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The Supreme Court Holds That Class Plaintiffs' Proposed Common Method for Proving Antitrust Impact And Damages on a Class-wide Basis Must Face Rigorous Scrutiny At Class Certification Stage Regardless Of Any Merits Overlap

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Yesterday, in *Comcast Corp. v. Behrend*, the Supreme Court in a 5-4 decision reaffirmed that district courts cannot simply "rubber stamp" class certification. Last year, in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), the Court explained that district courts must undertake a "rigorous analysis" of the evidence and arguments to ensure that the proponent of class certification satisfies the requirements of Federal Rule of Civil Procedure 23 before a putative class may be certified. Building upon the *Wal-Mart* decision, *Comcast* overturned the district court's grant of class certification because it declined to entertain arguments against plaintiffs' proffered damages model "simply because those arguments would also be pertinent to the merits determination." The Court held that the plaintiffs' damages model fell short of establishing the Rule 23(b)(3) predominance requirement because the alleged damages could not be directly tied to the lone surviving theory of how Comcast's activities allegedly harmed cable subscribers.

CASE BACKGROUND

In 2003, the *Comcast* plaintiffs brought a class action suit in the Eastern District of Pennsylvania against Comcast and affiliates, alleging that the defendants imposed horizontal territory, market and customer allocations, and engaged in unlawful monopolization and attempted monopolization in violation of Sections 1 and 2 of the Sherman Act.

In 2007, the district court granted plaintiffs' motion for class certification. However, the district court agreed to reconsider that decision after the Third Circuit's decision the next year in *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008), which held that a court must thoroughly examine (including by weighing conflicting expert testimony if necessary) and resolve all legal and factual disputes relevant to class certification by a preponderance of the evidence.

Front and center at the reconsideration hearing was the requirement of Rule 23(b)(3) that issues of law or fact common to the class must predominate over questions specific to individual members of the class. In discussing this predominance requirement, the district court quoted *Hydrogen Peroxide*, saying that it was necessary to determine whether the plaintiff class' legal claim is "susceptible to proof at trial through available evidence common to the class." This type of analysis, the district court recognized, depended on the merits of the plaintiffs' claim and required an assessment of what evidence the plaintiffs planned to use at trial to prove their claim.

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To support its certification arguments at the reconsideration hearing, the plaintiffs presented a variety of expert reports to demonstrate the type of common evidence of antitrust impact applicable to all class members that they would use at trial. Plaintiffs asserted four theories of antitrust impact, including that defendants' actions reduced the level of competition from "overbuilders," companies that build competing cable networks, raising the prices paid by subscribers.

Additionally, the plaintiffs presented expert reports to demonstrate a common methodology of calculating class-wide damages. In response, Comcast presented its own experts' reports that raised "substantial issues of fact and credibility" with regard to the plaintiffs' experts.

Importantly, the district court allowed plaintiffs' case to proceed only on the "overbuilder" theory of antitrust impact. However, the damages model sponsored by plaintiffs' expert incorporated all four asserted theories and was not tied to the particular theory of antitrust impact that survived the district court's scrutiny. Nonetheless, the district court held that the class plaintiffs had demonstrated that they could establish antitrust impact and damages through common evidence applicable to all class members and granted the plaintiffs' motion for class certification.

On appeal, a divided Third Circuit panel affirmed the district court. In rejecting Comcast's arguments that the plaintiffs' evidence was insufficient to satisfy Rule 23, the Court of Appeals explained that it was not the role of the court to "reach into the record and determine whether plaintiffs actually have proven antitrust impact," but rather to determine if the plaintiffs "could prove antitrust impact through common evidence at trial." Expressing concern over converting certification decisions into mini-trials, the court held that a district court may engage in merits inquiries only when necessary. To require any more, the Third Circuit reasoned, would contravene prior Supreme Court precedent and run "dangerously close to stepping on the toes of the Seventh Amendment by preempting the jury's factual findings with our own." Moreover, with regard to the adequacy of the damages model, the court emphasized that "[a]t the class certification stage," respondents were not required to "tie each theory of antitrust impact to an exact calculation of damages."

Last June, the Supreme Court granted Comcast's petition for writ of certiorari. Comcast's petition articulated the question presented as follows: "whether a district court may certify a class action without resolving 'merits arguments' that bear on Rule 23's prerequisites for certification" Interestingly, the Court's order granting certiorari indicated that review was limited to the following question: "[w]hether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis."

SUMMARY OF THE DECISION

In a 5-4 opinion written by Justice Scalia and joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito, the Court held that the class action was improperly certified under Rule 23(b)(3). The Court began by quoting the *Wal-Mart* decision, re-emphasizing the fact that courts, in all class certification proceedings, must undertake a "rigorous analysis" of the evidence and arguments to determine if class certification is warranted. Additionally, the Court made clear that this rigorous analysis applies with special force to the predominance requirement: "The same analytical principles govern Rule 23(b). If anything, Rule 23(b)(3)'s predominance criterion is even more demanding

Repeatedly, we have emphasized that it "may be necessary for the court to probe behind the pleadings before coming to rest on the certification question," and that certification is proper only if "the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." The same analytical principles govern Rule 23(b). If anything, Rule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a)."

- Justice Scalia

"There is no question that the model failed to measure damages resulting from the particular antitrust injury on which petitioners' liability in this action is premised."

- Justice Scalia

than Rule 23(a)...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."

The Court faulted the lower courts for merely accepting the plaintiffs' damages model that provided a method to measure damages on a class wide basis but did not show that the model was tied to an accepted theory of antitrust impact. The Court noted that failing to do so creates a situation where "any method of measurement is acceptable so long as it can be applied classwide, no matter how arbitrary the measurements may be."

The Court then went on to analyze the damages model at issue and explained that the model failed to measure damages resulting from the particular antitrust impact theory accepted by the courts below. Because the damages model assumed the validity of all four theories of antitrust impact initially advanced by the plaintiffs, rather than focusing on the sole theory accepted by the lower courts, the Court held that it could not satisfy the 23(b)(3) predominance requirement. The Court noted that "[p]rices whose level above what an expert deems 'competitive' [that have] been caused by factors unrelated to an accepted theory of antitrust harm are not 'anticompetitive' in any sense relevant here."

Justices Ginsburg, Breyer, Sotomayor, and Kagan dissented, arguing that the majority ignored the question presented by the Court and addressed at oral argument, which centered on admissibility. Under that question, the dissent would dismiss the writ of certiorari as improvidently granted because Comcast failed to object to the expert testimony in question at the lower level. Criticizing the majority, the dissent noted that the "Court's newly revised question, focused on predominance, phrased only after briefing was done, left respondents without an unclouded opportunity to air the issue the Court today decides against them. And by resolving a complex and fact-intensive question without the benefit of full briefing, the Court invites the error into which it has fallen."

IMPLICATIONS

While the dissent argued that the "court's ruling is good for this day and case only," the likely implication of the majority opinion is to raise the bar for plaintiffs seeking class certification generally and particularly in antitrust cases where the ability of class plaintiffs to use a common method of proof to establish antitrust impact (or the fact of injury) on a class-wide basis is frequently a hotly disputed issue. Moreover, this decision reinforces that lower courts must take a hard look at plaintiffs' claims and proffered damages models, which at times will require considering the merits of the case, before certifying a class. Because class certification is often a decisive point in litigation that can influence settlement decisions, defendants will be further protected from potentially frivolous class actions that would have little chance of surviving on the merits at trial.

Conclusive resolution of the question on which certiorari was initially granted in *Comcast* -- whether expert testimony relied on at the class certification stage must be in the form of admissible evidence -- must await another decision. The Supreme Court expressly stated in dictum in *Wal-Mart* that it "doubt[ed]" the district court's ruling in *Wal-Mart* that *Daubert* determinations about the admissibility of expert testimony were not required to be made at the class certification stage. *Comcast* will likely significantly

strengthen the post-*Wal-Mart* majority view endorsing critical evaluation of proffered expert testimony in support of class certification, which requires plaintiffs to demonstrate by a preponderance of the evidence that the expert's reasoning and methodology are valid and can be properly applied to the facts in issue.

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UNITED STATES

New York

425 Lexington Avenue
New York, NY 10017
+1-212-455-2000

Houston

2 Houston Center
909 Fannin Street
Houston, TX 77010
+1-713-821-5650

Los Angeles

1999 Avenue of the Stars
Los Angeles, CA 90067
+1-310-407-7500

Palo Alto

2475 Hanover Street
Palo Alto, CA 94304
+1-650-251-5000

Washington, D.C.

1155 F Street, N.W.
Washington, D.C. 20004
+1-202-636-5500

EUROPE

London

CityPoint
One Ropemaker Street
London EC2Y 9HU
England
+44-(0)20-7275-6500

ASIA

Beijing

3919 China World Tower
1 Jian Guo Men Wai Avenue
Beijing 100004
China
+86-10-5965-2999

Hong Kong

ICBC Tower
3 Garden Road, Central
Hong Kong
+852-2514-7600

Seoul

West Tower, Mirae Asset Center 1
26 Eulji-ro 5-gil, Jung-gu
Seoul 100-210
Korea
+82-2-6030-3800

Tokyo

Ark Hills Sengokuyama Mori Tower
9-10, Roppongi 1-Chome
Minato-Ku, Tokyo 106-0032
Japan
+81-3-5562-6200

SOUTH AMERICA

São Paulo

Av. Presidente Juscelino Kubitschek, 1455
São Paulo, SP 04543-011
Brazil
+55-11-3546-1000