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Comcast Turns 1: Trends In Class Certification

Law360, New York (March 06, 2014, 3:31 PM ET) -- Many of us believed that the U.S. Supreme Court's March 27, 2013, decision in Comcast Corp. v. Behrend[1] signaled a continued trend to make class certification the "exception" rather than the rule. The court's earlier opinion in Wal-Mart v. Dukes required lower courts to analyze the putative class's liability theory to ensure that class members suffer the "same injury." In Comcast, the court extended its scrutiny to a plaintiff's damages theory, determining that class certification was improper where plaintiff failed to establish that damages could be measured on a classwide basis.

Though the court portrayed its opinion as "unremarkable" and a "straightforward application" of class action doctrine, many believed that the decision had raised the class certification bar even higher.[2] Lower courts applying Comcast, however, have done so inconsistently. Few bright-line rules have emerged, and several questions remain.

As the one-year anniversary of the Comcast decision approaches, the time is ripe to evaluate its impact on class certification and the trends that are emerging in decisions applying it.

Comcast v. Behrend

In Comcast, the district court and the Third Circuit approved certification of a class of more than 2 million current and former cable subscribers who alleged Comcast engaged in an anti-competitive "clustering" strategy to achieve a dominant market share. A divided Supreme Court (5-4) reversed, holding that the class had been improperly certified because the plaintiffs did not establish that damages could be measured on a classwide basis.

Reaffirming that courts must undertake a "rigorous analysis" of evidence at the class certification stage, the court also stressed that the predominance requirement under Rule 23(b)(3) was even more "demanding" than the commonality requirement and may require probing into the merits of the underlying claim. The court found that the lower courts failed to undertake such an inquiry and erred in accepting a damages model that "identifies damages that are not the result of the wrong."

The court faulted the plaintiffs' damages model because it assumed four different theories of antitrust injury when the district court had accepted only one theory ("overbuilding") as capable of classwide proof. In the absence of an acceptable damages model, the court found that Rule 23(b)(3) predominance could not be established because "questions of individual damage calculations will inevitably overwhelm questions common to the class."

Lower Courts' Interpretation of Comcast Reveals the Need for More Clarity

Nearly 200 cases have cited Comcast in less than a year, but the only consensus reached is that its significance is unsettled. As one district court observed in a thorough analysis of the case, "district and circuit courts alike have grappled with the scope, effect, and application" of the decision.[3]

Some courts deem Comcast to only reinforce existing case law and, in support, point to the majority's own statement that the case "turns on the straightforward application of class-certification principles."[4] Other courts interpret the decision as marshalling higher scrutiny that requires certain classes to be decertified when they previously might have survived.[5]

The principal area of uncertainty centers on the "rigorous analysis" Comcast instructs courts to perform on damages model evidence. Courts have reached varying conclusions regarding (1) whether this inquiry must occur in every case, (2) what standards the court must employ, and (3) whether the court's "rigorous analysis" of a plaintiff's damages model necessarily dictates its decision on the ultimate certification issue.

First, as a threshold matter, courts disagree about whether Comcast always mandates analysis of the plaintiffs' damages theory at the class certification stage. In a recent decision upholding class certification for settling plaintiffs who alleged losses from the BP PLC oil spill, the Fifth Circuit echoed the dissent in Comcast and stressed that plaintiffs are not required to submit a formula for classwide measurement of damages as a prerequisite to certification under Rule 23(b)(3).[6]

The Fifth Circuit deemed Comcast to have "no impact" and to be "simply inapplicable" when common issues of damages did not constitute the basis for predominance in the first instance. The Sixth and Seventh Circuits relied on similar reasoning to uphold class certification of purchasers of allegedly defective washing machines, distinguishing Comcast as a suit where plaintiffs sought to certify both liability and damages.[7]

However, some post-Comcast district courts have deemed the absence of a classwide damages model to be fatal to class certification. For example, in Roach v. T.L. Cannon Corp., the court denied certification of a wage-and-hour class under Rule 23(b)(3) when the plaintiffs had not offered a damages model, rejecting plaintiffs' argument that damages need not be considered at the certification stage.[8] Similarly, another court cited Comcast and emphasized "[e]ven at the class certification stage, a plaintiff must demonstrate a damages methodology that has some potential to reasonably assess damages."[9]

Second, while courts invoking Comcast concur that a purported classwide damages model must be connected to the theory of liability, there is less agreement on how to treat the need for individualized damages calculations inherent in some damages theories. That is, under what circumstances do questions of individualized damages predominate over common questions subject to classwide proof?

Comcast gave limited guidance on the issue. It noted that the proposed damages model involved "nearly endless permutations" and suggested — in a footnote — that the model might still be insufficient even after isolating damages attributable to the theory of liability unless it also "plausibly showed" that the amount of anti-competitive conduct was the same throughout the geographical regions or that the extent of the conduct did not matter.

Courts also have split on whether individualized damages determinations alone are sufficient to defeat class certification. Some courts have found that a putative class's damages required too much individualized proof to allow class certification, irrespective of whether the overarching damages theory

aligned with the general injury claimed.

For example, one district court denied certification of a class challenging an insurance company's commission and fee policies because the damage determinations would have required evaluating each class member's individual accounts.[10] Conversely, the Ninth Circuit has stressed that issues regarding damages calculations for each putative class member, even if highly individualized and fact-specific, cannot alone defeat certification.[11]

Third and relatedly, post-Comcast courts have certified liability-only classes under Rule 23(c)(4) even after finding that individual damage calculations could overwhelm common questions to defeat predominance. For example, in Jacob v. Duane Reade, the Southern District of New York granted certification to a class of employees for common liability questions — whether their employer misclassified them as statutorily exempt — despite concluding that damages determinations would require individualized proof and "miniature trials."[12]

The approach in Jacob aligns with the recent Sixth and Seventh Circuit decisions upholding liability-only classes of purchasers of allegedly defective washing machines.[13] The Sixth Circuit found Comcast did not affect the outcome of its prior certification of a liability-only class, reasoning that "'no matter how individualized the issue of damages may be,' the determination of damages 'may be reserved for individual treatment with the question of liability tried as a class action.'"[14]

Likewise, the Seventh Circuit referenced the "efficiency" of certifying a liability-only class and dismissed defendants' arguments that the putative class included purchasers who had never experienced the alleged defect and thus had different levels of damages not capable of classwide proof.[15]

Navigating the Uncertainty

Notwithstanding the lower courts' inconsistent application of Comcast, a few guiding principles have emerged.

First, courts agree that Comcast requires lower courts to address a defendant's arguments regarding damages if raised at the certification stage. The Seventh Circuit distinguished its decision in Butler from Comcast on the ground that the lower court was not asked to decide if damages were capable of classwide measurement. For that reason, defendants should push plaintiffs to commit to a damages model, delve into the merits of any proffered model, and alert the court to damages issues that will rely on individualized proof.

Second, even though Comcast did not explicitly mandate the use of expert evidence at the class certification stage, parties who proceed without it to support or challenge damages theories do so at their own peril. One recent case declined to certify a consumer class action after rejecting plaintiff's argument that an expert was not needed because damages could be determined by "simple math."[16] With complex cases, parties should heed the D.C. Circuit's observation that "Rule 23 not only authorizes a hard look at the soundness of statistical models that purport to show predominance — the rule commands it."[17]

Finally, in the wake of Comcast, plaintiffs will likely pursue liability-only classes with increased frequency. Yet, carving out discrete issues for class treatment is not entirely consistent with Comcast's scrutiny of damages models that require individualized proof. Comcast reversed certification as to both liability and damages after finding "questions of individualized damage calculations will inevitably

overwhelm questions common to the class."

Until the Supreme Court addresses this apparent "end run" strategy to avoid Comcast, defense counsel should urge courts to consider the predominance of individualized damages issues on the case as a whole before considering whether efficient case management would warrant bifurcating "common" liability issues under Rule 23(c)(4).

After one year, courts have not uniformly embraced Comcast as either unremarkable, as the majority suggested, or "good for this ... case only," as the dissent stressed. Instead, courts have grappled — and in the absence of further clarification from the Supreme Court will continue to grapple — with the decision's impact on often case-dispositive class certification decisions.

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[1] 133 S. Ct. 1426 (2013).

[2] See, e.g., Classy Action at the High Court, Editorial, Wall Street Journal (Mar. 27, 2013) (describing decision as "another big defeat for the trial bar"); Emily Kokoll, Lawyers Weigh in on Supreme Court's Comcast Ruling, Law 360 (Mar. 27, 2013), http://www.law360. com/articles/427805/lawyers-weigh-in-on-supreme-court-s-comcast-ruling.

[3] Jacob v. Duane Reade, Inc., 293 F.R.D. 578, 581 (S.D.N.Y. Aug. 8, 2013).

[4] See, e.g., In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation, 722 F.3d 838, 860 (6th Cir. 2013) (citing 133 S.Ct. at 1429-31).

[5] See, e.g., In re BP PLC Securities Litigation, No. 10-2185 (S.D. Tex. Dec. 6, 2013) (denying class certification after finding that Comcast indicates a "significant shift in the scrutiny required for class certification" and noting that prior to Comcast plaintiff's mere offering of an event methodology may have satisfied predominance).

[6] See In re Deepwater Horizon, No. 13–30095, at *16-18 (5th Cir. Jan. 10, 2014), petition for reh'g en banc filed (5th Cir. Jan. 21, 2014).

[7] See Whirlpool, 722 F.3d at 860; Butler v. Sears Roebuck and Co., 727 F.3d 796, 800 (7th Cir. 2013).

[8] See Roach v. T.L. Cannon Corp., No. 11 Civ. 160, at *3 (N.D.N.Y. July 2, 2013).

[9] Ginsburg v. Comcast Cable Commc'ns Mgmt. LLC, C11-1959RAJ, at *7 (W.D. Wash. Apr. 17, 2013) (emphasis added) (denying class cert where plaintiffs offered "no manageable way to calculate damages").

[10] See Cowden v. Parker & Assoc., Inc., No. 5:09-323, at *7 (E.D. Ky. May 22, 2013); see also Wheeler

v. United Servs. Auto Ass'n, No. 3:11-cv-00018-SLG, at *5 (D. Alaska Aug. 27, 2013) (finding class certification inappropriate because "the necessary damages calculations would involve separate and 'significant personal injury damages' evaluations" for each of the class members).

[11] See Leyva v. Medline Indus. Inc., 716 F.3d 510, 511 (9th Cir. 2013) (finding Comcast did not bar certification of an employee class, since the classwide damages theory accounted for wages lost as a result of the defendant's unlawful timekeeping practices by subclass).

[12] Jacob, 293 F.R.D. at 592-94.

[13] The Supreme Court initially ordered the Sixth and Seventh Circuits to reconsider their decisions upholding class certification in light of Comcast. When they did so, the circuit courts reached the same conclusions. The Supreme Court recently denied cert in both cases.

[14] Whirlpool, 722 F.3d at 859 (quoting Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1197 (6th Cir. 1988)).

[15] Butler, 722 F.3d. at 800 ("[A] class action limited to determining liability on a class-wide basis, with separate hearings to determine—if liability is established—the damages of individual class members . . . is permitted by Rule 23(c)(4).").

[16] Astiana v. Ben & Jerry's Homemade, No. C 10-4387 PJH, at *18 (N.D. Cal. Jan. 7, 2014).

[17] See In Re Rail Freight Fuel Surcharge Antitrust Litig., 725 F.3d. 244, 255 (D.C. Cir. 2013).
