Applying a "Rigorous Analysis," Supreme Court Reverses Class Certification in Antitrust Suit Because of No Showing that Damages Could be Measured on Class-Wide Basis

Article By:

Jeff E. Scott

Jordan D. Grotzinger

In 2011, the Supreme Court explained in **Wal-Mart Stores, Inc. v. Dukes**,[1] that, "[w]hat matters to class certification … is not the raising of common 'questions,' -- even in droves -- but rather the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation." The Court expanded that principle in its March 27, 2013 decision in **Comcast Corp. v. Behrend**,[2] reversing class certification because the plaintiffs in an antitrust suit failed to prove that their alleged damages could be measured on a class-wide basis. In Dukes, the Court addressed whether the plaintiffs' theory of liability was susceptible to common answers, as required by Federal Rule of Civil Procedure 23(a)(2), and rejected the plaintiffs' argument that requiring common proof at the class certification stage depends too heavily on a premature determination of the merits. In Comcast, the Court applied this "rigorous analysis" to the issue of whether the plaintiffs' damages theory in an antitrust suit was susceptible to measurement on a class-wide basis, and held that it was not. This decision is a significant victory for antitrust class action defendants – it confirms that courts may, when necessary, consider the merits at the certification stage not only in assessing whether liability can be established on a class-wide basis, but also in considering whether plaintiffs have offered a competent basis to establish class-wide damages.

Comcast, a cable television provider, acquired competitor cable providers in the Philadelphia and surrounding region, and "swapped" its systems outside the region for the competitors' systems in the region. For example, Comcast acquired Adelphia Communications in this region, and in exchange sold certain of its systems in Florida and California to Adelphia. As a result of many of these transactions, Comcast's share of subscribers in the region increased substantially. Plaintiffs, who are Comcast subscribers, brought a putative antitrust class action against Comcast, seeking treble damages.

Plaintiffs sought class certification under Federal Rule of Civil Procedure 23(b)(3), which permits certification only when "**the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members….**" They proposed four theories of antitrust liability, but the District Court accepted only one – that "Comcast's activities reduced the level of competition from 'overbuilders,' companies that build competing cable

networks in areas where an incumbent cable company already operates."[3] The District Court certified a class of over two million current and former Comcast subscribers, finding that damages resulting from "overbuilder-deterrence impact" could be calculated on a class-wide basis.[4] However, Plaintiffs' damages claim for nearly $900 million was based on expert testimony that "did not isolate damages resulting from any one theory of antitrust impact."[5]

On appeal to the Third Circuit, Comcast argued that the class was improperly certified because the damages model failed to attribute damages to overbuilder deterrence, the only theory of liability left in the case. The Court of Appeals rejected that argument, and affirmed the District Court's certification order, holding that such an "**attac[k] on the merits of the methodology [had] no place in the class certification inquiry**."[6]

In a 5-4 opinion, Justice Scalia delivered the opinion of the Supreme Court, reversing the Third Circuit's decision. Citing Dukes, the Court held that a party seeking class certification must not only "'be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact,' typicality of claims or defenses, and adequacy of representation, as required by Rule 23(a); it must also satisfy through evidentiary proof at least one of the provisions of Rule 23(b)."[7] The provision at issue, Rule 23(b)(3), requires courts to find that "the questions of law or fact common to class members predominate over any questions affecting only individual members."[8]

The Court held that the Third Circuit's refusal to wade into merits issues that necessarily overlap with the predominance requirement was wrong. "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.'"[9] "That is so because the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action."[10]

In applying this analytical overlap to the issue of class-wide damages, the Court noted that, "[i]f anything, Rule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a)," which the Court examined in Dukes in assessing class Antitrust Quarterly treatment of liability issues.[11] Rule 23(b)(3) is designed for situations "in which class-action treatment is not as clearly called for."[12] That "explains Congress' addition of procedural safeguards for (b)(3) class members," such as the right to opt out.[13]

Based on those principles, the Supreme Court held that "[r]espondent's class action was improperly certified" because "[b]y refusing to entertain arguments against respondents' 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."[14] The Supreme Court recognized that damages "[c]alculations need not be exact, ... but at the class-certification stage (as at trial), any model supporting a plaintiff's damages case must be consistent with its liability case. [15] … And for purposes of Rule 23, courts must conduct a rigorous analysis to determine whether that is so."[16] The Supreme Court criticized the Third Circuit's logic of refusing to consider the merits, under which "any method of measurement is acceptable so long as it can be applied class-wide, no matter how arbitrary the measurements may be.[17] Such a proposition would reduce Rule 23(b)(3)'s predominance inquiry to a nullity."[18] The Court concluded 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."[19] "The District Court and the Court of Appeals ignored that first step entirely."[20]

This decision is important, not only for its continuing application of rigorous standards at the class certification stage, but also because it rejects a common plaintiffs' argument that damages need not be measurable on a class-wide basis. As the majority explains, without presenting proof of a damages theory tied to the alleged wrong, "respondents cannot show Rule 23(b)(3) predominance: Questions of individual damage calculations will inevitably overwhelm questions common to the class."[21] In other words, if a putative class includes members who may not have been affected at all by the defendant's conduct or whose damages cannot be measured by common proof or at least a common methodology, the class should not be certified.

---

[1] 131 S. Ct. 2541, 2551 (2011).

[2] No. 11-864, March 27, 2013. (All citations will be to the Slip Op.)

[3] Slip op., at 3.

[4] Id. at 4.

[5] Id.

[6] Id.

[7] Id. at 5-6.

[8] Id. at 6.

[9] Id. (citations omitted).

[10] Id. (citations and internal quotation marks omitted).

[11] Id.

[12] Id. (citing Dukes, internal quotation marks omitted).

[13] Id.

[14] Id at 6-7.

[15] Id. at 7 (citations and internal quotation marks omitted).

[16] Id. at 8 (citing Dukes, internal quotation marks omitted).

[17] Id. (emphasis in original).

[18] Id

[19] Id at 11 (emphasis in original, citation omitted).

[20] Id.

[21] Id. at 7.

Source URL:https://natlawreview.com/article/applying-rigorous-analysis-supreme-court-reverses-class-certification-antitrust-suit