SUPREME COURT EXTENDS "RIGOROUS ANALYSIS" STANDARD FOR CLASS ACTIONS TO DAMAGES CLAIMS IN *COMCAST CORP. v. BEHREND*

Until early last decade, most U.S. district courts—relying on the Supreme Court's statement in *Eisen v. Carlisle & Jacqueline* (1974) that a court should not "conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action"—declined to look beyond the pleadings in deciding class certification motions. Thereafter, numerous courts of appeal concluded that this approach was based on a misreading of *Eisen* and, relying instead on the Supreme Court's decision in *General Telephone Co. of Southwest v. Falcon* (1982), held that a trial court must subject certification motions to "rigorous analysis" and that class representatives must present evidence sufficient to establish each element of Fed. R. Civ. P. 23.

In *Wal-Mart Stores, Inc. v. Dukes* (2011), the Supreme Court confirmed that courts must "probe beyond the pleadings" and conduct a "rigorous analysis" to determine whether the class certification requirements of Rule 23(a) are met, even if doing so requires considering the merits of the putative class plaintiffs' claims. *Dukes* left open a number of key questions, however, including whether the same rigorous analysis standard applied to (i) establishing the prerequisites of Rule 23(b), and specifically Rule 23(b)(3) "catch-all" classes; (ii) antitrust or other claims outside the employment context; and (iii) the determination of whether class representatives can prove the amount of damages with class-wide proof.

On March 27, 2013, in *Comcast Corp. v. Behrend*, the Supreme Court, in a 5–4 decision, answered each of these questions in the affirmative. The Court held that the rigorous analysis standard applies with equal force to class certification of antitrust claims under Rule 23(b). The Court further held that, in order to satisfy Rule 23(b)(3), plaintiffs must come forward with a "just and reasonable" methodology for calculating damages that is capable of being proven on a class-wide basis and measures damages resulting specifically from plaintiffs' theory of antitrust liability. The Court concluded that the *Comcast* plaintiffs had failed to do so and reversed the Third Circuit's decision affirming the district court's certification order.

The Decisions Below: Plaintiffs, subscribers to Comcast's cable television programming services, alleged that Comcast had violated the antitrust laws by pursuing a "clustering scheme" in which Comcast concentrated its operations in certain markets, which allegedly eliminated competition and inflated prices for programming. Plaintiffs sought class certification under Rule 23(b)(3), which requires for certification that "questions of law or fact common to class members predominate over any questions affecting only individual members."

Plaintiffs advanced four theories of antitrust injury that they contended could be established on a class-wide basis. The district court accepted only one of these theories as susceptible to class-wide proof: that Comcast's alleged clustering scheme deterred competition from "overbuilders"—companies that provide alternative telecommunications capabilities using infrastructure already in place. The district court permitted plaintiffs to seek to prove antitrust injury based on that theory alone.

The district court also concluded that damages for the alleged clustering scheme could be calculated on a class-wide basis based on the testimony of plaintiffs' economist, who designed a regression model that purported to calculate damages for the entire class. However, the expert acknowledged that his model did not isolate damages resulting only from the overbuilder theory but instead included damages attributable to the other theories of antitrust injury, which the court had rejected.

Comcast had argued that the class should not be certified because, among other failings, the fact that the damages model did not isolate damages resulting from overbuilder deterrence meant the model was incapable of establishing damages on a class-wide basis. The district court declined to consider this argument because it amounted to an "attac[k] on the merits" of the expert's methodology, and certified the class.

A divided Third Circuit affirmed, holding that "[a]t the class certification stage we do not require that Plaintiffs tie each theory of antitrust impact to an exact calculation of damages." Instead, all that is necessary is that plaintiffs "assure us that if they can prove antitrust impact, the resulting damages are capable of measurement and will not require labyrinthine individual calculations."

The Supreme Court Opinion: Justice Scalia's majority opinion reaffirmed that "[t]he class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only'. . . . To come within the exception, a party seeking to maintain a class action 'must affirmatively demonstrate his compliance' with Rule 23." To determine whether this requirement is met, it "may be necessary for the court to probe behind the pleadings" by engaging in "a rigorous analysis" that may "overlap with the merits of the plaintiff's underlying claim." The Court applied these principles to the analysis of Rule 23(b), concluding that "[i]f anything, Rule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a)."

Based on this standard, the Court determined that the *Comcast* class was improperly certified. The lower courts had refused to determine whether plaintiffs' method of quantifying damages was "just and reasonable" on the grounds that such an inquiry would involve delving into the merits of plaintiffs' claim. The Court held that such avoidance of merits issues, which would have determined whether the predominance requirement of Rule 23(b)(3) had been met, "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 further held that plaintiffs' damages model must be tied to their theory of antitrust injury. That is, because plaintiffs were entitled only to damages resulting from reduced overbuilder competition, their damages model must measure only damages attributable to that theory of liability. Plaintiffs' model failed to differentiate among the four theories of antitrust impact, rendering it impossible to determine that all class members had been affected by the reduction specifically in *overbuilder competition*. As such, the Court held that individual damages calculations would "inevitably overwhelm questions common to the class," making certification inappropriate.

Conclusion: *Comcast* is significant because it defeats any argument that the *Dukes* endorsement of the "rigorous analysis" standard is limited to certification under Rule 23(a) or Title VII claims. After *Comcast*, plaintiffs seeking certification of antitrust claims and other actions for money damages will need to satisfy the rigorous analysis test in establishing each element of both Rule 23(a) and 23(b), and courts will be less deferential to plaintiffs' proposed methodology for proving damages on a class-wide basis. Indeed, the impact of *Comcast* has already been felt in the lower courts, as the Supreme Court has vacated and remanded a Sixth Circuit product liability case, *Whirlpool Corp. v. Glazer*, and a Seventh Circuit wage-and-hour case, *RBS Citizens, N.A. v. Ross*, in light of its decision in *Comcast.*

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