

US Supreme Court Reinforces "Rigorous Analysis" of Class Certification Requirements in *Comcast* Ruling

Following on the heels of *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. ___ (2011), the US Supreme Court's recent 5-4 decision in *Comcast Corp. v. Behrend*, 569 U.S. ___ (2013) reinforces that courts must undertake a "rigorous analysis" of Rule 23's prerequisites for class certification – including those under Rule 23(b)(3) – and that such analysis frequently will require "the court to probe behind the pleadings." This ruling again raises the bar for class certification in antitrust and other types of complex class actions.

Damages Models to be Assessed More Closely

Applying such an analysis to the damages model put forth by the plaintiffs in *Comcast*, the Court concluded that the lower courts erred in refusing to consider the defendants' arguments attacking the methodology of the plaintiffs' damages model. The Third Circuit noted that such inquiries going to the merits are not appropriate at the class certification stage. In reversing the Third Circuit, the Court makes clear that its precedents "requir[e] precisely that inquiry."

The Court's ruling likely will have a significant impact on antitrust and other putative class actions that rely on damage modeling at the class certification stage. For example, the Court already has vacated and remanded by GVR order an employment law case (*RBS Citizens NA v. Ross*) and product liability case (*Whirlpool Corp. v. Glazer*) for further consideration in light of *Comcast*.

Lower Courts Erred in Refusing to Consider Merits

Comcast involves a putative class of Comcast cable television subscribers who claimed certain Comcast business practices constituted antitrust violations under Sections 1 and 2 of the Sherman Act. The plaintiffs advanced four theories as to how such conduct had an antitrust impact as required to prove damages. The district court rejected three of these four antitrust impact theories, and allowed the case to proceed based on the fourth alone.

The district court then granted class certification pursuant to Rule 23(b)(3), finding that damages could be calculated on a classwide basis using a regression model created by the plaintiffs' expert witness. Comcast appealed the certification, arguing that the regression model, among other shortcomings, failed to attribute damages to the single theory of antitrust impact remaining in the case, as opposed to the three theories rejected by the district court. The Third Circuit nevertheless affirmed.

The Supreme Court reversed, holding that the plaintiffs' regression model was insufficient to establish that damages could be calculated on a classwide basis, as required by Rule 23(b)(3), because the model was not limited to only the single theory of antitrust impact accepted by the district court. The district court and Third Circuit had found no need for the plaintiffs to tie each theory of antitrust impact to the calculation of damages because doing so would involve consideration of the merits of the case, which they found not to be appropriate to a class certification inquiry. Citing its recent holding in *Wal-Mart Stores, Inc. v. Dukes*, the Court rejected this approach finding that its prior holdings require a determination that Rule 23 is satisfied, even when that necessitates inquiry into the merits of a claim.

Dissent Claims Ruling Breaks No New Ground

Justices Ginsburg and Breyer jointly authored a dissenting opinion focused primarily on what they called the majority's "misguided" reformulation of the question originally granted review (the admissibility of the plaintiffs' evidence) into the Rule 23(b)(3) question addressed. Criticizing the majority's holdings on that question, the dissent claims the opinion "breaks no new ground" on the class certification standard.

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