

Corporate Litigation:

Litigating the Effect of 'Comcast v. Behrend'

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The question of how much the U.S. Supreme Court's decision in [Comcast v. Behrend](#),¹ tightened the rule that a class action cannot be certified under Rule 23(b)(3) unless the district court finds, after a rigorous analysis of relevant evidence, that common questions predominate over individual ones has arrived in the lower courts. Strictly speaking, *Comcast* held that antitrust claims cannot be certified under Rule 23(b)(3) unless the plaintiffs present a damages model establishing that antitrust injury and damages attributable to the alleged antitrust violation can be proven through evidence common to the class. But underlying that holding is a broader recognition that the issue of whether causation and damages are susceptible to measurement on a classwide basis is an essential component of the predominance inquiry under Rule 23(b)(3).

A dissenting opinion jointly authored by Justices Ruth Bader Ginsburg and Stephen Breyer (and joined by Justices Sonia Sotomayor and Elena Kagan) argued that *Comcast* "breaks no new ground" on class certification standards and "should not be read to require, as a prerequisite to certification, that damages attributable to a classwide injury be measurable 'on a classwide basis.'" The Supreme Court, however, has issued "GVR" (grant, vacate and remand) orders based on *Comcast* in putative breach of warranty and employment class actions, sending lawyers to pore over the decision to frame arguments about the role of the nature of proof of causation and damages in cases beyond the antitrust context. This column assesses the effect of *Comcast* on two of the GVR cases, both of which involved putative class action breach of warranty claims arising from alleged mold problems in washing machines.

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Background

Class certification is appropriate where the court determines that the evidence used to establish liability as to the claims of the representative plaintiffs would also establish liability as to the claims of every absent class member. To this end, Rule 23(b)(3) allows class certification of claims seeking damages only if "the court finds" that common "questions of law or fact" predominate over individual questions and that class litigation is superior to other methods of adjudication. The court must undertake a rigorous analysis and resolve factual disputes on a class certification motion, even if the facts relevant to those disputes overlap with the merits, when such factual disputes are relevant to determining whether the Rule 23 requirements have been satisfied.

A court cannot simply accept the allegations of a complaint when the underlying facts relating to class certification are contested. Nor may loose labels like "efficiency" substitute for rigorous identification and weighing of the common and individualized factual and legal issues comprising the plaintiff's cause of action and the defenses thereto. The Supreme Court emphasized earlier this term in [Amgen v. Connecticut Retirement Plans and Trust Fund](#)² that "Rule 23(b)(3), however, does not require a plaintiff seeking class certification to prove that each 'elemen[t] of [her] claim [is] susceptible to classwide proof.'"

'Comcast' and Related GVRs

The central holding in last year's [Wal-Mart Stores v. Dukes](#),³ in which the Supreme Court addressed the commonality requirement of Rule 23(a), was that "[w]hat matters to class certification...is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." The Supreme Court's *Comcast* decision applied the rigorous analysis requirement to evaluation of the nature of the claims and their proof as part of the Rule 23(b)(3) predominance analysis.

Plaintiffs brought a putative class action on behalf of more than two million cable television subscribers in the Philadelphia area against Comcast and affiliates, alleging that the defendants imposed horizontal territory, market and customer allocations, and engaged in unlawful monopolization. Plaintiffs sought class certification under Rule 23(b)(3). To support their argument that damages could be calculated on a classwide basis, the plaintiffs relied on a regression model that

compared actual cable prices in the Philadelphia area with hypothetical prices that would have been charged but for Comcast's alleged anticompetitive conduct. In the district court, plaintiffs advanced four theories of antitrust impact, including that defendants' actions reduced the level of competition from "overbuilders" (potential cable network competitors), thereby raising the prices paid by subscribers.

In seeking class certification, plaintiffs presented a damages expert report proposing a common methodology of calculating class-wide damages through a standard regression analysis. After an evidentiary hearing, the district court allowed plaintiffs' case to proceed on only one theory of antitrust impact: the overbuilder theory. The damages model presented by plaintiffs, however, incorporated all four asserted theories without differentiation; it was not limited to the sole theory of antitrust impact that survived. Nonetheless, the district court held (and was affirmed by the U.S. Court of Appeals for the Third Circuit) that the class plaintiffs had demonstrated that they could establish antitrust impact and damages through common evidence applicable to all class members and certified the class.

The Supreme Court granted certiorari to decide "[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." As a result of what the dissent argued was a "misguided reformulation of the question presented," however, the five-justice majority opinion written by Justice Antonin Scalia decided that the class was improperly certified under Rule 23(b)(3) because the class certification finding that common questions predominated rested on a damages model that did not fit the substantive legal theories remaining in the case.

Building on *Wal-Mart's* insistence that no class may be certified unless a court's rigorous analysis of evidence relating to the Rule 23 criteria establishes that certification is appropriate, *Comcast* made clear that this rigorous analysis applies with special force to the predominance requirement. "Rule 23(b)(3)'s predominance criterion is even more demanding" than Rule 23(a)'s commonality requirement, the court held, pointing to "Congress's addition of procedural safeguards for (b)(3) class members beyond those provided for (b)(1) or (b)(2) class members (e.g., an opportunity to opt out), and the court's duty to take a 'close look' at whether common questions predominate over individual ones."

The court faulted the lower courts for accepting the plaintiffs' damages model simply because it was capable of measuring damages on a classwide basis, even though it was not tied solely to a theory of antitrust impact accepted by the courts. The court concluded that "a model purporting to serve as evidence of damages in this class action must measure only those damages attributable to that theory." By accepting a model that did not isolate its measurement of damages to those flowing from a theory of antitrust impact accepted by the district court, Scalia observed, the lower courts improperly based a finding that common questions predominated on an "arbitrary" basis and without the necessary "evidentiary proof." This error reduced "to a nullity" the rigorous analysis that must precede any finding of predominance. The lower courts erred by authorizing any method of measurement "so long as it can be applied classwide, no matter how arbitrary the measurements may be." Highlighting the importance of causation to the predominance analysis, the court ruled that the inability of the damages model "to bridge the differences between supra-competitive prices in general and supra-competitive prices attributable to the deterrence of overbuilding" precluded a finding that common questions predominated.

The *Comcast* dissent, jointly written by Ginsburg and Breyer and joined by Kagan and Sotomayor, took pains to disclaim broader implications of the majority decision. Arguing that *Comcast* "is good for this day and case only," the dissent asserted, "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." According to the dissent, *Comcast* "should not be read to require, as a prerequisite to certification, that damages attributable to a classwide injury be measurable 'on a class-wide basis.'"

The Supreme Court recently issued GVR orders in two substantially similar cases asserting class action breach of warranty claims arising from alleged mold and mildew problems in certain washing machines. "GVR" is an acronym for a Supreme Court practice in which the court grants a petition for certiorari, vacates the decision of the court below, and remands the case for further proceedings. The practice allows a circuit court to reconsider an opinion, usually after a change in the law or factual circumstances occurs that might lead to a different result. It is not a decision on the merits. A GVR order based on a new Supreme Court decision indicates that "a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration,

and where it appears that such a redetermination may determine the ultimate outcome" of the matter.⁴

In *In re Whirlpool Front-Loading Washer Products Liability Litigation*,⁵ the U.S. Court of Appeals for the Sixth Circuit affirmed certification of a single-state consumer class under Rule 23(b)(3) alleging that 21 different models of Whirlpool's washing machines had a design defect that caused accumulating residue, which may lead to the growth of mold and mildew. Rejecting defendant's argument that the proposed class was overly broad because some class members had not experienced any mold or mildew problem, the court stated that for certification purposes, "[w]hat is necessary is that the challenged conduct or lack of conduct be premised on a ground that is applicable to the entire class."

The court had "no difficulty" determining that common questions predominated over uncommon ones; it identified as common questions the alleged design defect and the adequacy of Whirlpool's warnings to consumers. The court minimized the individual inquiries required to show manifestation of the alleged defect, determining that irrespective of manifestation plaintiffs may be able to show "that each class member was injured at the point of sale upon paying a premium price for the [washing machine] as designed, even if the washing machines purchased by some class members have not developed the mold problem."

In *Butler v. Sears, Roebuck and Co.*,⁶ the U.S. Court of Appeals for the Seventh Circuit reversed denial of certification of breach of warranty claims alleged on behalf of several hundred thousand purchasers of more than 20 different models of the same brand of washing machine under the warranty laws of six states. The common allegation was that the machines are defective because they are prone to accumulate mold and mildew. On the other side of the predominance ledger, the evidence showed that (i) factually, class members purchased different models and had different experiences with the machines, including whether mold accumulated and whether each class member submitted a warranty claim and if so whether it was honored, and (ii) legally, there are material differences in the warranty laws of the six relevant states.

The Seventh Circuit nevertheless held that the predominance requirement was satisfied because "[t]he basic question in the litigation – were the machines defective in permitting mold to accumulate and generate noxious odors? – is common to the entire mold class, although the answer may vary with the differences in design."

The court's efficiency-driven determination brushed aside the fact that most members of the class did not experience a mold problem, asserting that absence of defect manifestation was no impediment to certification, but instead an argument "for certifying [the class] and then entering a judgment that will largely exonerate [defendant]...as all class members who did not opt out of the class action would be bound by the judgment."

The court acknowledged that whether each class member suffered any damages and, if so, in what amount, are individualized questions. Every class member who claims an odor problem with their machine, the court said, individually will have to prove odor in order to obtain damages. But "class members who have not yet encountered odor can still obtain damages for breach of warranty, where state law allows such relief—relief for an expected rather than for only a realized harm from a product defect covered by an express or implied warranty."

Applying 'Comcast'

Can *Whirlpool* and *Butler* survive *Comcast*? The *Comcast* majority said its decision was not confined to (or required an analysis of) substantive antitrust principles; the decision turned on "straightforward application of class-certification principles." Recall that *Wal-Mart* held that "[c]ommonality requires the plaintiff to demonstrate that the class members have suffered the same injury" and that their injury is "capable of classwide resolution." Rule 23(b)(3) predominance parallels Rule 23(a)(2) commonality in that both require the existence of common questions, but *Comcast* holds that the predominance requirement is "even more demanding" than the commonality requirement. *Comcast* emphasizes that the question of how damages will be proved must be evaluated as part of the requirement of *Wal-Mart* that plaintiffs seeking class certification must "affirmatively demonstrate" with "significant proof" that class members "suffered the same injury."

On class certification in *Butler*, the outcome-determinative, single common issue identified by the Seventh Circuit—"were the machines defective?"—may satisfy an "efficiency" standard, but that is not the Rule 23 test. It is possible to identify one or more common issues in virtually any action in which multiple claimants seek relief from the same defendant based on the same or similar conduct. It does not follow, however, that carving these common issues out for class treatment is desirable and permissible in every case, or will meaningfully advance the disposition of the claims in the action.

In *Whirlpool*, the Sixth Circuit similarly rooted its predominance finding in questions about the defendant's conduct: "No matter how individualized the issue of damages may be, these issues may be reserved for individual treatment with the question of liability tried as a class action." The *Comcast* dissent invoked the same principle, noting that it "is well nigh universal" that "individual damages calculations do not preclude class certification under Rule 23(b)(3)."

It is the rare case that every issue from liability to damages of every class member is appropriately the subject of class treatment; some follow-on proceedings to address individual variances in the amount of class member damages is routine. But *Comcast* recognizes that assessing whether each putative class member in fact suffered economic loss or damages as a result of defendant's conduct can be determined without resort to individual proof is a separate inquiry—one that should not be subsumed into the distinct question of whether damages can be calculated on a classwide basis. Depending on the underlying transactions or events, the fact of injury or damage resulting from the defendant's conduct may require individualized inquiries and require proof into the circumstances surrounding each class member's relationship with the defendant.

Under *Comcast*, individual damages issues may preclude certification under Rule 23(b)(3) and must be scrutinized at the class certification stage to ensure they do not "overwhelm" questions common to the class. The Supreme Court made clear in both *Comcast* and *Wal-Mart* that the linchpin to certification is assuring that determination of whether defendant's conduct caused injury to each class member can be made classwide and without resort to individualized assessments of each class member's circumstances. *Comcast* indicates that a plaintiff must "show (1) that the existence of individual injury resulting from" the alleged violation was "capable of proof at trial through evidence that [was] common to the class rather than individual to its members"; and (2) that the damages resulting from that injury were measurable 'on a class-wide basis' through use of a 'common methodology.'" This causation-oriented analysis is further evidenced in *Comcast's* insistence 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," and (b) a "methodology that identifies damages that are not the result of the wrong" cannot support a class action.

In *Comcast*, "nearly endless" "permutations" in class member claims arising from different causes of alleged injury, across numerous class members in separate locations, precluded class certification. The major infirmity in *Butler* and *Whirlpool* is

that each overlooked myriad permutations among hundreds of thousands of purchasers of different product models concerning the presence of mold and mildew, their causes, amounts of any resulting damages, customers' care of washers, whether requests for warranty service were made and timely, and defendants' responses to warranty claims (in *Butler* under the non-uniform warranty laws of six states).

The significance of these factors in the predominance analysis is heightened by the fact that the evidence showed that most of the putative class members in these cases have not suffered any injury because they have not experienced any mildew or odor problems with their machines. It is difficult to see how *Butler* and *Whirlpool* can stand on remand.

Endnotes:

1. 133 S.Ct. 1426 (2013).
2. 133 S.Ct. 1184 (2013).
3. 131 S.Ct. 2541, 2551 (2011).
4. [*Wellons v. Hall*](#), 558 U.S. 220, 225 (2010).
5. 678 F.3d 409 (6th Cir. 2012).
6. 702 F.3d 359 (7th Cir. 2012).

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