D.C. Circuit Overturns Certification of Antitrust Class Action and Requires Reconsideration in Light of *Comcast Corp. v. Behrend*

Class-action lawyers on both sides of the "v." have been debating the impact of the Supreme Court's decision earlier this year in *Comcast Corp. v. Behrend*. Last week, the D.C. Circuit delivered its answer in *In re Rail Freight Fuel Surcharge Antitrust Litigation*, the most significant opinion thus far to address *Comcast*. As the D.C. Circuit put it in a unanimous opinion by Judge Brown, "[b]efore [*Comcast v.*] *Behrend*, the case law was far more accommodating to class certification under Rule 23(b)(3)." But *Comcast* places that case law in doubt: When class certification rests on expert economic testimony—which is increasingly the case—"[i]t is now clear . . . that Rule 23 not only authorizes a ***hard look*** at the ***soundness of statistical models*** that purport to show predominance—***the rule commands*** it" (emphasis added). That powerful holding makes the *Rail Freight* decision especially important for defendants opposing class certification.

The *Rail Freight* litigation involves allegations by plaintiffs that "the four major freight railroads . . . engage[ed] in a price-fixing conspiracy" over "rate-based fuel surcharges" paid by shippers. According to the court, such rate-based surcharges are designed to "offset fuel costs," and are assessed "on top of the base rates" shippers pay when the price of fuel exceeds a "prearranged . . . 'trigger' price." Plaintiffs contend that the defendant railroads agreed to fix prices (the surcharges) in violation of the Sherman Act. The district court granted class certification, and the railroads sought leave to appeal under Federal Rule of Civil Procedure 23(f).

After briefing and oral argument, the D.C. Circuit granted leave to appeal, vacated the district court's order granting class certification, and remanded the case so that the district court could reconsider whether to certify a class in light of *Comcast*. As the court of appeals put it, "[c]lass certification is far from automatic." (You'll see that line quoted in defendants' briefs for years to come.) Instead, as the Supreme Court held in *Wal-Mart Stores, Inc. v. Dukes*, "[a] party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc." And that analysis sometimes "resembles an appraisal of the merits."

That appraisal was needed here, the court explained, because "much of the debate centered on the predominance requirement" of Rule 23 "and whether the plaintiffs could show, through common evidence, injury in fact to all class members from the alleged price-fixing scheme." In the absence of such common evidence, "individual trials are necessary to establish whether a particular shipper suffered harm from the [alleged] scheme." If such individual trials are needed, a class cannot be certified.

The need to resolve this debate "set[] up another classic battle of the experts." In an effort to show

that the requisite common evidence of conspiracy and antitrust injury existed, the plaintiffs' expert, Professor Gordon Rausser, developed two regression models that "[p]urportedly . . . operate in conjunction" to show that "'there was a structural break in the relationship between freight rates and fuel prices around 2003,' the start of the Class Period." According to plaintiffs, this so-called "structural break" proved the alleged conspiracy.

The district court's order certifying the class rested chiefly on the models advanced by Dr. Rausser, who routinely appears as an expert supporting the plaintiffs' class action bar. Indeed, the district court "accepted Rausser's models as 'plausible' and 'workable'" over the criticisms raised by the defendants' expert—effectively deferring a full assessment of the reliability of Dr. Rausser's methodology until trial.

That approach, the D.C. Circuit held, could not be squared with *Comcast*. Rule 23 does not allow plaintiffs to sail past the class-certification stage based on damages models that are merely "plausible" or "workable." Instead, under Comcast, "[i]t is now indisputably the role of the district court to scrutinize the evidence before granting certification, even when doing so 'requires inquiry into the merits of the claim'" (emphasis added).

Such an inquiry would have revealed significant potential flaws with Dr. Rausser's model. As the court of appeals pointed out, defendants argued that, while the model "purports to quantify the injury … to ***all*** class members attributable to the defendants' [allegedly] collusive conduct," that "methodology also detects injury where ***none*** could exist" (emphasis added). Specifically, a number of shippers "were subject to legacy contracts"—meaning that they had entered into, and were bound by, contracts specifying rates that were "negotiated before any conspiratorial behavior was alleged to have occurred." On the plaintiffs' theory, therefore, these shippers could not have suffered any antitrust injury, yet their "damages model yields similar results"; as Dr. Rausser "conceded," his model "measured overcharges to legacy shippers" outside the class period "and class members alike." This concession provided further fuel for "the defendants' concern that the damages model yielded false positives with respect to legacy shippers." And, if the defendants' "critique" were "accurate," it "would shred the plaintiffs' case for certification," because "[c]ommon questions of fact cannot predominate where there exists no reliable means of proving injury in fact." Or, as Judge Brown succinctly put it: "No damages model, no predominance, no class certification."

Significantly, the court of appeals recognized the plaintiffs' argument that "defendants' critique does not disprove the damages model's claim of classwide overcharges as a matter of logical necessity," but rejected it because plaintiffs' burden was to prove more: "It is not enough to submit a questionable model whose unsubstantiated claims cannot be refuted" through logic alone; "[o]therwise," as the Supreme Court explained in *Comcast*, "at the class-certification stage *any* method of measurement [would be] acceptable so long as it can be applied classwide, no matter how arbitrary the measurements may be." And in this case, the D.C. Circuit concluded, the plaintiffs' proposed methodology appeared arbitrary indeed: "As things stand, we have no way of knowing [that] the overcharges the damages model calculates for class members [are] any more accurate than the obviously false estimates it produces for legacy shippers." Recognizing that the district court lacked "the benefit of [*Comcast*'s] guidance"—in fact, it had relied heavily on the Third Circuit's now-reversed decision in that case—the court of appeals vacated the order certifying the class and remanded for reconsideration in light of *Comcast*.

The D.C. Circuit's decision is a significant development in the law governing class certification. Defendants will surely rely upon it in future class actions, both inside and outside the antitrust context. And while the dissenting

justices in *Comcast* contended that "[t]he Court's ruling is good for this day and case only"—a statement upon which many plaintiffs' lawyers have seized—the *Rail Freight* decision indicates that Comcast cannot be cast aside so lightly. Quite the opposite: It hewed closely to the *Comcast* majority's analysis. (A recent article in Law360 makes a similar observation.) The *Rail Freight* case should thus be helpful to defendants in convincing other courts to take Comcast seriously.

There is one other point that is worth mentioning about the decision. The court expends a great deal of effort in explaining why it chose to grant immediate review in the first place. As class-action practitioners know, appellate review of orders granting (or denying) class certification "is discretionary, not automatic." Rule 23(f) therefore requires a party who seeks to appeal an adverse class-certification decision to secure the court of appeals' permission. The D.C. Circuit identified "three situations" that may "warrant immediate review": (1) "when the decision to certify is 'questionable' and is accompanied by a 'death-knell'—*i.e.*, it places 'substantial pressure on the defendant to settle independent of the merits of the plaintiffs' claims'"; (2) "when the certification decision 'presents an unsettled and fundamental issue of law relating to class actions'"; and (3) when a "certification decision . . . is 'manifestly erroneous.'" In addition, "special circumstances" "may fortify" a decision to grant review.

The court's discussion of these factors underscores two lessons for defendants. First, a company that seeks review of an order granting class certification must be prepared to explain not only why the district court got it wrong but also why the court of appeals should intervene. Second, to borrow from Judge Brown's "battle" metaphor, when it comes to class certification, defendants should come out swinging in the district court; the federal appellate courts are not guaranteed—and indeed, are not likely—to help in the majority of cases.

Disclosure: Our firm is among the counsel representing one of the defendants in this case.

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