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Comcast v. Behrend – Potentially Another Tool to Use in Defending Against Class Certification

by Travis Swearingen



The requirements of Federal Rule of Civil Procedure 23 govern whether an alleged wrong will be certified with class treatment – the plaintiffs seeking class certification must prove numerosity (that the joinder of all members is impracticable), commonality (common questions of law and fact exist for the class), typicality (claims of representatives are typical of claims of the class), and that the parties will fairly and adequately protect the interest of the class. Additionally, the plaintiffs must show that the class action is maintainable under Rule 23(b) by demonstrating, among other things, that common questions of law or fact predominate over questions affecting individual members. Rule 23 requires a District Court to rule on certification "at an early practicable time."

For those of the defense bar who work defending against class actions, the class certification motion may be the most important pleading in the case – class certification "turns a \$200,000 dispute... into a \$200 million dispute... and may induce a substantial settlement even if the customers' position is weak," while the denial of class certification "may sound the 'death knell' of the litigation on the part of plaintiffs." See *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675 (7th Cir. 2001); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 162 (3d Cir. 2001).

In years past, class certification was almost rubber-stamped, with district courts having little leeway to test assumptions asserted by plaintiffs in their certification motions. In the Supreme Court's 1974 decision, *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156 (1974), the Court ruled that "nothing in either the language or history of Rule 23... gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."

Over the past decade, however, U.S. Federal Courts have begun to revise the requirements for class certification laid out in Rule 23. The Supreme Court, through its decision in *Wal-Mart Stores, Inc. v. Dukes et al.*, 131 S. Ct. 2541 (2011), authorized district courts to conduct a more thorough analysis of plaintiffs' proposed methodology for analyzing class-wide impact. The Court held that a "A party seeking class certification must affirmatively demonstrate his compliance with the Rule— that is, he must be prepared to prove that there are



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in fact sufficiently numerous parties, common questions of law or fact, etc." In citing to *Dukes* over 600 times since its publication, courts across Circuits have begun conducting more vigorous analyses of assertions of class certification readiness.

The Supreme Court further strengthened this heightened standard of review in its March 27, 2013, decision in *Comcast v. Behrend*, 133 S. Ct. 1426 (2013), a case in which DRI filed an amicus brief opposing class certification. *Comcast* involved allegations that Comcast entered into transactions that allowed it to monopolize the market for cable subscribers in the Philadelphia area by "clustering" its operations – in effect, Comcast and its competitors contracted to exchange customers with Comcast gaining customers from competitors in Philadelphia in exchange for its competitors receiving Comcast customers in other markets. The plaintiffs, Comcast subscribers in the Philadelphia area, asserted four theories for their monopolization case, but only one survived: that Comcast's activity reduced competition from "overbuilders" that build networks in areas where incumbent providers already operate. The district court granted class certification even though the damages model used by the plaintiffs' expert was not based on the surviving theory of antitrust liability. The Third Circuit Court of Appeals affirmed the district court's ruling certifying a class. *Behrend v. Comcast Corp.*, 655 F.3d 182 (3d Cir. 2011).

In reversing class certification, the Supreme Court concluded that the plaintiffs had not adequately shown that damages could be accurately measured for the entire class. *Behrend*, 133 S. Ct. at 1433. In authoring the majority opinion, Justice Scalia wrote that "a model purporting to serve as evidence of damages in this class action must measure only those damages attributable to that theory." *Id.* In so holding the Supreme Court reiterated its opinion in *Dukes* – that the district court must conduct a "rigorous analysis" under Rule 23 that frequently will overlap with the merits of the plaintiff's underlying claim. *Id.* *Comcast* can also be read to suggest that individual damages calculations may preclude some class certifications under Rule 23(b)(3) because questions of individual members would predominate over questions of the class.

For those with pending class certification motions, supplemental briefing to include the *Comcast* analysis would be prudent. It will be up to the federal circuits to decide whether the *Comcast* decision should be read so far as to preclude class certification of certain individualized damages cases. Even if the *Comcast* decision did not plow any untilled ground, it remains a win for the defense bar in class action litigation. By continuing to require lower courts to take a closer look at plaintiffs' evidence prior to certification and to consider defendants' arguments even if they relate to the merits of the underlying claim, the Supreme Court's decision will make it more difficult for plaintiffs to achieve class certification.

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