

**CLASS ACTION &
COMPLEX LITIGATION
ALERT**



MARCH 29, 2013

**U.S. SUPREME COURT RULES THAT A STATISTICAL
DAMAGES MODEL NOT SUFFICIENTLY TIED TO CLASS
PLAINTIFFS' THEORY OF LIABILITY IS INSUFFICIENT
TO DEMONSTRATE SATISFACTION OF RULE 23'S
PREDOMINANCE REQUIREMENT**

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In a 5-4 decision, the U.S. Supreme Court has held that plaintiffs who relied on a statistical damage model not directly tied to their operative theory of liability failed to satisfy Rule 23's class certification requirements, including "predominance." In *Comcast Corp. v. Behrend*, No. 11-864 (U.S. Mar. 27, 2013), the Court also expressly rejected the notion that apparent deficiencies in a statistical model bearing upon class certification could be ignored by a court considering class certification simply because that model would *also* be pertinent to the merits determination.

Comcast will likely prove to be a powerful tool for defendants opposing certification of Rule 23(b)(3) classes where plaintiffs propose to prove class damages using statistical methodologies.

In *Comcast*, the Supreme Court reversed a Third Circuit decision upholding class certification in an antitrust action brought on behalf of more than 2 million current and former Comcast cable-television subscribers. Plaintiffs in *Comcast* had sought certification of this class under Fed. R. Civ. P. 23(b)(3), which permits certification of a damages class only if "the court finds that questions of law or fact common to class members predominate over any questions affecting only individual members." The Supreme Court concluded that absent proof of a valid means of proving damages on a classwide basis, common issues did not predominate, and the class had been improperly certified.

Treatment of Plaintiffs' Damages Model During Class Certification Proceedings

The district court in *Comcast* held that Rule 23(b)(3)'s "predominance" requirement could be satisfied only if plaintiffs could show that (1) the existence of individual injury resulting from the alleged antitrust violation (the "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

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injury were measureable 'on a class-wide basis' through the use of a 'common methodology.'"

To satisfy that standard, plaintiffs offered the testimony of Dr. James McClave, who had designed a statistical regression analysis model purportedly able to measure damages on a classwide basis. That model assumed the validity of all four of plaintiffs' antitrust impact theories. In the course of the litigation, however, the district court rejected three of plaintiff's four theories, and Dr. McClave acknowledged that his model "did not isolate damages resulting from any one theory of antitrust impact." Despite the apparent shortcomings of the damages model under the only remaining theory of liability, the district court certified the class.

On appeal, a divided Third Circuit Court of Appeals panel affirmed. It specifically rejected defendant Comcast's argument that the class was improperly certified because Dr. McClave's model failed to attribute damages resulting from the only theory of injury remaining in the case. The Third Circuit did so by distinguishing class certification and merits determinations, holding that "the merits of the methodology [had] no place in the class certification inquiry," and that at the class certification stage, plaintiffs were not required to tie a specific theory of antitrust impact to an "exact calculation of damage." With respect to the reliability of the damages model, the Third Circuit concluded that the district court had "not reached the stage of determining on the merits whether [McClave's] methodology is a just and reasonable inference or speculative."

The Supreme Court Finds Class Certification Improper

The Supreme Court reversed, holding that its well-established precedents *required* consideration of arguments bearing on the propriety of class certification under Rule 23, regardless of whether such arguments would also be pertinent to the merits of plaintiffs' claims. The Court further held that under the proper standard for evaluating certification, plaintiffs' proposed damages model fell "far short" of establishing that damages were capable of measurement on a classwide basis.

Specifically, the Court found fault in the *Comcast* plaintiffs' damages model because while it purported to serve as evidence of classwide damages, it failed to measure damages actually attributable to plaintiffs' (only remaining) theory of liability: "At the class-certification stage (as at trial), any model supporting a 'plaintiff's damages case must be consistent with its liability case, particularly with respect to the alleged anticompetitive effect of the violation.'"

The Supreme Court found it essential that a method of classwide damages calculation offered in support of class certification be tied to the operative theory of liability in the case. This is true regardless of whether assessment of that methodology would involve consideration of the "merits." The district court must determine that a class action damages calculation methodology offers a "just and reasonable inference," not mere "speculation." If it does not, then *any* method of

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measurement might be acceptable “no matter how arbitrary the measurements may be.” Were that were to serve as the standard, the Court noted, Rule 23(b)(3)’s predominance requirement could be reduced to a “nullity.”

A Vociferous Dissent

The dissent, led by Justices Ruth Bader Ginsburg and Stephen Breyer, took issue with the majority for reshaping the dispute for which *certiorari* had been granted to focus on the admissibility of expert testimony at class certification. The dissenting justices opined that because Comcast had neither objected to the admission of Dr. McClave’s damages model nor moved to strike it, such admissibility questions were not properly before the Court. The dissent considered the Court’s approach, in which the majority’s decision was based on matters not fully briefed, unfair to the *Comcast* plaintiffs.

Noting that “[r]ecognition that individual damages calculations do not preclude class certification under Rule 23(b)(3) is nigh well universal,” the dissent declared Comcast’s failure to challenge the requirement that they prove damages on a class-wide basis a litigation “oddity.” Under the circumstances, it opined, the *Comcast* writ should have been dismissed as improvidently granted. At a minimum, the dissent urged that the existence of such an “oddity” effectively limits the applicability of the Court’s ruling given that, in the dissent’s view, “it remains ‘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.”

Key Takeaways for Class Action Defendants

Defendants looking to make the most of *Comcast* may wish to keep the following in mind:

- Statistical damage models submitted by plaintiffs in support of class certification should be carefully scrutinized for weakness, including any failure of the model to “tie” directly to plaintiff’s operative theory of liability. Special care should be taken to assess whether a statistical expert’s opinions remain valid if the bases for liability change, or are somehow limited, before the class certification determination. Even a statistical model that is valid when disclosed might be rendered otherwise in the course of vigorously defended class action litigation.
- Vulnerable statistical damage models should be challenged at every available opportunity and by all appropriate means. Defendants, for instance, may want to employ formal objections, *Daubert* challenges, and/or specific model-related arguments in their class certification briefs to ensure that their appellate rights are protected. The 2011 *Dukes* Supreme Court decision implicitly reinforced that *Daubert* challenges are appropriate and may be necessary at the class certification phase.

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- Defendants ought to argue in opposition to class certification that the need for individualized damage calculations *should* be considered in relation to Rule 23(b)(3)'s predominance requirement. A plaintiff who contends that damage calculations can be accomplished with a regression analysis may be left unable to meet his/her burden under Rule 23 if his/her expert's model is rejected. Defendants will want to ensure that they have specifically briefed all relevant issues related to the calculation of damages to be well-positioned if that happens.

This Class Action Alert was prepared by Rebecca Schwartz, a partner in SHB's Class Action Practice. If you have any questions about the *Comcast* decision, please contact Becky at rschwartz@shb.com, or call her directly at (816) 559-2235.

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