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A Year Later: Comcast's Impact On Antitrust Class Actions

Law360, New York (March 26, 2014, 12:55 PM ET) -- One year ago, on March 27, 2013, the U.S. Supreme Court issued its decision in Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013), overturning an order certifying an antitrust class action under Federal Rule of Civil Procedure 23(b)(3), which requires that questions of law or fact common to class members predominate over questions affecting only individual members.

The Supreme Court held that the plaintiffs' expert's damages model was unable to measure classwide damages attributable to the only theory of antitrust impact found viable by the district court. Because of this flaw in the damages model, individual damages calculations would overwhelm questions common to the class, and the class therefore could not be certified under Rule 23(b)(3).[1]

On remand, plaintiffs filed a new motion for class certification, slicing several years off the class period and limiting the geographic market to only five of the 18 counties in the Philadelphia area for which they originally sought certification.[2] The defendants opposed the motion and filed a new motion to exclude the opinions of plaintiffs' expert. The court then granted plaintiffs' unopposed request to stay the case while the parties conduct settlement discussions, which apparently are ongoing.[3]

It was not unexpected that class counsel in Comcast would narrow the class for which they sought certification, or that settlement discussions might take place after the Supreme Court's decision. But what effect is Comcast having on class certification in other antitrust cases? The answer is that in some cases courts have applied Comcast to deny certification and/or class counsel have chosen to limit the scope of their alleged classes or their theories of classwide impact and damages. In other cases, however, courts have certified classes or effectively certified liability-only classes under Rule 23(c)(4), leaving the question of damages for another day. Thus, Comcast provides a useful tool to attack Rule 23(b)(3) certification, but class counsel have been working diligently to try to blunt it.

Some Interesting Decisions

Class certification decisions in antitrust and nonantitrust cases since Comcast have generally fallen into three groups: (1) decisions applying Comcast and denying class certification because Rule 23(b)(3) was not satisfied;[4] (2) decisions distinguishing Comcast and finding Rule 23(b)(3) was satisfied;[5] and (3) decisions certifying a liability-only class under Rule 23(c)(4) ("[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues.").[6] See generally, e.g., Jacob v. Duane Reade Inc., 293 F.R.D. 578 (S.D.N.Y. 2013) (describing these groups of decisions), appeal pending, No. 13-cv-3873 (2d Cir.).

The following are some illustrative post-Comcast decisions in price-fixing, reverse payment and

compensation suppression cases.

Price-Fixing Cases

Decisions in price-fixing cases run the gamut from denying certification based on a flawed damages model to granting certification after reviewing expert reports.

The leading decision since Comcast is In re Rail Freight Fuel Surcharge Antitrust Litigation, in which a class of direct purchaser shippers alleged that they paid inflated shipping prices due to price fixing of fuel rate surcharges by four freight railroads.[7] The district court certified the class. On appeal, the defendants argued that plaintiffs' expert submitted a damages model that led to false positives, i.e., the model detected damages not just as to the purported class members, but also as to a control group of shippers that could not have been harmed because they were operating under legacy contracts that pre-dated the alleged conspiracy.[8]

The D.C. Circuit concluded that it had "no way of knowing the overcharges the damages model calculates for class members is any more accurate than the obviously false estimates it produces for legacy shippers."[9] Simply stated: "No damages model, no predominance, no class certification."[10] The court vacated the district court's order and remanded the case for reconsideration in light of Comcast, and the parties are filing supplemental briefs and expert reports regarding certification.[11] Rail Freight has prompted defense experts to focus on whether the plaintiffs' expert's damages model yields false positives or similar problems that may be fatal to certification.

The defendants' success in Rail Freight was not repeated in In re Cathode Ray Tube (CRT) Antitrust Litigation, where the court adopted the interim special master's (ISM) recommendation to certify a class of indirect purchasers, who allege that defendants engaged in a price-fixing conspiracy for cathode ray tubes used in televisions and computer monitors.[12] The ISM recommended certifying the class after accepting briefing directed to Comcast.[13]

The court adopted the ISM's recommendation in full, declining to conduct a "full-blown merits analysis," and ruling that Comcast did not "require[] putative class action plaintiffs to prove and calculate their damages at the class certification phase."[14] The Ninth Circuit denied the defendants' Rule 23(f) petition and the case is proceeding. The direct purchaser case, however, settled before the court ruled on that separate class certification motion; the order certifying the indirect purchaser class likely was a catalyst for settlement in the direct purchaser case.[15]

Given the different outcomes in cases such as Rail Freight and CRT, it is important to watch two pending appeals — In re Blood Reagents Antitrust Litigation, No. 12-4067 (3d Cir.), and In re Urethane Antitrust Litigation, 13-3215 (10th Cir.) — both of which were certified as class actions before Comcast was decided by the Supreme Court.

In Blood Reagents, the district court certified a class of direct purchasers who allege that defendants fixed prices of blood reagents.[16] The district court relied on the Third Circuit's decisions in Comcast and In re Hydrogen Peroxide Antitrust Litigation, 552 F.3d 305 (3d Cir. 2008), in ruling that the damages models "present[ed] a viable method of calculating damages using common proof," and that they could "evolve to become admissible evidence."[17]

In challenging certification on appeal, the remaining defendant argues that the district court's analysis did not comport with the Supreme Court's decision in Comcast, because it failed to address the

reliability of the direct purchasers' expert's opinion regarding damages and Rule 23(b)(3). Plaintiffs argue that the case is distinguishable because it involves only one theory of liability and one damages model, and Comcast requires only that a damages model be sufficiently linked to an accepted theory of liability. The parties submitted letters addressing the D.C. Circuit's decision in Rail Freight, and argument took place on Feb. 12, 2014.

In Urethane, the district court certified a class of direct purchasers of urethane chemicals.[18] The Tenth Circuit denied a Rule 23(f) petition and the case proceeded toward trial. In January 2013, just before trial, the remaining defendant filed a motion to decertify the class. Comcast came down in March 2013 and was addressed in the remaining briefing on the decertification motion. In May 2013 — after the jury rendered a verdict in favor of the class — the district court denied the motion to decertify the class, and that order is on appeal before the Tenth Circuit.[19]

One of the asserted grounds for decertification is that plaintiffs' expert (who is the same expert in Comcast) failed in his model (as in Comcast) to disaggregate damages resulting from two theories of liability — that defendants engaged in price fixing and also allocated customers and markets. Plaintiffs' response is that they abandoned their allocation theory at trial and the expert's testimony went to their price-fixing claim. The defendant's rejoinder is that what matters is that the models were designed to measure damages from both the alleged price fixing and customer/market allocation. Briefing on the appeal closed on March 7, and a hearing is currently set for mid-May, 2014.

Reverse Payment Cases

Two recent decisions in reverse payment cases suggest different approaches to class certification after Comcast. One decision certified a class of direct purchasers, but the other suggested Comcast might preclude class certification for end payors in certain circumstances.

In In re Nexium (Esomeprazole) Antitrust Litigation, the court certified a class of direct purchasers who alleged that drug manufacturers delayed the market entry of the generic version of the drug Nexium.[20] Defendants challenged plaintiffs' damages model for using average overcharge calculations, arguing Rule 23(b)(3) was not satisfied because individualized inquiries into what purchasers paid were necessary to determine damages.[21]

The court rejected the argument, finding that unlike the situation in Comcast, the direct purchasers advanced a single, classwide theory of harm, and that the proffered model showed that damages could be determined on a classwide basis.[22] The court noted that any necessary individualized inquiries could be addressed because precise sales data were readily available.[23]

In In re Skelaxin (Metaxalone) Antitrust Litigation, the court denied certification of classes of indirect purchasers and end payors of Skelaxin, which is the brand name of metaxalone, a muscle relaxant.[24] The purchasers alleged that they were overcharged due to delayed market entry of a generic form of metaxalone. The court denied certification without reaching Rule 23(b)(3)'s predominance test, but the court highlighted the potential impact of Comcast on plaintiffs' damages model for end payors, noting that after Comcast, "the damages model must be consistent with the theory of liability."[25]

According to the court, the end payors' expert's damages model included transactions with entities that should be excluded from the class because they did not purchase Skelaxin for their own consumption; that is, the model included transactions where a nonclass member paid some or all of the purported overcharge. The court stated that the "exact reach of Comcast ... is a matter of some controversy," but

"if Comcast is given its full breadth, the incongruity between End Payors' description of class membership and the entities included in its impact and damages model might defeat this proposed class."[26]

Compensation Suppression Cases

The following two cases applied Comcast in the context of alleged agreements to limit compensation paid to employees. Although the different training and skills of employees make it challenging to develop models for classwide impact and damages, in both cases the courts certified classes — but not without causing difficulties for class counsel.

In In re High-Tech Employee Antitrust Litigation, the court originally granted in part and denied in part plaintiffs' motion to certify a class of salaried employees of seven technology companies and an alternative class of salaried technical, creative and research and development employees of those companies (the "Technical Class"), based on allegations that the companies entered into "anti-solicitation agreements" to suppress salaries and wages.[27] The court concluded that the plaintiffs satisfied Rule 23(b)(3) with respect to liability and damages, but not as to classwide impact because the plaintiffs' evidence "may not be sufficient to show that all or nearly all Class members were affected by the anti-solicitation agreements."[28]

After conducting additional discovery, plaintiffs filed a supplemental motion for class certification based on the Technical Class — which was approximately 60 percent of the original two classes.[29] The court found that plaintiffs demonstrated classwide impact based on additional evidence and supplemental expert reports.[30] Defendants again attacked the sufficiency of the expert's damages model under Comcast.[31]

Among other things, defendants argued that the damages model's use of a single conduct variable for all defendants resulted in correlation analyses that "show[ed] that total compensation and changes in total compensation at Defendants diverged and sometimes moved in opposite directions."[32] The court bypassed this problem on the ground that using a single conduct variable, instead of a separate one for each defendant, "allowed [the expert] to produce a 'more coherent, more efficient model."[33] The court held that Rule 23(b)(3) was satisfied and certified the Technical Class. The Ninth Circuit denied a Rule 23(f) petition, and trial is set for May 27, 2014.

In In re VHS of Michigan Inc., the district court originally certified a class of registered nurses who allege that Detroit-area hospitals (1) conspired to suppress wages of the nurses (the "per se" claim), and (2) exchanged compensation-related information in a manner that reduced competition in the wages paid to nurses (the "rule of reason" claim).[34] In denying a Rule 23(f) petition, the Sixth Circuit instructed the district court to revisit its original decision in light of Comcast.[35]

The district court reinstated its original decision, rejecting the argument that plaintiffs' expert's damages model was like that in Comcast because, according to defendants, the model did not parse out a separate damages methodology for each of the two theories of liability.[36] The court reasoned that in Comcast the four theories of liability were complementary and overlapped, but in VHS the defendants did not establish that the per se and rule of reason theories of liability would bring about "separate and distinct harm" to class members, and that the expert's "calculation of damages reflects the aggregation of these distinct harms."[37]

Because the court previously had granted summary judgment to dispose of the per se claim, the

damages model could be used for the remaining rule of reason claim.[38] The court noted, however, that plaintiffs had not provided expert testimony as to whether either theory had actually caused or contributed to the harm the expert purported to measure, leaving plaintiffs with "thorny issues of proof" of causation at trial.[39]

Some Guidance for Counsel

There is no serious dispute that Comcast has had a significant effect in some antitrust class actions. In some cases, it has prompted courts to deny certification motions (e.g., Rail Freight, High-Tech Employees, and, potentially, Skelaxin). It also has prompted class counsel to seek certification of a narrower class (e.g., Comcast, High-Tech Employees), or caused them to submit limited expert reports that may fail to support causation (e.g., VHS of Michigan). But in some cases courts have certified classes after conducting what they would describe as "rigorous scrutiny" of plaintiffs' theories and models of classwide impact and damages (e.g., CRT, Nexium). So, what does all this mean for practitioners?

Individual judges, of course, have their own views regarding class actions and some amount of latitude whether to grant or deny certification. That said, one can expect class counsel to resist the temptation to make full-throated arguments in every case that class certification is business as usual on the ground that Comcast, Rail Freight and other cases are aberrational.

Rather, class counsel may be more circumspect in drafting new complaints, may be more measured in alleging the scope of the class, and may advance more limited theories of classwide impact and damages. Their experts undoubtedly are aware of the need to provide reports that are capable of disaggregating theories of classwide impact and damages, and to develop models that closely align with the theories counsel advance. And, of course, their models now are trying to avoid false positives or other problems that may prove fatal to class certification.

Defense counsel recognize that Comcast and its progeny provide bullets to attack class certification, but courts are not necessarily treating them as silver bullets. Defense counsel should press courts to conduct a full and rigorous Rule 23(b)(3) analysis of plaintiffs' experts' reports and models. In doing so, they should explain that proving classwide injury and damages in antitrust cases is more complicated than in many other cases, and the court needs to delve into the facts and economic analysis in the case before the court, as well as in cases that both sides rely upon.

This is particularly true in cases involving varying relationships among class members and defendants, extended distribution systems for allegedly affected products, allegations of intermittent anti-competitive conduct, and cases involving multiple theories of anti-competitive conduct or liability to which classwide injury and damages are allegedly linked.

One thing we all can be sure of: Class counsel and defense counsel will use the facts, circumstances and analyses in these decisions — and the coming decisions in Rail Freight, Blood Reagents and Urethane — to bolster their arguments in support of, or against, class certification.

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[1] For a refresher on Comcast, see Six Months Since Comcast: What Do Recent Decisions Mean for Antitrust Practitioners, Orrick's Antitrust and Competition Newsletter (Oct. 1, 2013), available at http://www.orrick.com/Events-and-Publications/Pages/Six-Months-Since-Comcast-What-Do-Recent-Decisions-Mean-For-Antitrust-Practitioners.aspx.

[2] See Glaberson v. Comcast Corp., No. 03-6604 (E.D. Pa. Aug. 19, 2013), ECF No. 560.

[3] Id., ECF Nos. 581, 589, 591.

[4] E.g., Parko v. Shell Oil Co., 739 F.3d 1083 (7th Cir. 2014) (Posner, J.) (reversing district court order certifying Rule 23(b)(3) class in groundwater contamination case); Halvorson v. Auto-Owners Ins. Co., 718 F.3d 773 (8th Cir. 2013) (reversing district court order certifying Rule 23(b)(3) class of policyholders who brought breach of contract and bad faith claims against their insurer); Chieftain Royalty Co. v. XTO Energy, Inc., 528 F. App'x 938 (10th Cir. 2013) (vacating order certifying Rule 23(b)(3) class in case alleging defendant underpaid royalties for fuel extraction); Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc., 725 F.3d 1213 (10th Cir. 2013) (same); see also Carrera v. Bayer Corp., 727 F.3d 300 (3d Cir. 2013) (citing Comcast as an additional reason to deny Rule 23(b)(3) certification).

[5] E.g., Levaya v. Medline Indus., Inc., 716 F.3d 510 (9th Cir. 2013) (instructing district court to enter an order certifying a class in an unpaid wages case); In re US Foodserv. Inc. Pricing Litig., 729 F.3d 108 (2d Cir. 2013) (affirming class certification order in a fraudulent billing practices case).

[6] E.g., In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig., 722 F.3d 838 (6th Cir. 2013) (certifying a liability-only class under Rule 23(c)(4)), cert. denied, 82 U.S.L.W. 3491 (Feb. 24, 2014); Butler v. Sears, Roebuck and Co., 727 F.3d 796 (7th Cir. 2013) (same), cert. denied, 82 U.S.L.W. 3491 (Feb. 24, 2014); In re Deepwater Horizon, 739 F.3d 790 (5th Cir. 2014) (same).

[7] 725 F.3d 244 (D.C. Cir. 2013).

[8] Id. at 252-53.

[9] Id. at 254.

[10] Id. at 253.

[11] In re Rail Freight Fuel Surcharge Antitrust Litig., MDL No. 1869, 07-mc-00489 (D.D.C. Oct. 31, 2013), ECF No. 694.

[12] MDL No. 1917, 07-cv-5944, 2013 U.S. Dist. LEXIS 137946 (N.D. Cal. Sept. 19, 2013).

[13] In re CRT Antitrust Litig., MDL No. 1917, 07-cv-5944 (N.D. Cal. June 20, 2013), ECF No. 742.

[14] In re CRT Antitrust Litig., 2013 U.S. Dist. LEXIS 137946, at *79, *82.

[15] In re CRT Antitrust Litig., MDL No. 1917, 07-cv-5944 (N.D. Cal. Mar. 10, 2014), ECF No. 2430.

[16] 283 F.R.D. 222 (E.D. Pa. 2012).

[17] Id. at 244-45.

[18] 251 F.R.D. 629 (D. Kan. 2008).

[19] In re Urethane Antitrust Litig., No. 13-3215 (10th Cir.).

[20] 296 F.R.D. 47 (D. Mass. 2013).

[21] Id. at 59.

[22] Id.

[23] Id.

[24] No. 1:12-md-2343, 2014 U.S. Dist. LEXIS 11467 (E.D. Tenn. Jan. 30, 2014).

[25] Id. at *56.

[26] Id. at *63-64.

[27] 289 F.R.D. 555 (N.D. Cal. 2013).

[28] Id. at 576.

[29] In re High-Tech Employee Antitrust Litig., No. 11-cv-02509, 2013 U.S. Dist. LEXIS 153752, *23-26 & n.5, *32 (N.D. Cal. Oct. 24, 2013).

[30] Id. at *68-167.

[31] Id. at *167-177.

[32] Id. at *174.

[33] Id. at *175.

[34] Cason-Merenda v. VHS of Mich. Inc., No. 06-15601, 2013 U.S. Dist. LEXIS 131006 (E.D. Mich. Sept. 13, 2013).

[35] In re VHS of Mich. Inc., No. 13-0113, 2014 U.S. App. LEXIS 4447 (6th Cir. Jan. 6, 2014).

[36] Cason-Merenda v. VHS of Mich. Inc., No. 06-15601, 2014 U.S. Dist. LEXIS 29447 (E.D. Mich. March 7, 2014).

[37] Id. at *17.

[38] Id. at *12-13, *22-24.

[39] Id. at *20-21 & n.5. In In re NCAA Student-Athlete Name & Likeness Licensing Litigation, the court declined to certify a Rule 23(b)(3) subclass of student-athletes seeking monetary damages, because plaintiffs had not proffered any feasible method of determining which student-athletes actually appeared in televised game footage or were depicted in video games. No. C 09-1967, 2013 U.S. Dist. LEXIS 160739 (N.D. Cal. Nov. 8, 2013). Although the court described this an "obstacle[] to manageability" under Rule 23(b)(3), id. at *40, it could be described as a failure to provide models demonstrating classwide impact and damages sufficient to satisfy Comcast.
