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Third Thursday Briefing
Comcast v. Behrend – How Big A Deal?

April 18, 2013

The webinar will begin shortly. Please stand by.

Today's Presenters

Tom Gies

Shari Lahlou

Mark Romeo

April Ross

Comcast v. Behrend – Supreme Court

***Comcast Corp. v. Behrend*, __ S.Ct. __, 2013 WL 1222646 (Mar. 27, 2013)**

- The Facts
- The Majority – J. Scalia
- The Dissent – J. Ginsburg and J. Breyer

Antitrust Consequences

- More Certain Effects
  - Continuation in evolution of law
  - Extends Wal-Mart v. Dukes 23(a) standards to 23(b)(3)
  - Courts must examine issues relevant to Rule 23 regardless of overlap with merits
    - Potential impact on timing of class determination
    - Limited bifurcation of discovery
  - Damages proffer must directly relate to theory of liability

Antitrust Consequences

- Less Certain Effects
  - Impact on individual damages as basis for denying certification
    - Not contested in Comcast
    - Formulaic vs. other methods
  - Impact on level of scrutiny given econometric models used to establish class-wide impact
    - Is *any* method that *could* establish class-wide impact enough – i.e., any model?
    - Do substantial critiques of model disqualify as adequate proof?

Employment Law Implications

- Ross v. RBS Citizens Bank NA
  - Individual defenses to liability in misclassification and "off the clock" issues
    - Lack of knowledge of hours worked
    - Different job duties
  - Damages – are they inevitably individualistic?

Employment Law Implications (cont)

- Other Wage Hour Litigation issues
  - Mt. Clemens Pottery - extrapolation of damages from test plaintiffs
  - Impact on FLSA cases?
- Title VII Class Actions – not just huge cases like Dukes v. Wal-Mart
- ERISA Litigation – death knell for "stock drop" and "excessive fee" class actions?

Employment Law Implications (cont)

- Additional Reactions
  - Take advantage of developments in other substantive law areas
  - Make the Daubert record
  - Insist on a viable trial plan
  - Class certification – now the whole enchilada?

Impact on Consumer Class Actions

- Is this the end of class actions that are not susceptible to class-wide proof of damages?
  - Consumer class actions
  - Mass tort class actions

- Courts have long allowed these cases to proceed as class actions based on other common issues, with individualized damages to be addressed down the road

- Dissent says *Comcast* makes no change to this "well neigh universal" principle – true?

Whirlpool Corp. v. Glazer, No. 12-322

- Consumer class action
- Plaintiffs claim 21 models of Whirlpool washers contain design defects causing moldy odors
- Sixth Circuit affirmed district court order certifying class
  - Held class certification can be appropriate even if some class members have not been injured, if the challenged practice is premised on a ground applicable to the entire class

Whirlpool Corp. v. Glazer (cont)

- Whirlpool sought certiorari, argued *Wal-Mart v. Dukes* requires absent class members to suffer the same injury.
  - *Comcast* decided while cert petition was pending
- Parties file supplemental briefing on impact of *Comcast*
- April 1, 2013: Supreme Court vacates 6th Circuit class certification decision and remands "for further consideration in light of *Comcast v. Behrend*."
- How much should we read into this decision?

Where does *Comcast* leave us?

- Confirms that class certification under Rule 23(b)(3) requires a "rigorous inquiry" and common proof on all elements of a claim
- Reflects a growing willingness to tighten class certification standards and make certification more difficult
  - *AT&T v. Conception*: upholding class action waivers in arbitration agreements
  - *Standard Fire v. Knowles*: rejecting creative pleading to evade CAFA jurisdiction
- Leaves important questions unanswered
  - Does *Daubert* apply at the class stage?
  - Should classes be certified where members claim varying levels of injury (or no injury at all)?
  - What about class arbitration? *Oxford Health Plans v. Sutter*

Comcast's Progeny –What they tell us about the lasting impact of the decision?

Wage & Hour:

- *Martins v. 3PD, Inc.*, 2013 WL 1320454 (D. Mass. Mar. 28, 2013)
- *Schwann v. Fed Ex Ground Package System, Inc.*, 2013 WL 1292432 (D. Mass. Apr. 1, 2013)
- *Roach v. T.L. Cannon Corp., d/b/a Applebee's,* 2013 WL 1316452 (N.D.N.Y. Mar. 29, 2013).

Consumer and Other:

- *Harris v. Comscore, Inc.*, 2013 WL 1339262 (N.D. Ill. Apr. 2, 2013)
- *Williams v. Macon County Greyhound Park, Inc.*, 2013 WL 1337154 (M.D. Ala. Mar. 29, 2013)
- *In re Motor Fuel Temperature Sales Practices Litigation*, 2013 WL 1397125 (April 5, 2013)

Contacts

Tom Gies
tgies@crowell.com
202.624.2690

Mark Romeo
mromeo@crowell.com
949.798.1316

Shari Lahlou
slahlou@crowell.com
202.624.2679

April Ross
aross@crowell.com
202.624.2687

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Raising the Bar for Class Certification: Employment Law Implications of *Comcast Corp. v. Behrend*

Tom Gies and Mark Romeo, Crowell & Moring LLP

The Supreme Court's March 27 decision in *Comcast Corp. v. Behrend*, 133 S.Ct. 24 (2013) decertified a class action in an antitrust case. The majority concluded that the damages model tendered by plaintiffs' expert witness was flawed, holding that evidence of damages must be amenable to class-wide proof in order to warrant class certification under Rule 23(b)(3). Debate about the significance of the sharply-divided 5-4 opinion began immediately. This article offers some preliminary thoughts regarding the likely effect of *Comcast* in three areas of employment law litigation.

The *Comcast* decision

Plaintiffs in *Comcast* brought Sherman Act monopolization claims regarding a series of "swap deals" entered into between Comcast and other cable-television providers. These arrangements were allegedly pursued in an effort to increase the concentration of customers Comcast served in particular geographical areas, thereby permitting it to set prices at supra-competitive levels. Plaintiffs advanced four separate theories in support of their claims, and sought class certification under Rule 23(b)(3). The district court found that only one of the four theories was capable of class-wide proof. The court concluded that class certification was appropriate because the existence of individual injury resulting from the alleged antitrust violation was capable of proof at trial through evidence that was common to the class. The court also concluded that damages resulting from the injury were measurable on a class-wide basis, even though plaintiffs' expert witness acknowledged that the regression analysis underlying his damages model assumed the validity of all four theories of liability.

A divided panel of the Third Circuit affirmed. The appellate court held that plaintiffs were not required to tie each theory of antitrust impact to an exact calculation of damages, and that plaintiffs' job was only to ensure that the resulting damages are capable of measurement and would not require a "labyrinthine of individual calculations."

The Supreme Court reversed in a 5-4 decision. Justice Scalia's majority opinion criticized the Third Circuit's refusal to entertain arguments against the plaintiffs' damages model at the class certification stage simply because those arguments would also be pertinent to merits determination. The Court concluded that the plaintiffs' damages evidence was defective, because the expert assumed the validity of all four theories of liability asserted by plaintiffs. The Court held that this was contrary to the requirement that, in order to justify class certification, plaintiffs' damages theory must be tied to a liability theory that is capable of class-wide proof.

Justice Scalia relied on *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011). In *Dukes*, a nationwide class of 1.5 million current and former female employees from 3,400 stores sued Wal-Mart, alleging that the company engaged in a pattern or practice of gender discrimination in violation of Title VII of the Civil Rights Act of 1964. The Court reversed the district court's

certification order on the grounds that the plaintiff could not offer "significant proof that Wal-Mart operated under a general policy of discrimination." *Dukes*, 131 S.Ct. at 2556. The Court found that there was no unifying motive theory holding together "literally millions of employment decisions." *Id.* at 2552. In citing *Dukes*, Justice Scalia was careful to include that opinion's several quotations from *General Telephone Co. of Southwest v. Falcon*¸ 457 U.S. 147 (1982). *Falcon* was an important development in the Court's Title VII jurisprudence. There, a unanimous Court held that Rule 23(a) barred an individual who alleged he was not promoted because of his national origin from representing a class of both employees and applicants complaining about a broad range of employment practices, under what was then known as an "across the board" attack alleging a general policy of discrimination. After invoking *Falcon*, Justice Scalia concluded that the same analytical principles applicable to the commonality and typicality provisions in Rule 23(a) extend to rule 23(b), and that Rule 23(b)(3)'s "predominance criterion is even more demanding than Rule 23(a)." Slip op. at 6. (quoting *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997)).

The dissent in *Comcast* first disagreed with the majority's reformulation of the question on which *certiorari* was granted. The dissent asserted that the writ should have been dismissed because Comcast had forfeited its right to complain about the admissibility of the plaintiffs' damages model. The dissent then argued that the majority's opinion "breaks no new ground" on the standard for class certification under Rule 23(b)(3), citing what Justice Kagan called "legions of appellate decisions across a range of substantive claims" to the effect that the preponderance requirement of Rule 23(b)(3) is "generally satisfied even if damages are not provable in the aggregate." This assertion led Justice Kagan to opine that the majority's opinion "is good for this day and case only."

Neither the majority nor the dissent attempted to resolve, at least directly, the question of whether class certification decisions must examine whether a party's proposed expert witness testimony is admissible under *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 579 (1993).

Consequences for Wage Hour Litigation

Five days after the decision in *Comcast*, the Court vacated and remanded the Seventh Circuit's decision in *RBS Citizens, N.A. v. Ross*, No. 12-165, 2013 U.S. LEXIS 2640 (U.S. Apr. 1, 2013). Practitioners are right to interpret this as a significant development. At a minimum, the Court's decision to vacate the *Ross* opinion makes it very clear that *Comcast* will not be limited to antitrust litigation.

Ross was a wage-hour claim brought under Illinois state law against a bank, alleging both "off the clock" and misclassification claims. The employer argued that, in light of *Dukes*, neither proposed class could be certified because individual issues, both as to liability and damages, overwhelmed any class-wide issues. The lower courts disagreed, concluding that plaintiffs' claim of an unofficial practice of refusing to pay employees for overtime worked was sufficient to justify class certification. The bank's petition for *certiorari* focused more on liability issues rather than damages in arguing that certification was not permitted under Rule 23(b)(3). The Supreme Court's order requires the Seventh Circuit to conduct a rigorous analysis of whether the evidence adduced in that case satisfies the predominance requirement of Rule 23(b)(3).

Read in conjunction with *Dukes*, *Comcast* will help employers in a variety of wage hour cases brought under state law. It should be more difficult for plaintiffs to get class certification of many types of "off the clock" wage-hour claims, particularly in cases that involve complex issues involving timekeeping practices and work schedules. Cases involving numerous potential plaintiffs working at multiple locations for several different managers should also face tougher scrutiny. Similarly, class certification of certain misclassification cases should be easier to challenge, particularly those that involve non-standardized job duties. In either scenario, where individual issues can be found to predominate over allegedly common ones, or where plaintiffs' damages models do not adequately reflect variant situations among workers, *Comcast* gives employers useful ammunition to argue that class certification is inappropriate.

Comcast provides no support for defeating certification of collective actions brought under the Fair Labor Standards Act (FLSA). The Court's opinion is plainly limited to cases subject to Rule 23, and says nothing about the two-step "opt-in" collective action procedure set forth in Section 216(b) of the FLSA. Indeed, the Court's April 16 decision in *Genesis HealthCare v. Symczyk*, No. 11-1059, 2013 U.S. LEXIS 3157 (U.S. Apr. 16, 2013), pours additional cold water on employer arguments that FLSA collective actions should be treated similarly to Rule 23 cases. The *Symczyk* majority emphasized, albeit in a different context, that Rule 23 cases are very different from FLSA cases. As with *Dukes*, many lower courts are likely to reject the notion that the lessons of *Comcast* should be extended to collective actions brought under the FLSA.

Employers facing wage-hour litigation must also continue to be mindful of the litigation problems posed by the Supreme Court's decision in *Anderson v. Mt. Clemens Pottery, Co.*, 328 U.S. 680 (1946). Since the 1940s, *Mt. Clemens* has been widely understood to afford a presumption of accuracy to testimony by plaintiffs in FLSA cases where employers have not maintained accurate records. Particularly in cases brought by the Department of Labor, *Mt. Clemens* also supports extrapolation of damages established by the testimony of selected plaintiffs to the entire class. To be sure, the "trial by formula" notion was soundly rejected by the majority in *Dukes*, but it is still very much an open question in wage-hour litigation. *Comcast* does nothing to reduce those concerns.

In this respect, companies should consider taking an aggressive position in demanding that plaintiffs' counsel provide a trial plan, as part of the predominance showing required by Rule 23(b)(3). There are a number of cases in which courts have refused to permit class actions to go forward, where the plaintiffs are unable to demonstrate how the case can actually be tried in a manageable way without undue waste of judicial resources. *See, e.g., Espenscheid v. DirectSAT USA, LLC*, 705 F.3d 770 (7th Cir. 2013). In *Espenscheid*, Judge Posner affirmed the district court's decision, only a few weeks before trial, to decertify a state law wage-hour case that had been certified under Rule 23(b)(3). The district court concluded that plaintiffs had not presented a viable trial plan and that the plaintiffs' plan to extrapolate from testimony from a small number of test plaintiffs was both unworkable and a potential denial of due process. In affirming, the Seventh Circuit explained that the plaintiffs were "ask[ing] the district judge to embark on a shapeless, free-wheeling trial that would combine liability and damages and would be virtually evidence-free so far as damages were concerned." *Id.* at 776.

In the few weeks since *Comcast*, it has become clear that the most immediate impact of *Comcast* will be a series of battles over how damage models must be constructed in order to justify class certification. As with reactions to *Dukes*, we can predict that some courts will read *Comcast* as narrowly as possible. For example, in *Martins v. 3PD, Inc.*, Civil Action No. 11-11313-DPW, 2013 U.S. Dist. LEXIS 45753 (D. Mass. Mar. 28, 2013), a Massachusetts federal court granted a class of delivery drivers' motion for Rule 23 class certification in a case involving alleged misclassification of drivers as independent contractors rather than employees. The court gave *Comcast* a narrow reading, concluding that it did not foreclose the possibility of certification in cases where individual damages issues were not particularly complicated or numerous. Three days later, another Massachusetts district court reached a different outcome in another truck driver independent contractor case, concluding that the proposed damages model was too complex to be handled in a properly-managed class trial. *Schwann v. FedEx Ground Package Sys., Inc.*, Civil Action No. 11-11094-RGS, 2013 U.S. Dist. LEXIS 46908 (D. Mass. Apr. 1, 2013). The district court in *Roach v. T.L. Cannon Corp.*, No. 3:10-cv-0591, 2013 U.S. Dist. LEXIS 45373 (N.D.N.Y. Mar. 29, 2013) also cited *Comcast* in deciding that class certification was not appropriate for the specific New York state law claims at issue there, concluding that a class action trial would founder over individual determinations of hours worked.

Employment Discrimination Litigation Implications

Perhaps the biggest take-away from *Comcast* in the employment discrimination arena is the realization that the Court intends to insist on a rigorous analysis of each relevant subsection of Rule 23 even in cases that are a lot smaller than *Dukes*.

The most obvious implication of *Comcast* in employment discrimination cases is that employers now have additional arguments to contest certification motions in complex employment discrimination cases involving multivariate claims supported by regression analyses. Race and gender pay and promotion discrimination cases are clear examples.

Farther down the road, it will be interesting to see how lower courts apply *Comcast* to claims like those brought in *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 481 (7th Cir. 2012). There, the Seventh Circuit endorsed certification of a so-called "issue" class action, in a Title VII case brought by African American stock brokers who claimed that two policies maintained by the stock brokerage adversely affected their ability to achieve earnings equality with whites.

ERISA Litigation implications

Employers that sponsor 401k plans have been inundated with litigation in recent years. Two specific categories of ERISA fiduciary breach cases are relevant here. The first is the so-called "stock drop" cases, in which lawsuits are filed against employers that offer company stock as an investment option in the 401k plan following a decline in the company's stock as a result of a business reversal. More than 200 such cases have been filed against publicly-traded companies in recent years, often as tag-along claims to securities law case. The second is what is known as "excessive fee" litigation, in which plaintiffs allege that a variety of practices, including revenue

sharing with financial advisors to the plan, end up reducing the investment returns of plan participants.

The question of whether class certification is appropriate in such cases is frequently litigated. In *Spano v. Boeing*, 633 F.3d 475 (7th Cir. 2011), the Seventh Circuit rejected class certification under Rule 23(b)(1)(B) in two cases alleging a series of fiduciary duty breaches by plan administrators, including conduct that allegedly caused the plans to pay excessive fees and to select imprudent investment options. The Seventh Circuit vacated the lower courts' class certification orders. The court held that Rule 23(a) requires enough congruence between the investments held by the named representative and those of the unnamed members of the class to justify allowing the named plaintiff to litigate on behalf of the group.

Just last month, in *Tibble v. Edison Int'l*, --- F.3d ----, 2013 U.S. App. LEXIS 5598 (9th Cir. Mar. 21, 2013) a Ninth Circuit panel affirmatively ducked the issue of whether class certification in that case was appropriate under Rule 23(b)(1)(B), reserving for another day the question of whether the court was prepared to adopt the rationale of *Spano*. *Spano* provides compelling reasons why Rule 23(b)(1)(B) should not be available in many cases involving individual losses in 401k plan accounts. To the extent that the logic of *Spano* prevails, *Comcast* now suggest that certification of many "stock drop" and "excessive fee" cases under Rule 23(b)(3) may also be inappropriate.

Ducking *Daubert*

Perhaps the biggest surprise was the Court's decision not to address the quality of the plaintiffs' expert witness report under the standards established by *Daubert*. It may be that Justice Scalia was unable to attract five votes for the desired outcome of announcing a major retrenchment on the availability of class action treatment for many kinds of unwieldy cases without avoiding a head-on resolution of the *Daubert* question. In any event, a close reading of *Comcast* suggests that the majority may have effectively tipped its hand. After all, there is nothing particularly unusual about a dispute as to whether a regression analysis includes the appropriate number and type of variables. The statistical biases created by using too few (or the wrong) variables are well documented in the academic literature. The academic critique of unsophisticated econometric models has been widely adopted by courts in various substantive legal areas, including employment discrimination law. The *Comcast* majority criticized the plaintiffs' expert report for failing to distinguish among the various liability theories asserted by plaintiffs. One can argue that this effectively suggests that, had a *Daubert* challenge been made, at least four of the current Supreme Court justices were prepared to conclude that the expert report should have been excluded for answering the wrong question. This outcome, of course, was foreshadowed in *Dukes*, in which the majority was extremely critical of some of the expert witness evidence marshaled by plaintiffs in support of their claims against Wal-Mart.

Some Concluding Thoughts

It is obviously too soon to know how lower courts will address the *Comcast* Court's directive that the "rigorous analysis" necessary to support Rule 23 class certification includes an evidentiary determination as to each application subsection of Rule 23(b). While *Comcast* may

not turn out to signal a seismic shift in the rules governing class certification in federal court, it's pretty clear that plaintiffs' counsel are in denial if they believe the decision is, as Justice Kagan put it, good for "this day and case only."

Comcast seems to be a pretty clear statement by the Court's majority that they disapprove of shortcuts that ignore individualized issues in Rule 23(b)(3) certification decisions. Justice Scalia repeated the admonition he made in *Dukes* that class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only," and that certification is proper in cases seeking class damages under Rule 23(b)(3) only after a rigorous analysis of the preponderance issue.

Comcast is thus properly seen another manifestation of the trend by the conservative wing of the Supreme Court to rein in the volume of class action litigation. The Court's April 1, 2013 decision to vacate the Sixth Circuit's decision in *Whirlpool Corp. v. Glazer*, No. 12-322, 2013 U.S. LEXIS 2695 (U.S. Apr. 1, 2013) is yet another example.

It is a reasonably safe prediction that advocates will have more latitude in arguing from principles established in cases from other areas of substantive law in opposing Rule 23 certification motions. It is noteworthy in this respect that Justice Scalia's opinion cited no Supreme Court antitrust authority on the class certification issue, relying almost exclusively on *Dukes.* To be sure, the question of certification will still be governed in large part by substantive law. An example comes from the securities law field, where plaintiffs' counsel can take considerable comfort from *Amgen, Inc. v. Connecticut Retirement Plans & Trust Funds*, 133 S.Ct. 1184 (Feb. 27, 2013), upholding the virtually automatic certification of a securities fraud class action.

A final observation. One likely consequence of *Comcast* and the Court's other decisions in this area will be increased litigation costs and enhanced scrutiny of the class action issue. Class certification motions practice is likely to become more complicated and more expensive, reflecting the new focus on whether or not the plaintiffs can provide adequate evidentiary support for each of the relevant subsections of Rule 23.