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In Key Decision, Supreme Court Applies “Rigorous Analysis” to FRCP 23(b)(3) Class Determination in Reversing Class Certification Based on Lack of Showing That Damages Can Be Measured On Classwide Basis

In 2011, the Supreme Court explained in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) 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 Court expanded that principle in its March 27, 2013 decision in *Comcast Corp. v. Behrend*, reversing class certification where the plaintiffs failed to prove that their alleged damages could be measured on a classwide 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 was susceptible to measurement on a classwide basis and held that it was not. This decision is a significant victory for class action defendants - it confirms that courts may, where necessary, consider the merits at the certification stage not only in assessing whether liability can be established on a classwide basis, but also in considering whether plaintiffs have offered a competent basis to establish classwide 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.

Plaintiffs sought class certification under Federal Rule of Civil Procedure 23(b)(3), which permits certification only where “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.” (Slip op., at 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 classwide basis. *Id.* at 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.” *Id.*

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.” *Id.*

In a 5-4 opinion, Justice Scalia delivered the opinion of the 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). [Citation.] The party must also satisfy through evidentiary proof at least one of the provisions of Rule 23(b).” *Id.* at 5-6. 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.” *Id.* at 6.

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.’” *Id.* (citations omitted). “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.” *Id.* (citations and internal quotation marks omitted).

In applying this analytical overlap to the issue of classwide 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 treatment of liability issues. *Id.* Rule 23(b)(3) is designed for situations “in which class-action treatment is not as clearly called for.” *Id.* (citing *Dukes*, internal quotation marks omitted). And that “explains Congress’ addition of procedural safeguards for (b)(3) class members,” such as the right to opt out. *Id.*¹

Based on those principles, the Court held that “Respondent’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.” (Slip op., at 6-7).

The 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” *Id.* at 7 (citations and internal quotation marks omitted). “And for purposes of Rule 23, courts must conduct a rigorous analysis to determine whether that is so.” *Id.* at 8 (citing *Dukes*, internal quotation marks omitted). The

¹ Among other reasons, this is why the Court in *Dukes* refused to permit certification of monetary claims pursuant to Rule 23(b)(2), which applies to injunctive and declaratory relief claims. 131 S. Ct. at 2545. “[I]ndividualized monetary claims belong instead in *Rule 23(b)(3)*, with its procedural protections of predominance, superiority, mandatory notice, and the right to opt out.” *Id.* (emphasis in original).

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 classwide, no matter how arbitrary the measurements may be.” *Id.* (emphasis in original). “Such a proposition would reduce Rule 23(b)(3)’s predominance inquiry to a nullity.” *Id.* 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*.” (Slip op., at 11, emphasis in original, citation omitted). “The District Court and the Court of Appeals ignored that first step entirely.” *Id.*

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 classwide 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.” *Id.* at 7. 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.

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