

## Recent Developments

### Supreme Court Rules that Class Was Not Properly Certified Because Plaintiffs Did Not Establish that Damages Could Be Measured on a Class-wide Basis

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A divided Supreme Court ruled 5 to 4 last week<sup>1</sup> that certification of an antitrust class action was not proper because plaintiffs failed to establish that damages caused by actionable antitrust injury were capable of measurement on a class-wide basis. *Comcast Corp. v. Behrend*, No. 11-864 (Mar. 27, 2013) (see document section, *infra*, page 165)

The proposed class plaintiffs in *Comcast* asserted antitrust claims based on defendants' alleged conduct in concentrating operations in a particular region. To certify a class under Fed. R. Civ. P. 23(b)(3) (which requires that questions of law or fact common to class members predominate), the district court had ruled that plaintiffs were required to show (1) that the existence of individual injury resulting from the alleged antitrust violation (referred to as "antitrust impact") 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. The district court found that damages resulting from only one of plaintiffs' original four theories of antitrust impact could be calculated on a class-wide basis. However, plaintiffs' only proof at the class certification stage of class-wide measurability of damages was from an expert whose model did not isolate damages attributable to that one theory of antitrust impact. The district court nevertheless certified the class, and the Third Circuit affirmed.

The Supreme Court reversed, reasoning that the Court of Appeals erred "[b]y refusing to entertain arguments against [plaintiffs'] damages model that

<sup>1</sup> This memo was originally released April 1, 2013.

bore on the propriety of class certification, simply because those arguments would also be pertinent to the merits determination." Citing its decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), the Court held that a plaintiff must satisfy Rule 23(b)(3) "through evidentiary proof" and that its precedent "requir[ed] a determination that Rule 23 is satisfied, even when that requires inquiry into the merits of the claim." Because plaintiffs' model failed to measure damages resulting from the particular antitrust injury on which defendants' liability in the action was premised, plaintiffs failed to establish that damages were capable of measurement on a class-wide basis. The majority opinion in *Comcast* expressly extended to Rule 23(b) the instruction previously articulated by the Court in *Wal-Mart* with regard to Rule 23(a) — *i.e.*, that a court should perform a "rigorous analysis" to determine whether a proposed class proved its compliance with Rule 23 prerequisites.

Noting that plaintiffs never challenged the need to prove damages on a class-wide basis, the four dissenting Justices asserted that "[t]he Court's ruling is good for this day and case only" and "it remains the 'black letter rule' that a class may obtain certification ... when liability questions common to the class predominate over damages questions unique to class members." But the majority opinion offered no such qualification of its holding.

In its result, *Comcast* stands in contrast to *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 133 S. Ct. 1184 (2013) (memo), which upheld class certification in a Rule 10b-5 securities fraud case, holding that proof of materiality is not a prerequisite to certification under Rule 23(b)(3). In *Amgen*, the plaintiff had invoked the "fraud-on-the-market" presumption of reliance set out in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), a presumption that four Justices in *Amgen* questioned and expressed a willingness to revisit.

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