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Supreme Court Holds Damages Must be Measurable on a Classwide Basis for Class Certification

By Erik Hult

In a significant class action decision for employers, *Comcast Corp. et al v. Behrend et al*, No. 11-864 (March 27, 2013), the U.S. Supreme Court held that the ability to establish classwide damages is essential to a favorable ruling on class certification. Although the case involved alleged antitrust violations, the principles expressed by the Court are equally applicable in employment class actions. Notably, the Court reversed the Third Circuit Court of Appeals, and denied class certification finding certification was improper under the standards set forth in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

Background

The plaintiffs sued Comcast Corporation, alleging that the company's practice of concentrating operations within a particular region by acquiring competitor cable providers and swapping systems outside the region for competitor systems in the region violated the Sherman Act. According to the plaintiffs, Comcast's strategy harmed subscribers in the Philadelphia area by eliminating competition and holding prices for cable services above competitive levels.

Plaintiffs sought to certify a class action under Federal Rule of Civil Procedure 23(b)(3), which permits certification only if the "court finds that the questions of law or fact common to class members predominate over any questions affecting individual class members." In support of their claim, plaintiffs presented expert testimony based on a regression model purporting to compare actual cable prices in the Philadelphia area with hypothetical prices that would have prevailed but for Comcast's allegedly anticompetitive prices. The expert did not, however, link the alleged damages to the plaintiffs' theory of antitrust impact. Nevertheless, the district court certified the class.

On appeal before the Third Circuit, Comcast focused on the shortcomings of plaintiffs' damages analysis and argued that the class was improperly certified because plaintiffs failed to establish that damages could be measured on a classwide basis. The Third Circuit refused to consider this argument because, in its view, an "attac[k] on the merits of methodology [had] no place in the class certification inquiry."

Supreme Court Decision

In a relatively brief opinion authored by Justice Scalia (Justices Ginsburg, Breyer, Sotomayor, and Kagan dissented), the Court held that by “refusing to entertain arguments against [plaintiffs’] 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, [plaintiffs’] model falls far short of establishing that damages are capable of measurement on a classwide basis.” As it did in *Wal-Mart*, the Supreme Court held that a trial court may not refuse to review evidence presented at the certification stage in a class action just because the evidence is relevant to the merits of the case.

Thus, the Court criticized the Third Circuit for concluding that plaintiffs

“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 [plaintiffs’] 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.

In this regard, the Court reiterated the standards in *Dukes*, emphasizing that proof of common questions of law and fact will frequently require that the district court delve into the merits.

Tying these points into the case, Justice Scalia and the majority held that any damages model purporting to serve as evidence of damages in a class action must measure only those damages attributable to the plaintiffs’ theory of the case: “If the model does not even attempt to do that, it cannot possibly establish that damages are susceptible of measurements across the entire class for purposes of Rule 23(b)(3).” The Court noted that “[t]he first step in a damages study is the translation of the legal theory of the harmful event into an analysis of the economic impact of that event,” a step that the Third Circuit “ignored . . . entirely.”

While the Third Circuit held that there was no need for plaintiffs to “tie each theory of antitrust impact to a calculation of damages” because that inquiry would delve into the “merits” of the case, the Court explained that this 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 Majority held that the plaintiffs’ damages model “falls far short of establishing that damages are capable of measurement on a classwide basis” so plaintiffs “cannot show Rule 23(b)(3) predominance” because individual damages calculations will overwhelm questions common to the class.

The Impact of *Comcast*

Comcast clearly establishes that plaintiffs seeking certification of a class action under Rule 23(b)(3) must show that damages can be reasonably determined on a classwide basis, and, conversely, that the predominance of individual damages will defeat certification. Furthermore, after *Comcast*, plaintiffs must be able to establish that their damages proof is tied to the specific violations alleged in the complaint.

Moving forward, *Comcast* should result in greater attention being paid to the specifics of the proposed trial plan, and how that plan will permit damages to be proved on a classwide basis.

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