

## Supreme Court Rules That District Court Must Rigorously Review Plaintiffs' Damages Model at Class Certification Stage

The Supreme Court this week in *Comcast Corp. v. Bebrend* forcefully reiterated that Rule 23(b)(3) requires the district court to engage in rigorous review to ensure that damages are capable of measurement on a classwide basis, even though making that assessment may require the court to inquire into the merits of the plaintiffs' claim. Despite the dissent's attempt to confine *Comcast* to its particular facts, the Court's decision raises the hurdle for class certification both in antitrust and other class cases.

*Comcast* arose out of a claim that Comcast engaged in illegal anticompetitive conduct in the Philadelphia market by "clustering" its operations in that region. The plaintiffs sought to certify a class under Federal Rule of Civil Procedure 23(b)(3), which requires that a court find that "the questions of law or fact common to class members predominate over any questions affecting only individual members." Plaintiffs had alleged four theories of antitrust injury from Comcast's conduct, but the court permitted only one of those to proceed. In support of class certification, the plaintiffs' damages expert provided testimony that calculated damages on the assumption that all four of plaintiffs' liability theories were valid, including the three that had been rejected by the court. The district court nonetheless found that the plaintiffs had met their burden to show classwide damages that were susceptible to a common method of proof on the ground that plaintiffs' model *could* support a classwide damages determination, and the Third Circuit affirmed. The court of appeals reasoned that Comcast's arguments amounted to an attack on the merits of the expert's methodology that was premature at the class certification stage.

In a 5-4 opinion authored by Justice Scalia, the Supreme Court reversed. The Supreme Court reasoned that "[b]y refusing to entertain arguments against respondents' damages model that bore on the propriety of class certification, simply because those arguments would also be pertinent to the merits determination, the Court of Appeals ran afoul of our precedents requiring precisely that inquiry." Even at the certification stage, the Court explained, a plaintiff's damages model must be "consistent with its liability case." Because the *Comcast* plaintiffs did not "tie" their damages model to their liability theory, the lower court erred in certifying the class. The Court rejected the Third Circuit's view that it was only necessary at the certification stage to determine that damages "will not require labyrinthine individual calculations." Under that logic, the Supreme Court noted, "any method of measurement is acceptable so long as it can be applied classwide, no matter how arbitrary the measurements may be."

The plaintiffs' bar may be tempted to seek solace in the dissent's contention that the decision was of limited significance because the *Comcast* plaintiffs had accepted the fundamental premise of the lower courts' opinions: that for common questions to predominate in the case before it, damages must be proven on a classwide basis through a common methodology. The dissent urged that the decision therefore did not call into question the rule "that a class may obtain certification under Rule 23(b)(3) when liability questions common to the class predominate over damages questions unique to class members." The dissent's skepticism notwithstanding, the majority opinion implies that questions of individual damages may be fatal to an attempt at class certification and that certification of a damages class requires a showing that all class members suffered the same injury.

*Comcast* is welcome news for class action defendants. It continues the Court's trend of requiring a more searching analysis of expert evidence at the certification stage. The decision makes crystal clear that courts may not certify on the basis of supposition and leave merits questions for resolution later. Rather, plaintiffs

must present compelling evidence in favor of certification, and courts must rigorously examine that evidence, even if that involves a review of the merits of the underlying claim.

If you have any questions or would like to learn more about the issues raised by the Court's decision, please contact your usual Ropes & Gray advisor. For the full text of the Supreme Court's decision in *Comcast Corp. v. Bebrend*, please [click here](#).