Supreme Court Fails To Provide Needed Guidance On Use of Testimony In Class Certification

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FOR THOSE WHO MONITOR DEVELOPMENTS in class action law, the Supreme Court's March 27, 2013 decision in *Comcast Corp. v. Behrend* is a bit of a disappointment. Although the Court had promised to address the question of whether expert testimony offered in connection with class certification is subject to the admissibility standards governing expert evidence in Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* the Court's ruling never decided that issue.

Instead, in a 5-4 decision, the Court addressed the question of whether a class action can meet the predominance requirement of Rule 23(b)(3) if the model proposed to establish damages on a class-wide basis is not consistent with the class's theory of liability. The majority answered that question in the negative, holding that district court should not have certified the class since the class expert's methodology purportedly did not distinguish damages associated with the particular theory of liability the court found to be viable from damages related to other theories that did not lend themselves to class treatment.

Class action defendants undoubtedly will seize on the Court's decision in *Comcast* as another reason for courts to deny class certification, arguing that lack of a viable class-wide damage theory is fatal to class certification even if common issues predominate over individual issues on liability. Plaintiffs will argue that the decision, in the words of Justice Breyer in his dissenting opinion, "is good for this day and case only." Time will tell whether the decision will have a lasting impact on class action litigation or whether (as some observers predict) the decision will serve merely as a more thorough statement of the holdings of prior class certification cases.

In the wake of *Comcast*, practitioners and companies confronted with class action litigation are left with continuing uncertainty regarding the role of Rule 702 and *Daubert* at the certification stage of class actions. And district courts are left without definitive guidance in the rules or from the Supreme Court on the types of hearings and procedures they should employ in resolving disputes regarding expert testimony presented on class certification. This article explores why the Supreme Court might have deliberately side-stepped these questions in the *Comcast* case and outlines the potential approaches that the Supreme Court might take on the issue if and when it hears another case where expert testimony is used to bolster or defeat a motion for class certification.

The Supreme Court's Side-Step

In *Comcast*, some two million cable subscribers in the metro Philadelphia area filed suit under the antitrust laws claiming their cable television provider had engaged in a series of anticompetitive transactions that resulted in its acquisition of monopoly power and ultimately higher prices for cable services in violation of the antitrust laws. The district court certified the class, finding that the plaintiff had demonstrated, through an expert, that damages resulting from Comcast's conduct could be calculated on a class-wide basis. The Third Circuit Court of Appeals affirmed, saying it was satisfied the class's damages "are capable of measurement and will not require labyrinthine individual calculations."

In its writ of certiorari asking the Supreme Court to reverse the decisions, Comcast sought review of the following question: "Whether a district court may certify a class action without resolving 'merits arguments' that bear on Rule 23's prerequisites for certification, including whether purportedly common issues predominate over individual ones under Rule 23(b)(3)." The court granted certiorari but reformulated the question presented as follows: "Whether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the

case is susceptible to awarding damages on a class-wide basis."

This reformulation probably came about as a result of the Supreme Court's 2011 decision in *Wal-Mart Stores, Inc. v. Dukes* where the Court held that a district court must conduct a "rigorous analysis" to ensure that the plaintiff class has satisfied the prerequisites of Rule 23, even if that entails deciding issues that "overlap with the merits of the plaintiff's underlying claim." Rather than revisit an issue it already had addressed, the Supreme Court elected to rewrite the question presented. The problem with the reformulated question, however, was that Comcast had never objected to the testimony of the class's expert or demanded a *Daubert* hearing in the district court and, therefore, the question of admissibility had been waived by Comcast. Rather than dismiss the case as improvidently granted (as the dissenters argued), the majority decided to side-step the Court's own reformulated question and answer yet another question. In doing so, the Court added to its growing class action jurisprudence by underscoring that district courts are not precluded from grappling with the merits of the class's case in the context of resolving certification issues.

Differing Approaches to the Issue

With no decision from the Supreme Court on the issue, the Circuit Courts of Appeals remain split on whether expert testimony used in connection with class certification must be admissible for a district court to rely on it in deciding whether to certify a class. In some circuits, like the Seventh Circuit, if a district court finds expert evidence to be "critical" to its decision to certify a class under Rule 23 and that evidence is contested, the expert's opinions must be admissible under Rule 702 and *Daubert*. Critics of this rule complain that it transforms a motion for class certification into a full-fledged trial on the merits, particularly in complicated cases like antitrust class actions where expert testimony is almost always relied upon to prove both liability and damages. Nonetheless, this approach seems to be gaining traction in district courts across the country, many of which are electing to utilize more procedural safeguards to protect their rulings from successful appeal.

In other circuits, such as the Eighth Circuit, the rule is that expert testimony need not undergo a "full and complete *Daubert* inquiry" to be relied upon for class certification purposes. The rationale of this rule is that class certification is an inherently tentative stage of the litigation and questions of ultimate admissibility are better left for trial. In these circuits, it is sufficient for the district court to find that expert evidence is of assistance in determining "whether, if the [plaintiff]'s basic allegations were true, common evidence could suffice" to show class-wide injury. Plaintiffs and defendants alike therefore can rely on expert testimony, even if it might not be fully admissible at trial. Critics of this approach point out that a court's decision whether to certify a class can effectively bring an end to litigation, just as in the case of a summary judgment motion, but courts are only permitted to rely only upon admissible evidence on summary judgment.

In still other circuits, there exists no definitive guidance as to under what circumstances it is proper for a court to rely on contested expert testimony in deciding whether to certify a class under Rule 23. This situation leaves practitioners, parties to class action litigations, and district courts uncertain as to the rules governing the use of expert testimony on certification.

The Future?

Hopefully, the Supreme Court will jump at its next opportunity to address the issue of the proper use of expert evidence at class certification. In *dicta* in the *Dukes* case, the Court cited with seeming approval to the approach taken to the issue by the Seventh Circuit. Until it hears another case presenting the issue directly and the votes are counted, however, we are left to wonder how the Supreme Court ultimately will come down on this important issue. One thing is nonetheless clear: guidance on this important issue is overdue.

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