

Competition - USA

Supreme Court issues significant class certification ruling in antitrust case

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Introduction

In a five-to-four decision in the much-anticipated *Comcast v Behrend* case, the Supreme Court rejected a class of millions of Comcast subscribers seeking nearly \$1 billion in antitrust damages, holding that at the class certification stage, district courts must conduct a rigorous, merits-based analysis of any damages model that purports to show that damages are "measurable on a class-wide basis through use of a common methodology".

In doing so, the court extended its mandate from the landmark decision in *Wal-Mart v Dukes*, making clear that district courts must consider and resolve merits questions related to expert damages analysis at the class certification stage where they overlap with the requirements of Rule 23 of the Federal Rules of Civil Procedure. The court specifically rejected the Third Circuit's holding that an "attack on the merits of the methodology had no place in the class certification inquiry". However, the court stopped short of specifically holding that the admissibility standard of *Daubert v Merrell Dow* applies to expert testimony on damages at the class certification stage, potentially because Comcast did not object on *Daubert* grounds to the admissibility of the expert evidence in the district court.

In overturning the class certification, the Supreme Court reasoned that because the damages model proffered by the plaintiffs was based on multiple, interrelated antitrust liability theories, only one of which was certified for class treatment, the model failed to establish that damages could be calculated on a class-wide basis on the theory that would be presented at trial. Thus, the damages model could not satisfy the predominance requirement of Federal Rule of Civil Procedure 23(b)(3).

Facts

In 2003 a group of Comcast customers brought an antitrust class action lawsuit alleging that Comcast had engaged in 'anti-competitive clustering' in the Philadelphia area through swapping cable assets with other cable providers or buying cable providers outright. The plaintiffs claimed that these actions excluded and prevented competition among cable providers and artificially increased prices for cable services.

The district court certified the class of more than 2 million former and existing Comcast subscribers as to only one of the plaintiffs' four theories – that clustering deterred competitors known as 'overbuilders' from entering the Philadelphia area market. The district court concluded that the plaintiffs had met the certification requirements of Rule 23(b)(3), which requires that common issues "predominate" over issues unique to each individual class member. As part of meeting the predominance requirement, the plaintiffs had to show that damages were measurable "on a class-wide basis" through use of a "common methodology". To that end, after evidentiary hearings, the district court found that the plaintiffs' damages model entailed a common methodology to measure damages on a class-wide basis.

On appeal, a divided panel of the Third Circuit affirmed. All three judges agreed that in order to satisfy the predominance requirement in this antitrust case, the plaintiffs had to establish that the alleged damages were capable of measurement on a class-wide basis using common proof. In the majority's view, conducting a full inquiry into the reliability and admissibility of the plaintiffs' expert evidence was unnecessary at this

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phase of the litigation. The majority stated that such a requirement would impermissibly allow the district court to assess the merits at the certification stage. In contrast, the dissent asserted that the damages model was unreliable and questioned whether any model could prove common impact due to facts that suggested that damages varied among the class members.

Decision

The Supreme Court began by noting that if the plaintiffs/respondents prevailed on their claim, they would be entitled to damages based only on the single 'overbuilders' theory that had been certified. The court noted that a damages model that fails to measure damages based solely on the certified theory "cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3)". The court rejected the district court and Third Circuit's reasoning that the respondents need not match their damages calculation to each theory because such matching would involve consideration of the merits at the certification stage. The court indicated that this reasoning flatly contradicted *Dukes*' mandate that the requirements of Rule 23 cannot be ignored even if consideration of the merits of the claim is necessary in order to determine whether Rule 23 requirements have been met. Indeed, according to the court, failing to consider whether a method to calculate damages was a just and reasonable inference or was speculative "would reduce Rule 23(b)(3)'s predominance requirement to a nullity".

The court determined that the damages model at issue assumed the validity of non-certified theories, and thus identified damages that were not a result of the alleged wrong. Moreover, determining which of the 2 million subscribers located in 16 different counties had paid competitive rates based on overbuilding, rather than the other asserted anti-competitive actions that were part of the damages model, would be impossible. As a result, the model could not establish class-wide damages.

Dissent

Justices Breyer and Ginsburg wrote a joint dissent, joined by Justices Sotomayor and Kagan, that articulated procedural and substantive objections to the majority opinion. The dissent asserted that the court should dismiss the writ of certiorari as improvidently granted for procedural reasons, noting its view that the court had rewritten the question presented in a manner that required the respondents to focus on an argument not preserved for appeal. The dissent further asserted that the writ should be dismissed because the respondents had not raised the issue of whether the need for individual damages calculations precludes Rule 23(b)(3) certification.

On the merits, the dissent stated that the case law is clear in that "individual damages calculations do not preclude class certification", and that damages are often calculated after a ruling on liability and are even calculated differently for different subclasses. Given previous rulings where the court made clear that "predominance is a test readily met" in actions alleging 'violations of the antitrust laws', the dissent contended that this case covered no new ground and was limited to its own facts.

The dissent also stated that the court relied on a version of the facts which was inconsistent with the finding by the lower courts that the damages model was sufficient, and concluded that the lower courts "were right". The dissent explained that the requirement that the plaintiffs prove injury caused by the alleged monopolisation on a class-wide basis is not synonymous with determining damages on a class-wide basis. In closing, the dissent also argued that because the parties did not fully argue about the damages model, the court might have an incomplete understanding of the model or statements in the record, risking an inaccurate decision.

Comment

While the Supreme Court's decision clearly has a major impact on antitrust class actions, which almost always involve a determination of damages on a class-wide basis, it will also affect all class actions in which plaintiffs claim that damages are measurable on a class-wide basis through the use of a common methodology. In such cases, before certification, district courts will be required to decide not just whether damages are susceptible to class-wide proof on a theoretical basis; instead, plaintiffs now must have evidence and/or expert testimony from which a jury properly could return a non-speculative damages verdict in favour of the class. The court has sent a message to district courts that they must conduct a rigorous analysis to determine that damages can be measured based on a common methodology, even if that rigorous analysis necessitates a consideration of the merits of the liability and damages theories at the certification stage.

The requirement that courts rigorously scrutinise whether plaintiffs can prove a common methodology for measuring class-wide damages will make it more difficult for plaintiffs to get speculative class action claims certified.

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