D.C. Circuit’s Rail Freight Decision Reflects Greater Scrutiny of Antitrust Class Certification in the Wake of Supreme Court’s Comcast Ruling

Earlier this month, the influential U.S. Court of Appeals for the D.C. Circuit issued an important decision on the standards for certifying antitrust class actions. Taking its cue from the Supreme Court’s decision this past March in Comcast Corp. v. Behrend, the D.C. Circuit vacated a lower court decision certifying a class of shippers in an antitrust case against railroads alleging collusion on fuel surcharges. The ruling in In re: Rail Freight Fuel Surcharge Antitrust Litigation is significant as the first known decision to apply Comcast to reject a proposed antitrust class. Companies facing overreaching class action suits may be able to take comfort that, after a few lower court decisions sidestepping Comcast, the principles set forth in that decision are now catching on in the lower courts.

BACKGROUND
Class certification allows plaintiffs’ lawyers to aggregate the claims of many individuals or entities to be tried in a single proceeding, giving them enormous leverage that often overshadows the actual legal or factual merit of the claims. The certification decision is often the pivotal moment in such litigations, because if a class is certified, the company faces enormous pressure to settle to avoid even a small risk of a colossal verdict.

In theory, the federal courts are supposed to certify classes only after a rigorous analysis shows that they meet certain standards set forth in Federal Rule of Civil Procedure 23. In antitrust cases, the most important requirement is usually “predominance,” which means that “questions of law or fact common to class members predominate over any questions affecting only individual members.” Under the federal antitrust laws, the plaintiff has to show, among other things, that it was impacted by the alleged violation (e.g., paid higher prices), and certification typically hinges on whether injury and damages to each class member can be shown with evidence common to all of them.

For much of the five-decade history of the modern Federal Rule of Civil Procedure 23, the scales were tilted in favor of finding antitrust cases susceptible to class certification. That began to change in the last decade with several circuit decisions heralding a more analytically rigorous, evenhanded approach. Then the Supreme Court issued its

1 133 S. Ct. 1426 (2013).
4 See, e.g., In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 317-18 (3d Cir. 2008); In re New Motor Vehicles Canadian Exp. Antitrust Litig., 522 F.3d 6, 27 (1st Cir. 2008); Blades v. Monsanto Co., 400 F.3d 562, 575 (8th Cir. 2005).
landmark 2011 decision reversing certification of a class in \emph{Wal-Mart Stores, Inc. v. Dukes}. Although \emph{Wal-Mart} was an employment discrimination, not antitrust, case, and did not turn on the predominance requirement of Rule 23(b)(3), the Supreme Court spoke forcefully about the need to engage in rigorous analysis and meaningfully test expert testimony before certifying a class.\textsuperscript{5}

**COMCAST AND ITS AFTERMATH**

This past March, the Supreme Court decided \emph{Comcast}, reversing a Third Circuit decision allowing cable subscribers to bring antitrust claims against \emph{Comcast} as a class.\textsuperscript{7} Building on \emph{Wal-Mart}, the Court held that “under the proper standard for evaluating certification,” the plaintiffs’ expert’s damages model in \emph{Comcast} “falls far short of establishing that damages are capable of measurement on a classwide basis.”\textsuperscript{8} “Without presenting another methodology, respondents cannot show Rule 23(b)(3) predominance” because “[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class.”\textsuperscript{9}

Despite this seemingly clear takeaway, \emph{Comcast}'s impact in the lower courts had generally been muted until this month's decision in \emph{Rail Freight}. That may be partly due to a debate over how far the \emph{Comcast} decision reaches. In \emph{Comcast}, the plaintiffs’ expert’s damages model assumed the validity of four distinct theories of antitrust violation, but three of the four theories did not survive the class certification determination, leaving plaintiffs with a damages model that was out of sync with their liability case. Espousing a narrow view of \emph{Comcast}, the plaintiffs’ bar has argued that its holding is limited to that precise fact pattern, frequently invoking a remark by four dissenting Justices that the majority’s decision was “good for this day and case only.”\textsuperscript{10}

However, the majority in \emph{Comcast} expressed several important general principles governing the predominance analysis. For example, \emph{Comcast} makes clear that the “proper standard for evaluating certification” involves “establishing that damages are capable of measurement on a classwide basis.”\textsuperscript{11} That teaching cannot be squared with the notion that the Court's decision was somehow “good for this day and case only.” Also, the Court rejected the lower courts’ logic that “at the class-certification stage any method of measurement is acceptable so long as it can be applied classwide, no matter how arbitrary the measurements may be. Such a proposition would reduce Rule 23(b)(3)'s predominance requirement to a nullity.”\textsuperscript{12} The standard articulated in that passage applies to every antitrust class certification case in which expert testimony is offered to show common impact and damages.

Nevertheless, until \emph{Rail Freight}, lower courts that had considered \emph{Comcast} when deciding certification issues in antitrust cases had found the decision limited and distinguishable.\textsuperscript{13} Similarly, in a consumer fraud case that the Supreme Court had expressly directed the Sixth Circuit to revisit in light of \emph{Comcast}, the Sixth Circuit adhered to its earlier ruling in favor of certification, finding that \emph{Comcast} has “limited application” and “breaks no new ground.”\textsuperscript{14} These decisions are notable for the extent to which they rely on the \textit{dissent} in \emph{Comcast} as opposed to the majority opinion that constitutes the actual binding precedent of the Court.

**RAIL FREIGHT AND ITS IMPLICATIONS**

In \emph{Rail Freight}, plaintiffs sued four railroads alleging that they had coordinated fuel surcharges imposed on shippers in the mid-2000s. Prior to the \emph{Comcast} decision, the D.C. district court certified a class of shippers based primarily on a multiple regression model, offered by plaintiffs’ expert economist, that purported to show that impact and damages could be proven on a common basis for all class members. The defendant railroads sought interlocutory review in the D.C. Circuit. \emph{Comcast} came out while that application for review was pending.

Much of the D.C. Circuit’s decision deals with the threshold question of whether to accept the case for interlocutory

\textsuperscript{5} 131 S. Ct. 2541 (2011).
\textsuperscript{6} Id. at 2551-52.
\textsuperscript{7} 133 S. Ct. 1426.
\textsuperscript{8} Id. at 1433.
\textsuperscript{9} Id.
\textsuperscript{10} See id. at 1437 (Ginsburg & Breyer, JJ., dissenting).

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appeal. But even the court’s discussion of that procedural issue reveals its dissatisfaction with the plaintiffs’ arguments for certification. The court noted that the plaintiffs’ model produced “false positives,” i.e., it “detects injury where none could exist.” Specifically, some shippers paid fuel surcharges due to “legacy contracts” that predated the alleged conspiracy and thus could not have resulted from the conspiracy, yet plaintiffs’ economic model nevertheless found those shippers to have been injured by the conspiracy. “If accurate,” the Court stated, “this critique would shred the plaintiffs’ case for certification.” Moreover, the intervening Comcast decision was itself a reason to accept the interlocutory appeal. “As we see it,” the court explained, Comcast “sharpens the defendants’ critique of the damages model as prone to false positives.”

The “false positives” issue ultimately drove the D.C. Circuit’s decision to vacate class certification. After all, there was “no way of knowing the overcharges the damages model calculates for class members [are] any more accurate than the obviously false estimates it produces for legacy shippers.” The court also left no doubt that Comcast was critical to its analysis: “Before [Comcast], the case law was far more accommodating to class certification under Rule 23(b)(3)…. It is now clear, however, that Rule 23 not only authorizes a hard look at the soundness of statistical models that purport to show predominance — the rule commands it.”

Companies defending antitrust cases where certification is sought or has been granted based on sketchy economic models should be encouraged by the D.C. Circuit’s decision. Unlike a few other lower court decisions to date that have read Comcast narrowly, Rail Freight embraces the fundamental principles behind Comcast and makes clear that they should be broadly and rigorously applied in future cases. Rail Freight may serve as a bellwether for other lower courts grappling with econometric evidence on common impact in the post-Comcast era.

Antitrust defendants should also consider specific strategies to leverage the Rail Freight decision to resist certification or seek decertification of existing classes. One specific exercise is to attack plaintiffs’ econometric model by putting forward “false positives” — customers or transactions that as an a priori matter indisputably could not have been impacted by the alleged violation, but for which the plaintiffs’ expert’s model nevertheless purports to find impact. Defendants should start by positing groups of customers who are similarly situated to putative class members except could not possibly have been impacted under plaintiffs’ theory of the case. Examples might include subsets of customers who had contracts that locked in price before the alleged conspiracy started, who purchased before or after the alleged conspiratorial behavior, or who purchased in a geographic area unaffected by the alleged conspiracy. Defendants should then run the plaintiffs’ expert’s model on those populations. If the model produces an estimate of impact in circumstances where other evidence makes it certain there was none, that is a strong signal that the model cannot carry plaintiffs’ burden to show predominance as necessary for certification.

If you have any questions about any of the topics discussed in this advisory, please contact your Arnold & Porter attorney or the following attorneys:

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