

Lawyers Weigh In On Supreme Court's Comcast Ruling

By **Emily Kokoll**

Law360, New York (March 27, 2013, 7:39 PM ET) -- In siding with Comcast Corp. in an antitrust class action by cable TV subscribers, the U.S. Supreme Court on Wednesday heightened the class action standard by finding that individualized proof of damages can block certification. Here, attorneys tell Law360 why the 5-4 ruling in *Comcast v. Behrend* matters.

Wystan M. Ackerman, Robinson & Cole LLP

"The court's decision substantially raises the bar for plaintiffs to obtain class certification in federal court, by requiring plaintiffs to prove that damages for the class as certified are in fact susceptible to proof on a classwide basis. While the dissent attempts at length to suggest that the decision is limited to the circumstances of this case and that the court is not rejecting prior lower court decisions concluding that a need for individual damages calculations often does not prevent a class from being certified, Justice [Antonin] Scalia's majority opinion does not suggest any agreement with the dissent on that point. The majority opinion appears to require that plaintiffs present, with admissible evidence, a method for proving damages on a classwide basis."

Gregory Ascioffa, Labaton Sucharow LLP

"The Supreme Court's succinct Comcast opinion makes clear that nothing has changed as to the requirements to meet predominance under Rule 23(b)(3), particularly with respect to classwide proof of damages. As the majority noted, this standard was not even contested. Many were expecting a monumental decision as to class certification. Instead, we have affirmation that class actions will move forward as usual under the same standards that have guided them in the past."

Mark Batten, Proskauer Rose LLP

"As a general matter of class action practice, the decision is helpful in including proof of damages among the things that must be examined for compliance with Rule 23. There are a lot of lower court cases out there saying that so long as liability can be determined on a classwide basis, damages don't have to be. This decision seems not to agree with that, and echoes the Seventh Circuit's recent *Espenscheid* decision on this point."

Andrew Bell, Locks Law Firm

"The Supreme Court essentially held that when a proponent of class certification attempts to have a court certify a Rule 23(b)(3) class action, the method of proving damages on a class basis must be tied to the theory of liability upon which the class claims are based. In other words, showing the ability to prove class damages generally is not enough; the proponent of class adjudication must demonstrate that the specific damages that would flow from the specific theory of liability are capable of class proof. As such, the ruling may not have a profound impact on class certification, although one can only wait until lower courts interpret today's Supreme Court ruling to gauge the true breadth and scope of this decision."

Steve Bradbury, Dechert LLP

"The Supreme Court's holding here is not a surprise. It follows the trend set by the court in the Wal-Mart case and other recent class certification decisions, where the court has made clear that the trial court must consider how the plaintiffs propose to prove their case on the merits before certifying a class. The court's reframing of the issue presented for review was unusual, as the dissent's critique highlights, but the court's treatment of the case reflected two complications: First, the reframing of the issue shows that the court wished to focus specifically on the competency of the damages model at the class certification stage. Proof of injury is required as an element of a private antitrust claim, and the plaintiffs must have a reliable and competent way to prove injury on a classwide basis to gain class certification in cases such as this one. Second, the decision affirms that while the competency of expert evidence for class certification purposes may not be exactly synonymous with the ultimate admissibility of the evidence at the later trial, it will require a similar Daubert-like analysis to earn class certification acceptance."

Richard Brosnick, Butzel Long PC

"The court's opinion further clarifies the trend of recent precedents toward making class certification decisions fully informed by the merits. The practical result should be to continue the trend that merits and class discovery will happen at the same time so that decisions can be made based on a full factual record. Merits decisions cannot be made at the class stage, but the fact that a class certification issue implicates merits cannot be a reason to just avoid it until a later proceeding. Practically, this is a continuing recognition of the fact that certification of a class is often the whole ball game because of the potential liability involved. So it would belie reality to put off key determinations until after a class is certified."

Robert Cocchia, McKenna Long & Aldridge LLP

"The Supreme Court's ruling is an incremental 'raising of the bar' for plaintiffs seeking to certify a class action. [Now] a defendant may press the trial court to analyze plaintiff's damages methodology, at the class certification stage, to determine whether it adequately links damages to the allegedly harmful act across the entire class. This certainly will not preclude class actions in the future, but will arguably require the trial court to engage in a more rigorous analysis of the damages model than previously thought necessary before permitting certification."

Gordon Cooney, Morgan Lewis & Bockius LLP

"In reversing the class certification, the court clarified at least four critical points. First, the court emphasized that it may be necessary for the trial court to review the evidence offered by plaintiffs to determine whether the requirements of the class certification rule have been satisfied. Second, the court built upon the decision in *Wal-Mart v. Dukes* and noted that the predominance requirement in the rule for damages class actions is 'even more demanding' than that in other types of class actions. Third, it rejected as insufficient the expert evidence offered by the plaintiffs that was not reasonably tied to their theory of liability. Finally, and perhaps most importantly, it found that questions of individual alleged damages against Comcast 'will inevitably overwhelm questions common to the class.' This last point is particularly significant, as it should counter an approach by plaintiffs — frequently used in damages class actions — in which plaintiffs claim to pursue only one theory of damages and disavow claims for individual additional or different damages over and above the one alleged classwide theory. Justice Scalia's holding and rationale in *Comcast* should establish the inappropriateness of that approach and limit damage class actions to those cases where all class members truly suffered the same injury."

Chris S. Coutroulis and D. Matthew Allen, Carlton Fields PA

"Comcast is significant. The majority again emphasized that class certification must be based on a rigorous analysis. The court applied that principle to antitrust damages, holding that it is insufficient for plaintiffs to offer damage models that may be subject to common proof if they do not match up with the theory of antitrust impact and liability in the case. The court also implied that individualized damages alone can be sufficient to deny certification of a (b)(3) damages class."

Cari Dawson, Alston & Bird LLP

"The court was unequivocal in ruling that district courts cannot refuse to consider arguments in opposition to class certification simply because those arguments are also relevant to the merits. Today spells the end of any further reliance on the language in *Eisen v. Carlisle & Jacquelin* 417 U.S. 156 (1974) admonishing courts for conducting a preliminary inquiry into the merits of plaintiffs' claims at the class certification stage. Under today's decision, district courts must inquire into the merits if necessary in determining the propriety of certification under Rule 23. Today's decision is a win for the defense bar and applies beyond antitrust class actions. For class actions moving forward, plaintiffs' counsel can no longer rely upon class experts whose methodologies are unreasonable or speculative or are inconsistent with the theories of liability which remain viable in the case at the class certification stage. And, district courts must evaluate challenges to class experts' methodology at the class certification stage even if those challenges also overlap with the merits of the case."

Miguel Estrada, Gibson Dunn & Crutcher LLP

"In previous cases, the Supreme Court has held that courts must rigorously scrutinize evidence pertaining to liability elements and defenses to ensure that class adjudication would be fair for all parties. Today's decision confirms that the same scrutiny must be applied to damages evidence at the class certification stage. The court's decision requires proof that damages may be established on a classwide basis and in a manner that is tied to the plaintiff's liability theory. This will help ensure that only those cases truly suited for collective adjudication will be certified as class actions."

Andra Barmash Greene, Irell & Manella LLP

"Today's Comcast decision represents a continuing trend on the part of the Supreme Court to examine and articulate the requirements for class certification under FRCP 23 and guide the lower courts in their determination of whether class certification is appropriate. The decision reflects a willingness on the court's part to consider merits-related issues that are intertwined with the class certification analysis. This case heightens the burden for class certification."

Mona Z. Hanna, Michelman & Robinson LLP

"The Comcast decision is one of several decisions currently before the Supreme Court that may have significant impact on class action litigation. While the facts of the case deal with antitrust arena, the issue before the court addressed a critical issue in class actions, namely, what kind of evidence does a plaintiff have to present at the certification stage of a case before a judge can allow a class action to go forward. In finding in favor of Comcast, the decision found that trial court erred in not examining whether common questions among class members predominate over individual questions. By doing so, the Supreme Court provides guidance to the trial court that it cannot ignore issues of merit in the certification processes. This decision is a strong indication that the court is looking more critically at certification, including an analysis of merits if necessary to establish the elements of certification."

David Hanselman, McDermott Will & Emery LLP

"The Comcast decision clearly raises the bar for plaintiffs to obtain certification of antitrust class actions. But its reasoning can apply to other types of class actions as well. In terms of the decision's long-term implications, the most important holding is that individualized proof of damages can preclude class certification. Many lower courts have held the opposite, so in this regard, the court's decision clearly moves the needle toward defendants. In addition to this crucial holding, Comcast continues build on the court's 2010 decision in Wal-Mart Stores, Inc. v. Dukes by holding (1) that plaintiffs must satisfy 'by evidentiary proof' that they meet one of the prerequisites of Rule 23(b)(3) and (2) that district courts may not decline to resolve issues bearing on Rule 23 even if those issues overlap with the merits of the plaintiffs' underlying claims. In antitrust cases, plaintiffs must demonstrate a common method of proving damages in order to obtain class certification, and that method of proof must be tied to the plaintiffs' theory of antitrust injury. In the last several years, there has been a continuing trend toward more rigorous analysis of expert opinion at the class certification stage. Comcast continues that trend."

Paul Karlsgodt, BakerHostetler

"From the defense perspective, the majority's decision in Comcast is the right result, but the analysis doesn't go quite as far as many of us would have hoped. The decision requires federal courts to scrutinize proposed expert testimony rather than blindly accepting it for whatever proposition the plaintiff says it supports. But it doesn't expressly address certain key issues, for example, whether the court must hold a full-blown Daubert hearing prior to accepting a plaintiff's expert's theory of class-wide proof. However, despite not squarely addressing all the issues it could have addressed, there can be little doubt that Comcast is a victory for defendants. It reaffirms a key sentiment reflected in the Court's 2011 Wal-Mart decision: a federal court has to conduct a rigorous analysis and actually decide the factual issues relevant to the elements of class certification. It cannot certify first and ask questions later."

Jeffrey Kessler, Winston & Strawn LLP

"This is a very important ruling for the world of antitrust class actions. It provides clear direction from a majority of the Supreme Court that the plaintiff's burden to satisfy the 'predominance' requirements of Rule 23(b)(3) require the same 'rigorous analysis' as other Rule 23 class certification requirements and that the district courts are required to carefully scrutinize expert testimony to determine if it reliably provides a sound basis tied to the record facts upon which the court can determine that it is possible for plaintiffs to prove classwide injury and damages through common economic evidence. In many class actions, particularly involving indirect purchasers, this is a requirement which may not easily be satisfied."

Michael Leffel, Foley & Lardner LLP

"The Comcast decision is the latest in a line of cases from the Supreme Court and lower courts demonstrating that the ability to prove damages on a classwide basis can be a major obstacle to class certification. There can no longer be any doubt that courts must engage in a rigorous analysis of plaintiffs' experts and theories before certifying a class, even if that analysis is enmeshed with the merits of plaintiffs' claims. To certify a class, plaintiffs are going to need to prove with admissible evidence that their specific theories of liability (and nothing else) resulted in damages that can be readily, and efficiently, calculated for each class member."

Gerald Maatman, Seyfarth Shaw LLP

"The Comcast ruling is incredibly important for defendants, for virtually all class action lawsuits are dependent upon expert analysis to cross the class certification threshold. In holding that plaintiffs will need to show that their expert analysis has adequately explained how the data show that a classwide determination of damages is possible, the Supreme Court has put teeth into the requirements for certifying a Rule 23(b)(3) class. Coupled with the Rule 23(a)(2) commonality requirements established in Wal-Mart Stores Inc. v. Dukes, 131 S.Ct. 2451 (2001), the Comcast decision creates a much improved playing field for the defense to confront and challenge class certification motions."

W. Daniel "Dee" Miles III, Beasley Allen Crow Methvin Portis & Miles PC

"This decision is very narrow in its scope, fact-specific and we do not view this decision as having any significant impact on class action lawsuits. However, the four dissenting justices very correctly point out that the court abused its own procedures by inappropriately reshaping the issue presented and then rendering a decision on which the parties were not questioned. This will certainly discount any value of the case as legal precedent."

Archis Parasharami, Mayer Brown LLP

"The court's decision in Comcast is significant. In the past, a number of lower courts of appeal have been willing to 'certify first, ask questions later' — that is, they have concluded that it's inappropriate to consider the underlying merits of a lawsuit to any extent at the class certification stage, and they have routinely approved class certification without worrying about whether the damages that might be paid out to class members can actually be proven at trial on a classwide basis. The court's decision today makes clear that some 'inquiry into the merits of the claim' may be required at the class certification stage. And significantly, the court's opinion requires that the method by which a plaintiff proposes to measure classwide damages must be tied to the legal theory of liability that the plaintiff is advancing. To do otherwise would improperly allow class actions to go forward even when the method for assessing damages is wholly 'arbitrary.'"

Michael R. Pennington, Bradley Arant Boult Cummings LLP

"The Comcast opinion is short, but it is important on a number of levels. First, Comcast makes it clear that the court meant what it said in Wal-Mart v. Dukes — that the commonality that matters for class certification is not just the existence of common questions, but whether those questions can be answered for each and every class member with the same classwide proof. Next, it tells lower courts that expert testimony relied upon for class certification must be rigorously analyzed to ensure that the testimony actually shows a classwide method for determining those elements of the claim that the testimony purports to address. Third, Comcast leaves no doubt that the court must examine the merits issues and the proffered method for resolving them to determine whether the elements of the claims of every class member can actually be established in a collective fashion at trial. Finally, Comcast implicitly eviscerates the line of lower court authority that previously held that the inability to prove damages on a classwide basis is not a real impediment to class certification, and makes clear that Rule 23's requirement of common proof applies not just to liability questions but also to damage questions."

Amy L. Pierce, Pillsbury Winthrop Shaw Pittman LLP

"This appears to be another ruling in a line of Supreme Court opinions directing the district courts to take a hard look at whether a class action is the appropriate mechanism for resolving the dispute at hand. It tends to view the district courts as the watchdogs for making sure that the procedural prerequisites of Rule 23(a) that ensure fairness to all parties (including absent class members) are met. In the end, this should lead to plaintiffs being required to bridge the gap, through more precise pleadings and briefing, between their legal theory of the purported wrong and the resulting economic impact."

James J. Rodgers, Dilworth Paxson LLP

"The Comcast decision is not likely to have a substantial impact on class action procedures in antitrust cases. It stands for the unremarkable proposition that plaintiffs' proposed method of classwide proof must match their theory of impact and damages. While an argument could be made that the majority opinion could be read to require that plaintiffs present a credible theory of proof of damages on a classwide basis, I doubt that was intended by Justice Scalia. The decision is somewhat disappointing in that it does not address the question of the standards to be applied to the admissibility of expert testimony at the class certification stage, which had been anticipated."

Thomas Rohback, Axinn Veltrop & Harkrider LLP

"Today's Comcast decision reinforces the Wal-Mart decision in which Justice Scalia held that district courts need to engage in a rigorous analysis of any expert theory asserting that claims can be proven on a classwide basis. A month ago, Justice Ginsburg wrote the opinion in Amgen, declaring that 'Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage.' In each of the three cases, Justices Scalia and Ginsburg have opposed each other. Today's decision may have the effect of confining some of the more sweeping language of Amgen to the facts of that case."

Erick Sandler, Day Pitney LLP

"The Comcast decision joins Wal-Mart in signaling that a majority of the court is committed to heightened standards for class certification. The rigorous analysis that the majority applied to the antitrust injury and damages issues will have an immediate and broad impact on antitrust class action litigation. Lower courts will have to sort out the decision's implications beyond that; the dissent certainly made an effort to describe the holding as limited. However, a clear and significant message has been sent to lower courts to scrutinize class certification requests even if it means consideration of the merits."

David Schiffman, Sidley Austin LLP

"Comcast shines a light on the question of how class action plaintiffs will establish damages, particularly in antitrust cases. After Comcast, motions for class certification will need to be supported by an expert presenting a 'common methodology' to show that 'damages are capable of measurement on a classwide basis.' The trial judge is then expected to conduct a 'rigorous analysis' to ensure that the methodology ties damages to the specific classwide theory of liability. Comcast thus reinforces Wal-Mart in seeking to rein in class actions by imposing 'more demanding' requirements at the class certification stage."

James F. Speyer, Arnold & Porter LLP

"Today's opinion is a profoundly significant and positive development for class action defendants. In holding that a plaintiff seeking class certification under Rule 23(b)(3) must establish through evidentiary proof that damages can be measured on a classwide basis, the court has imposed a bar to certification for cases where individual damage calculations are required. The court also made clear that at the certification stage the trial court must probe the merits of the claim to ensure that the method for measuring damages fits the underlying substantive legal theories and is not arbitrary. In a highly unusual move, the dissent attempts to limit the impact of the court's holding by ignoring reality and denying that the court made such a ruling."

Kate Todd, National Chamber Litigation Center

"The Supreme Court's decision, which invalidates an improper class certification, reinforces that courts can't rubber-stamp proposed class actions without first taking a hard look at the plaintiffs' claims. The reality is that frivolous class actions impose unjustified litigation and settlement costs on businesses that are passed on to consumers. Today's decision is a victory in the effort to curb class action abuse."

Brian A. Troyer, Thompson Hine LLP

"The dissent is correct that Comcast breaks no new ground under Rule 23, but the majority's clear statement that individual damage questions would inevitably overwhelm common questions comes closest and will appear in many future defendants' briefs. The dissent tellingly was at pains to cabin this part of the majority's opinion within the conventional (but never really true) wisdom that individual damage questions do not preclude class certification. The majority's holding that a methodology for common proof of damages must correspond to the theory of common proof of liability is most significant in similar antitrust cases but also has broad application in other cases. This principle that class certification is improper where there is a mismatch or conceptual gap between damage methodology and liability theory was also the basis for Wal-Mart v. Dukes, but its reaffirmation in Comcast will strengthen the argument for defendants. Finally, by finding that the court of appeals failed to scrutinize the methodology on grounds that it overlapped with the merits, the majority also gave defendants a handy reminder for lower courts that it meant what it said in Wal-Mart on that issue."

Joshua D. Wolson, Dilworth Paxson LLP

"The decision does not address the exact standard that courts should use to assess expert testimony at the class certification stage of a case. However, it does place an exacting standard on experts, whose reports now must 'fit' whichever theory of class certification the court ultimately approves. That could require greatly expanded expert reports, with conditional analyses to address each possible theory of certification, or even each combination of theories. In short, the decision is likely to make class certification proceedings even more expensive, time-consuming and important than they already are."

Lisa C. Wood, Foley Hoag LLP

"For antitrust practitioners, the decision adds yet another hurdle for plaintiffs. However, the decision is significant for all class action practitioners because it further tightens class certification standards, and will help defense counsel convince trial courts to critically evaluate damages and liability theories well before trial. The majority signaled its hostility to class actions by beginning its analysis with the quote: 'The class action is an exception to the usual rule that litigation is conducted by and behalf of the individual named parties only.'"

Raul Zermeno, Fisher & Phillips LLP

"The decision will significantly impact the future of class action lawsuits nationwide. The decision requires plaintiffs to not only show they could prove their claims through common evidence at trial, but puts an affirmative burden on plaintiffs to establish, prior to certification, that there is reliable and admissible evidence of common injury and damages on a classwide basis. This decision is one that merits attention as it highlights the importance that admissibility determinations be sufficiently made on the record before expert testimony can be presented in any stage of litigation."

--Editing by Katherine Rautenberg.