



To read the transcript of the oral argument in *Comcast v. Behrend*, please [click here](#).

The Supreme Court Considers the Extent to Which Courts Must Determine the Admissibility of Expert Evidence at the Class Certification Stage

November 7, 2012

The Supreme Court heard oral arguments this past Monday in *Comcast v. Behrend*, No. 11-864, a widely-watched antitrust monopolization case in which the Court is expected to clarify the extent to which district courts may be required to examine the admissibility at trial of expert evidence when deciding class certification motions under Rule 23 of the Federal Rules of Civil Procedure.

Under Rule 23, a proposed class must satisfy certain prerequisites to be certified before the case may proceed to the stage where the merits of the claim are litigated on a class-wide basis. Last year, in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), the Court explained that district courts must undertake a “rigorous analysis” of the evidence and arguments to ensure that the proponent of class certification satisfies the requirements of Rule 23; the Court observed that “frequently [the] rigorous analysis will entail some overlap with the merits of the plaintiffs’ underlying claim.” 131 S. Ct. at 2551. The question in the wake of *Wal-Mart Stores* is to what extent the merits can and must be considered at the class certification stage.

In particular, in *Comcast*, the Court will review whether a district court may certify a class without deciding whether the expert evidence presented in support of class certification would be admissible under the Federal Rules of Evidence at trial.

CASE BACKGROUND

In 2003, the plaintiffs in *Comcast*, six non-basic cable television programming services customers, brought a class action suit against Comcast and its affiliates, alleging that the defendants imposed horizontal territory, market and customer allocations, and engaged in unlawful monopolization and attempted monopolization in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2.

On May 3, 2007, the United States District Court for the Eastern District of Pennsylvania granted plaintiffs’ class certification petition under Rule 23. However, following the Third Circuit’s decision the next year in *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008), which held that a court must thoroughly examine (including by weighing conflicting expert testimony if necessary) and resolve all legal and factual

disputes relevant to class certification by a preponderance of the evidence, 552 F.3d at 320, the district court agreed to reconsider its certification decision in *Comcast*.

Front and center at the reconsideration hearing was the requirement of Rule 23(b)(3) that issues of law and fact common to the class predominate over issues of fact and law specific to any individual member of the class. In discussing this predominance requirement, the district court quoted *Hydrogen Peroxide* and said it was necessary to determine whether the plaintiff class' legal claim is "susceptible to proof at trial through available evidence common to the class." 264 F.R.D. 150, 155 (E.D. Pa. 2010). This type of analysis, the district court recognized, depended on the merits of the plaintiffs' claim and required an assessment of what evidence the plaintiffs planned to use at trial to prove their claim.

To support its certification arguments at the reconsideration hearing, the plaintiffs presented a variety of expert reports to demonstrate the type of common evidence of antitrust impact applicable to all class members that they would use at trial. Additionally, the plaintiffs presented expert reports to demonstrate a common methodology of calculating class-wide damages. In response, Comcast presented its own experts' reports that raised "substantial issues of fact and credibility," 264 F.R.D. at 154, with regard to the plaintiffs' experts.

After reviewing the competing expert reports, the district court held that the class demonstrated that it can establish its antitrust claims through common evidence of antitrust impact applicable to all class members and granted the plaintiffs' motion for class certification.

On appeal, the United States Court of Appeals for the Third Circuit affirmed the district court. In rejecting Comcast's arguments that the plaintiffs' evidence was insufficient to satisfy Rule 23, the court explained that it was not the role of the court to "reach into the record and determine whether Plaintiffs actually have proven antitrust impact," but rather to determine if the plaintiffs "could prove antitrust impact through common evidence at trial." 655 F.3d at 197. Expressing concern over converting certification decisions into mini-trials, the court held that a district court may only engage in merits inquiries that are necessary. *See* 655 F.3d at 199. To require any more, the Third Circuit reasoned, would contravene the Supreme Court's decision in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), and would run "dangerously close to stepping on the toes of the Seventh Amendment by preempting the jury's factual findings with our own." *See id.* at 199-200.

Judge Jordan of the Third Circuit dissented from the majority, explaining that he would have vacated the district court's decision because the plaintiffs' expert reports on class-wide damages would not be admissible at trial under the Federal Rules of Evidence.

On June 25, 2012, the Court granted Comcast's petition for writ of certiorari. Comcast's petition articulated the question presented as follows: "whether a district court may certify a class action without resolving 'merits arguments' that bear on Rule 23's prerequisites for certification" But the Court's order granting certiorari indicated that review was limited to the following question: "[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."

Taking its cue from this formulation of the question presented, Comcast urged in its brief for the Court to find that lower courts, prior to certifying a class, must determine if the evidence offered in support of class certification would be admissible at trial under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), the Court's seminal decision on the admissibility of expert evidence.

ORAL ARGUMENT HIGHLIGHTS

Comcast began its argument by asserting that the Third Circuit's holding effectively prohibits a court from assessing the adequacy of expert evidence offered in support of class certification because such assessment is a merits inquiry. Comcast argued that this holding would allow proponents of class certification to point to some "abstract methodology . . . that conceivably might be applied to the problem at hand in a way in which in the fullness of time will evolve into admissible evidence by the time of the class trial."

Justice Ginsburg asked Comcast to clarify that it was limiting its arguments to the expert reports determining class-wide damages, which Comcast confirmed. Justice Ginsburg noted that this limitation is significant, as "in class certifications, if the liability question can be adjudicated on a class basis, then the damages question may be adjudicated individually." Comcast accepted that there are cases where individualized damages may not prohibit class certification, but argued that in this case the lower courts erred in relying on the plaintiffs' expert evidence of class-wide damages to find that questions common to the class predominate over individual questions under Rule 23(b)(3).

Justice Kagan pointed out that the outcome was unfavorable to Comcast even though the law that the lower courts applied was actually quite favorable to Comcast: "the legal standard that was used was exactly the legal standard that you wanted, that the plaintiffs had to come in and show by a preponderance that they had a class-wide way to measure damages in this case." Comcast responded by arguing that even though the district court articulated the correct standard from the Third Circuit's decision in *Hydrogen Peroxide*, the court erred in applying the standard by refusing to evaluate the merits of plaintiffs' expert reports.

Both Justices Kennedy and Breyer continued to push back on Comcast's position that the facts in this case, with the need for individualized damages, preclude class certification. Justice Kagan refocused the discussion on the legal question presented, by stating the following: "as the case comes to the Court, I guess I wonder why any of this [factual inquiry] is relevant [W]hat we wanted to talk about was whether a district court at a class certification stage has to conduct a *Daubert* inquiry"

Justice Kagan went on to propose that Comcast waived its right to make a *Daubert* objection because it failed to raise the admissibility issue (and rather only challenged the probative value) of the expert reports in the lower courts. On the waiver issue, Justice Sotomayor said that "I think you really can't deny that you never raised the word '*Daubert*' below until the very end."

"I think you really can't deny that you never raised the word 'Daubert' below until the very end."

- Justice Sotomayor

"[I]t seems to me that one option for the Court . . . is to answer the question [of whether a district court must engage in a Daubert inquiry at the class certification stage] and then send it back for the court to determine whether or not the parties adequately preserved that [objection] or not."

- Chief Justice Roberts

"I am still in search of a legal question that anybody disagrees about here The parties both agree with . . . the standard. It seems to me that the parties also both agree . . . that if the Daubert question had not been waived . . . the court . . . should have held a hearing on the admissibility of the expert report"

- Justice Kagan

Continuing discussion on the waiver issue, plaintiffs argued that "to get a sense of how profoundly uninterested Comcast was in *Daubert* and in arguing weight and probativeness as opposed to admissibility, which is the question before this Court, they never, ever cited *Daubert*."

Chief Justice Roberts set forth one way in which the Court could resolve the issue of waiver: "it seems to me that one option for the Court . . . is to answer the question [of whether a district court must engage in a *Daubert* inquiry at the class certification stage] and then send it back for the court to determine whether or not the parties adequately preserved that [objection] or not."

Plaintiffs proceeded to argue that, in any event, the damages model is reliable and based on sound methodology. Justice Scalia questioned the reliability of the model based on the fact that the damages expert took into account four different theories of liability in calculating damages even though the district court held only one of the theories to be valid: "You can't be agnostic about what the anticompetitive conduct is . . . if you're going to do an analysis of what are the consequences of the . . . anticompetitive conduct, you have to know the anticompetitive conduct you are talking about." Plaintiffs responded that the model can be manipulated to accurately reflect the district court's finding with regard to the potential theories of liability, and thus is still usable and persuasive.

Justice Kagan again refocused the discussion on the legal question at hand: "I am still in search of a legal question that anybody disagrees about here The parties both agree with . . . the standard. It seems to me that the parties also both agree . . . that if the *Daubert* question had not been waived . . . the court . . . should have held a hearing on the admissibility of the expert report [U]sually we decide cases based on disagreements about law, and here I can't find one." Justice Alito followed-up by asking "If we were to answer the question presented . . . I take it your answer would be that a district court under those circumstances may not certify a class action; is that right?" Plaintiffs conceded that if a *Daubert* objection were not waived, then the district court could not certify the class without resolving the objection.

Justice Kennedy asserted that "the whole question of weight and admissibility is somewhat less important when the trial judge is not the gatekeeper. The trial judge at the end of the day can hear the testimony, say: You know, I admitted this testimony, but it doesn't make any sense." Plaintiffs argued that, in fact, the judge is a gatekeeper because "what he's doing or she's doing is projecting: What's this trial going to look like based on the evidence in front of me." Justice Kennedy disagreed, saying that "[t]he judge has to make a determination that in his view the class can be certified And that includes some factual inquiries as to the damages alleged and the cause of the injury and . . . whether or not there's a commonality."

When Justice Sotomayor asked about the legal significance of the district court's finding that the plaintiffs' expert's theory was adequate, plaintiffs answered that it is "[m]ore likely than not that [the evidence] will be admissible at trial, and it will meet the standard that's required to get to a verdict." Chief Justice Roberts restated the legal significance as "whether it's more likely than not that this will be something that can be used at trial, . . . whether or not this evidence is usable." Plaintiffs disagreed with this word choice and

concluded its argument by saying that “we’re going to trust that the district judge is not going to be persuaded by phony evidence”

In rebuttal, Comcast urged the Court to find that, because the plaintiffs’ damages model is based on theories of liability that the district court judge struck down, the model is flawed because “it is not linked to any theory of anticompetitive conduct.” Justice Breyer questioned this position and stressed that it is “one of the easiest things in the world to simply change the base for this model And I think anybody running a model could do that, but I promise you I don’t know. And to know whether you’re right on that or they’re right, I will have to get into the model-building business where I am not an expert.”

POTENTIAL IMPLICATIONS

In *Comcast v. Behrend*, the Court has again chosen to examine the question of how closely a court must analyze the available evidence before certifying a class. If the Court agrees with Comcast’s position that district courts may not certify a class based on evidence that would be inadmissible at trial under the Federal Rules of Evidence, the bar for class certification will be further raised and lower courts will be required to examine certification motions with greater scrutiny in the future. On the one hand, this would make it more difficult for plaintiffs to make it through the class certification stage of litigation. On the other hand, because class certification is often a decisive point in litigation that can influence settlement decisions, defendants would be protected from potentially frivolous class actions that would have little chance of surviving on the merits at trial.

Given the number of questions at oral argument that addressed whether Comcast had waived their *Daubert* objection by failing to raise it below, it is also possible that the Court could resolve the case on narrower grounds, which would shed less light on the extent to which district courts must grapple with questions of admissibility of evidence during the class certification phase.

* * *

The contents of this publication are for informational purposes only. Neither this publication nor the lawyers who authored it are rendering legal or other professional advice or opinions on specific facts or matters, nor does the distribution of this publication to any person constitute the establishment of an attorney-client relationship. Simpson Thacher & Bartlett LLP assumes no liability in connection with the use of this publication.

UNITED STATES**New York**

425 Lexington Avenue
New York, NY 10017
+1-212-455-2000

Houston

2 Houston Center
909 Fannin Street
Houston, TX 77010
+1-713-821-5650

Los Angeles

1999 Avenue of the Stars
Los Angeles, CA 90067
+1-310-407-7500

Palo Alto

2475 Hanover Street
Palo Alto, CA 94304
+1-650-251-5000

Washington, D.C.

1155 F Street, N.W.
Washington, D.C. 20004
+1-202-636-5500

EUROPE**London**

CityPoint
One Ropemaker Street
London EC2Y 9HU
England
+44-(0)20-7275-6500

ASIA**Beijing**

3919 China World Tower
1 Jian Guo Men Wai Avenue
Beijing 100004
China
+86-10-5965-2999

Hong Kong

ICBC Tower
3 Garden Road, Central
Hong Kong
+852-2514-7600

Seoul

West Tower, Mirae Asset Center 1
26 Eulji-ro 5-Gil, Jung-Gu
Seoul 100-210
Korea
+82-2-6030-3800

Tokyo

Ark Mori Building
12-32, Akasaka 1-Chome
Minato-Ku, Tokyo 107-6037
Japan
+81-3-5562-6200

SOUTH AMERICA**São Paulo**

Av. Presidente Juscelino Kubitschek, 1455
São Paulo, SP 04543-011
Brazil
+55-11-3546-1000