corp. v. Behrend*, 569 U.S. ___ (2013).

This is not the first case that the Court has granted certiorari only to vacate the decision in favor of further consideration in light of *Behrend*. Writing for The UCL Practitioner, Kimberly A. Kralowec noted that this is at least the third case in which the Court has vacated a class certification order for further consideration based upon *Behrend*. The other two decisions are the Seventh Circuit decision *Ross v. RBS Citizens, N.A.* and the Sixth Circuit's decision in *In re Whirlpool Corp. Front-Loading Washer Products Liab. Litig*. A class was certified in all three cases. Nevertheless, after the SCOTUS's grant of certiorari and subsequent vacatur, each of these cases is once more wide open. Further, the prior decisions are now no longer binding precedent.

In order to understand why your author is flabbergasted by the Court's vacatur of the *Butler* decision, let us look at what *Behrend* held. The *Behrend* decision at its core addressed the use of a regression model by an expert in the class certification determination. The basis for finding error in certification of the class was Rule 23(b)(3)'s predominance requirement. To that end, the majority opinion – authored by Justice Antonin Scalia – stated:

> If anything, Rule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a). Rule 23(b)(3), as an "'adventuresome innovation,'" is designed for situations "'in which "class-action treatment is not as clearly called for."'" That explains Congress's addition of procedural safeguards for (b)(3) class members beyond those provided for (b)(1) or (b)(2) class members (e.g., an opportunity to opt out), and the court's duty to take a "'close look'" at whether common questions predominate over individual ones.

* * *

> We start with an unremarkable premise. If respondents prevail on their claims, they would be entitled only to damages resulting from reduced overbuilder competition, since that is the only theory of antitrust impact accepted for class-action treatment by the District Court. It follows that a model purporting to serve as evidence of damages in this class action 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). Calculations need not be exact, but at the class-certification stage (as at trial), any model supporting a "plaintiff's damages case must be consistent with its liability case, particularly with respect to the alleged anticompetitive effect of the violation. And for purposes of Rule 23, courts must conduct a "'rigorous analysis'" to determine whether that is so.
>
> The District Court and the Court of Appeals saw no need for respondents to "tie each theory of antitrust impact" to a calculation of damages. That, they said, would involve consideration of the "merits" having "no place in the class certification inquiry." That reasoning flatly contradicts our cases requiring a determination that Rule 23 is satisfied, even when that requires inquiry into the merits of the claim. The Court of Appeals simply concluded that respondents "provided a method to measure and quantify damages on a classwide basis," finding it unnecessary to decide "whether the methodology [was] a just and reasonable inference or speculative." Under that logic, at the class-certification stage *any* method of measurement is acceptable so long as it can be applied classwide, no matter how arbitrary the measurements may be. Such a proposition would reduce Rule 23(b)(3)'s predominance requirement to a nullity.

This excerpt is the primary thrust of the discussion on predominance. Put simply, the Court's holding is focused on the ability to use the methodology put forth by the expert in the case to determine classwide damages under the antitrust theory of liability.

Many persons were under the impression that this case was going to establish whether, as a practical matter, an expert was a necessity to class certification. Alas, the decision not only did not resolve this question, it did not provide all that much guidance in the predominance inquiry. The best critique of

the *Behrend* decision yet produced by a court is provided by Northern District of Illinois Chief Judge James F. Holderman in *Harris v. comScore, Inc*. In a footnote of that order, Judge Holderman wrote:

> The Supreme Court recently reversed a grant of class certification where "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class." *Comcast Corp. v. Behrend*, No. 11–864, 2013 WL 1222646 (U.S. Mar. 27, 2013). The Supreme Court's holding came from its assumption, uncontested by the parties, that Rule 23(b)(3) requires that damages must be measurable based on a common methodology applicable to the entire class in antitrust cases. That assumption, even assuming it is applicable to privacy class actions in some way, is merely dicta and does not bind this court. *See id*. at *9 (Ginsburg and Breyer, JJ., dissenting) ("[T]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." (citation and quotation marks omitted)).

I read Judge Holderman's critique to be quite applicable to an attempt to broadly apply *Behrend* to other class cases. Based upon my reading of *Behrend*, I think that Judge Holderman is absolutely correct. In fact, the portion of the *Behrend* dissent that immediately preceeds the quotation provided by Judge Holderman is even more telling. Justices Ginsburg and Breyer wrote: "While the Court's decision to review the merits of the District Court's certification order is both unwise and unfair to respondents, the opinion breaks no new ground on the standard for certifying a class action under Federal Rule of Civil Procedure 23(b)(3)."

In short, the *Behrend* decision has done almost nothing to shift the class action landscape – at least absent an attempted utilization of an expert. Nevertheless, the Court has used the case as a bizarre weapon to force reexamination of a number of certified classes. Perhaps most egregious among the vacatur orders is the one vacating the Seventh Circuit's *Butler* decision. In *Butler* the Seventh Circuit held that both classes ought to be certified. At no point in the decision is expert testimony educed. Thus, the only theoretical basis for applying *Behrend* is the contention that the Seventh Circuit failed to determine whether damages could be determined on a classwide basis. However, as so well noted by the dissent in *Behrend*, that is not a prerequisite to class certification.

Butler stands for the proposition that "[p]redominance is a question of efficiency." I fail to see any application of *Behrend* to *Butler*, let alone an application mandating the vacatur of the Seventh Circuit's well-reasoned opinion.

A very interesting dynamic in this is that *Behrend* was authored by Justice Scalia and *Butler* by Judge Posner. As we have discussed before, Justice Scalia and Judge Posner have been involved in a high-profile academic feud. I think it is highly likely that we shall see a new chapter in this saga when the Seventh Circuit opinion readdressing *Butler* is released.

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

Sources

- *Comcast Corp. v. Behrend*, 569 U.S. ___, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013).

- *Butler v. Sears, Roebuck and Co.*, 702 F.3d 359 (7th Cir. 2012), *reh'g and reh'g en banc denied*, *cert. granted*, *judgment vacated sub nom. Sears, Roebuck & Co. v. Butler*, No. 12-1067, 2013 WL 775366 (U.S. June 3, 2013).

- Federal Rule of Civil Procedure 23(b)(3).

- Kimberly A. Kralowec, *Recent U.S. Supreme Court activity of interest: Sears, Roebuck & Co. v. Butler and Mississippi ex rel. Hood v. AU Optronics Corp.*, The UCL Practitioner, June 10, 2013.

- *Ross v. RBS Citizens, N.A.*, 667 F.3d 900 (7th Cir. 2012), *cert. granted*, *judgment vacated*, 133 S. Ct. 1722 (U.S. 2013).

- *In re Whirlpool Corp. Front-Loading Washer Products Liab. Litig.*, 678 F.3d 409 (6th Cir. 2012), *cert. granted*, *judgment vacated sub nom. Whirlpool Corp. v. Glazer*, 133 S. Ct. 1722 (U.S. 2013).

- *Harris v. comScore, Inc.*, No. 11 C 5807, 2013 WL 1339262, at *10 n.9 (N.D. Ill. Apr. 2, 2013).

- Eileen Shim, *Yet Another Round of the Scalia-Posner Fight*, The New Republic, Sept. 18, 2012.

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