April 4, 2013

Supreme Court Reverses Certification of Antitrust Class Action But Defers Decision on Standards for Expert Testimony

On March 27, 2013, the Supreme Court issued its opinion in *Comcast Corp*. v. *Behrend*. In a 5-4 decision, the Court vacated the certification of a class of more than 2 million current or former Comcast television subscribers who alleged that they were overcharged due to Comcast's allegedly anticompetitive "clustering" in the Philadelphia cable television market, or DMA.

Many commentators expected that the Court's decision in *Comcast* would address whether the *Daubert* standards for expert testimony apply to an antitrust damages model supporting class certification, especially because the Court had reformulated the question presented as whether a plaintiff must introduce "admissible evidence, including expert testimony," to show that damages can be proven class-wide.

However, the Court did not issue any broad pronouncements on that issue. Instead, the Court's decision involved what it called a "straightforward" application of existing class certification principles

The *Comcast* Case

The plaintiffs in *Comcast* alleged that Comcast engaged in anticompetitive "clustering" by acquiring competing local cable companies and "swapping" its cable systems outside Philadelphia in exchange for competitors' cable systems in the Philadelphia DMA.

The plaintiffs argued that Comcast's conduct distorted the market in four anticompetitive ways that enabled Comcast to charge supracompetitive prices. *First*, the plaintiffs alleged that Comcast's conduct allowed it to withhold local sports programming from competitors, which discouraged satellite television providers from entering the market. *Second*, the plaintiffs alleged that the reduction in competition deprived subscribers of price comparisons. *Third*, the plaintiffs alleged that Comcast's conduct gave it disproportionate bargaining power over television content providers. And *fourth*, the plaintiffs alleged that Comcast's conduct had deterred so-called "overbuilders," companies that build competing cable systems in areas dominated by an existing firm.

The district court held that the "overbuilders" theory could be proven on a class-wide basis, but that the other three theories could not. *Behrend v. Comcast Corp.*, 264 F.R.D. 150, 165, 174, 178, 181 (E.D. Pa. 2010). It further held that the plaintiffs could prove damages on the "overbuilders" theory on a class-wide basis using a model developed by their expert, Dr. James McClave. McClave "identified counties that

reflected competitive characteristics he would expect to see in the Philadelphia DMA absent the conduct challenged by the plaintiffs," *i.e.*, without the four alleged distortions discussed above, and then used statistical analysis to calculate the difference between prices in these counties and prices in the Philadelphia DMA. *Id.* at 182

A divided panel of the Third Circuit affirmed. *See* 655 F.3d 182 (3d Cir. 2012). On appeal, Comcast argued that the district court erred in holding that damages could be proven on a class-wide basis because "Dr. McClave's damages theory was based on all of Plaintiffs' alleged anticompetitive effects, but the District Court rejected three of Plaintiffs' four theories." *Id.* at 203. Accordingly, "Dr. McClave's model cannot isolate damages for individual theories of harm, and . . . therefore cannot distinguish between lawful and unlawful competition." *Id.* at 205.

The Third Circuit majority rejected this argument because, on class certification, a court has "not reached the stage of determining on the merits whether the methodology is a just and reasonable inference or speculative." *Id.* at 206. Rather, the question was "only whether Plaintiffs have provided a method to measure and quantify damages on a class-wide basis." *Id.* The Court found that Plaintiffs had so provided.

In dissent, Judge Jordan reasoned that "because the only surviving theory of antitrust impact is that clustering reduced overbuilding, for Dr. McClave's comparison to be relevant, his benchmark counties must reflect the conditions that would have prevailed in the Philadelphia DMA but for the alleged reduction in overbuilding." *Id.* at 216. Because the model did not reflect a "but-for" world without overbuilding, Judge Jordan would have found that Plaintiffs' evidence of classwide damages was neither relevant nor sufficient to support class certification. *Id.*

The Question Presented

In granting Comcast's petition, the Court reformulated the question originally posed by Comcast and asked: "[w]hether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis."

The Court's reformulation suggested to many that the Court was interested in clarifying the evidentiary standards applicable to the "rigorous analysis." In particular, the Court's reference to "expert testimony" hinted to many commentators that the Court was interested in resolving an issue that had divided the Court of Appeals: whether expert testimony offered in support of class certification must meet the standards of reliability set forth in *Daubert*.

The Court's Decision

The Court's decision in *Comcast* did not address, let alone resolve that issue. Instead, in an opinion by Justice Scalia, joined by Chief Justice Roberts, and Justices Kennedy, Thomas, and Alito, the Court simply reiterated the principles it had recognized in *Wal-Mart*; clarified that these principles apply not only to whether common issues exist but also whether they predominate; and held that a "straightforward" application of these principles showed that the courts below erred in certifying the class.

Quoting extensively from its decision in in *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541 (2011), the Court began by reiterating that a court must undertake a "rigorous analysis" of whether the Rule 23 requirements have been met and that such an analysis "will frequently entail 'overlap with the merits of the plaintiff's underlying claim.'" (Slip Op. at 6.) Next, the Court clarified that these "same analytical principles" -- which it had held in *Wal-Mart* applied to the commonality inquiry under Rule 23(a) -- also "govern Rule 23(b)" and that "Rule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a)." (Slip Op. at 6.)

Finally, turning to the case before it, the Court noted that the district court had held that the plaintiffs could only maintain a class action on the "overbuilder" theory, and reasoned that the plaintiffs' damages model "must measure only those damages attributable that theory. If the model does not even attempt to do that, it cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3)." (Slip. Op. at 7.)

The Court found "no question" that Dr. McClave's model failed to measure damages solely from the "overbuilder" theory because Dr. McClave had admitted that his model took into account all four of the plaintiffs' damages theories. And the Court held that the lower courts' refusal to consider this disconnect between Dr. McClave's model and the "overbuilder" theory, on the grounds that this went to the "merits," was contrary to the Court's decision in *Wal-Mart* that courts must reach merits-related issues if doing so is necessary to a "rigorous analysis" on class certification.

The Court then held that the plaintiffs had not satisfied the "predominance" requirement of Rule 23(b)(3). The Court noted that Dr. McClave measured the alleged damages by comparing prices in the Philadelphia area to prices in "benchmark" areas. Dr. McClave selected these "benchmark" areas -- proxies for prices in the "but-for" world -- because they contained "none of the four distortions" that corresponded to plaintiffs' theories of anticompetitive conduct. But since only one of those distortions could be proved on a class-wide basis, for class certification purposes, the other three distortions were not anticompetitive and should have been part of the "benchmark" counties. Since they were not, the Court reasoned that the difference between the prices in Philadelphia and the prices in the "benchmark" counties could have been caused by the three distortions other than "overbuilding." As such, Dr. McClave's model "identifies damages that are not the result of the wrong," which was fatal to proving class-wide antitrust damages because "[p]rices whose level above what an expert deems 'competitive' has been caused by factors

unrelated to an accepted theory of antitrust harm are not 'anticompetitive'" in any relevant sense. (Slip Op. at 10-11.)

Justices Ginsburg and Breyer issued a joint dissent, in which Justices Kagan and Sotomayor joined. The dissenters argued that Comcast's petition for *certiorari* had been improvidently granted because the Court's "opinion breaks no new ground on the standard for certifying a class action under Federal Rule of Civil Procedure 23(b)(3)." (Slip Op. at 2-3.)

The dissenters also argued that the fact that "the need to prove damages on a classwide basis through a common methodology was never challenged" was "a further reason to dismiss the writ as improvidently granted." (Slip Op. at 4-5.) That was so because, in their view, "[r]ecognition that individual damages calculations do not preclude class certification under Rule 23(b)(3) is well nigh universal" and "[a]ntitrust cases, which typically involve common allegations of antitrust violation, antitrust impact, and the fact of damages, are classic examples." (Slip Op. at 5.) Because the contrary was taken as given in the case before it, the dissenters argued that "[t]he Court's ruling is good for this day and case only." (*Id.*)

Finally, the dissenters criticized the majority for overturning the lower courts' factual findings about what Dr. McClave's econometric model was capable of proving. The dissenters noted that Comcast had argued in the district court that the three alleged distortions the district court rejected had no effect on prices in the Philadelphia DMA which, if true, would mean that any price differential measured by Dr. McClave would have reflected only the "overbuilder" theory. And the dissenters argued while "Dr. McClave's model does not purport to show precisely *how* Comcast's conduct led to higher prices," it was sufficient for that it "simply shows *that* Comcast's conduct brought about higher prices." (Slip Op. at 11 (emphasis in original).)

Implications

Many thought that the Court granted *certiorari* in this case in order to render a decision that would clarify the evidentiary standards for determining whether antitrust damages can be proven on a class-wide basis and whether Daubert applies at the class certification stage. But the Court declined to reach this issue and the *Comcast* decision breaks little new ground.

The decision does suggest a potential simmering divide among members of the Court about whether a plaintiff must prove that all members of a proposed antitrust class suffered the same injury. In a footnote at the end of its opinion, the Court stated that "even if the model had identified subscribers who paid more solely because of the deterrence of overbuilding, it still would not have established the requisite commonality of damages unless it plausibly showed that the extent of overbuilding (absent deterrence) would have been the same in all counties, or that the extent is irrelevant to effect upon ability to charge supra-competitive prices." (Slip. Op. at 10 n.6 (emphasis added).) The Court did not say whether this would be true as a general rule or only in the case before it because the need to prove classwide damages

was undisputed. The dissenters appeared eager to clarify that this was not the general rule and that "it remains the 'black letter rule' that a class may obtain certification under Rule 23(b)(3) when liability questions common to the class predominate over damages questions unique to class members." (Slip Op. at 5.)

It remains to be seen whether the Court's footnote planted a seed for requiring classwide proof of damages in order to certify an antitrust class action. In any event, the Court did not say anything about what kind of evidence would have made this showing "plausible" or whether expert evidence admissible under *Daubert* would be necessary to do so. The answers to those questions will have to come in another case.

* * *

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

Robert A. Atkins
212-373-3183
ratkins@paulweiss.com

Craig A. Benson
202-223-7343
cbenson@paulweiss.com

Jay Cohen
212-373-3163
jaycohen@paulweiss.com

Andrew C. Finch
212-373-3460
afinch@paulweiss.com

Kenneth A. Gallo
202-223-7356
kgallo@paulweiss.com

William B. Michael
212-373-3648
wmichael@paulweiss.com

Jacqueline P. Rubin
212-373-3056
jrubin@paulweiss.com

Moses Silverman
212-373-3355
msilverman@paulweiss.com

Joseph J. Simons
202-223-7370
jsimons@paulweiss.com

Aidan Synnott
212-373-3213
asynnott@paulweiss.com

Associate Justin P. Raphael contributed to this client alert.