Certification in the Age of Comcast: What's Next?

CLE Roundtable Discussion

Moderators: Alex Bomstein, Pepper Hamilton LLP

Ria Momblanco, Fine, Kaplan and Black, R.P.C.

Faculty: Paul H. Saint-Antoine, Drinker Biddle

Eric L. Cramer, Berger & Montague, P.C.

General trend: Tightening the standards for class certification

- *In re Hydrogen Peroxide Antitrust Litig.*
- *Wal-Mart v. Dukes*
- *Genesis HealthCare*
- *Amgen* (an outlier)

In re Hydrogen Peroxide Antitrust Litigation

552 F.3d 305 (3d Cir. 2008)

- Evidence from damages experts at the class certification stage requires more than just a threshold showing;
- Like all evidence presented at class certification hearings, expert reports and testimony must undergo a rigorous analysis before being accepted.

Wal-Mart v. Dukes
131 S. Ct. 2541 (2011)

- To demonstrate commonality under Rule 23(a), plaintiffs must show more than just common questions
- Plaintiffs must show that there are no "'[d]issimilarities within the proposed class' that 'have the potential to impede the generation of common answers'"
- "Rigorous analysis" must be applied.

Genesis Healthcare
133 S. Ct. 1523 (2013)

- Not a Rule 23 case
- A collective action claim under the FLSA, which allows individuals to bring a private cause of action on their own and others' behalf, is no longer justiciable when the lone plaintiff's individual claim becomes moot.

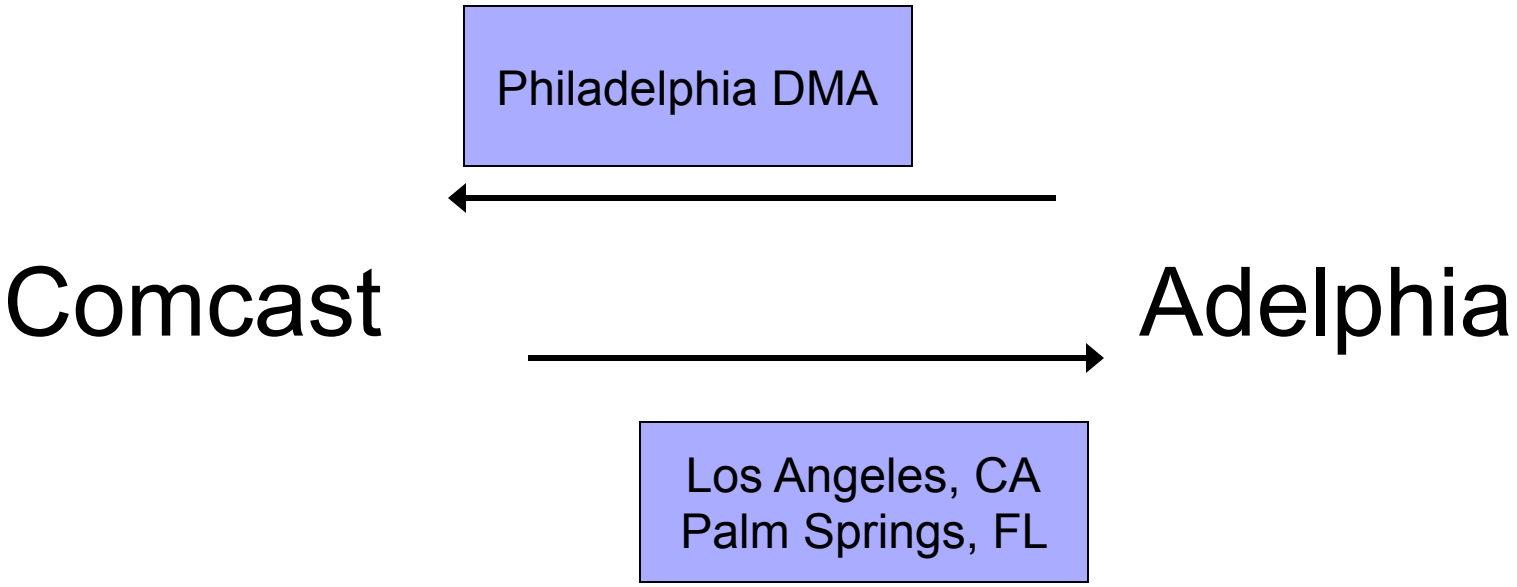
Amgen v. Connecticut Retirement Plans & Trust Funds
133 S. Ct. 1184 (2013)

- In a securities class action proceeding on a fraud-on-the-market theory, materiality need not be proven at the class certification stage to satisfy Rule 23(b)(3) predominance.

Comcast Corp. v. Behrend
133 S. Ct. 1426 (2013)

- The Parties
  - Defendants: Comcast and its subsidiaries
  - Putative class: All cable TV customers in Comcast's Philadelphia "cluster" who subscribed from Comcast at any time from 1999 to the present
    - Philadelphia "cluster" = 16 counties within Pennsylvania, Delaware, and New Jersey

- 1998 – 2007: Comcast engaged in "clustering" or "swap" transactions



- Clustering resulted in elimination of competition and supra-competitive pricing in the Philadelphia DMA.

- In support of class certification, Plaintiffs proffered four theories of antitrust impact
  - Profitable for Comcast to withhold local sports programming from local competitors
  - Reduction in “overbuilder” competition
  - Reduction in “benchmark” competition
  - Increased bargaining power relative to content providers

    = increased cable subscription rates in the Philadelphia DMA

- E.D. Pa. certified class based upon only one of the theories proffered by Plaintiffs:

  - Reduction in “overbuilder” competition

= increased cable subscription rates in the Philadelphia DMA

- Plaintiffs' damages expert (Dr. McClave):
  - "but for" multiple regression analysis
  - damages ~ $875 million
  - model did not isolate damages resulting from any one theory of impact

- E.D. Pa. - class certification granted

  264 F. R. D. 150 (E.D. Pa. 2010)

- Comcast appealed:
  - Damages model failed to calculate the damages resulting solely from the decrease in overbuilder competition

- Third Circuit – affirmed

  655 F. 3d 182 (3d Cir. 2011)

  - "attac[k] on the merits of the methodology [had] no place in the class certification inquiry."
  - "[a]t the class certification stage," respondents were not required to "tie each theory of antitrust impact to an exact calculation of damages."

- U.S. Supreme Court – granted writ of certiorari

  133 S. Ct. 24 (2012)

- Limited to the following question:

  "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."

- U.S. Supreme Court – granted writ of certiorari

  133 S. Ct. 24 (2012)

- Limited to the following question:

  "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."

- Emphasis appeared to be on *Daubert*

- Supreme Court - reversed:
  - Courts must apply a “rigorous analysis” when determining whether the requirements of Rule 23 are met
  - Courts must consider the merits of a plaintiff’s underlying claim to the extent that the merits overlap with the Rule 23 analysis
  - At the class-certification stage, damages calculations need not be exact, but “any model supporting a ‘plaintiff’s damages case must be consistent with its liability case, particularly with respect to the alleged anticompetitive effect of the violation.’”

"' The first step in a damages study is the translation of the ***legal theory of the harmful event*** into an analysis of the economic impact ***of that event***.' "

(quoting Fed. J. Ctr., *Ref. Man'l on Sci. Evid.* 432 (3d ed. 2011) (emphasis added in S.Ct. opinion))

- Dissent:
  - Writ was improvidently granted:
    - Question on appeal focused on whether the *Daubert* standard for admissibility apply in class-certification proceedings
    - Comcast failed to preserve a claim of error with respect to admissibility of expert testimony

"The Court's ruling is for this day and case only. In the mine run of cases, it remains the 'black letter 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."

(Ginsburg and Breyer, JJ., dissenting)

"Incautiously entering the fray at this interlocutory stage, the Court sets forth a profoundly mistaken view of antitrust law."

(Ginsburg and Breyer, JJ., dissenting)

"We are particularly concerned about the matter because the Court, in reaching its contrary conclusion, makes broad statements about antitrust law that it could not mean to apply in other cases."

(Ginsburg and Breyer, JJ., dissenting)

"Dr. McClave's model does not purport to show precisely ***how*** Comcast's conduct led to higher prices in the Philadelphia area. It simply shows ***that*** Comcast's conduct brought about higher prices. And it measures the amount of subsequent harm."

(Ginsburg and Breyer, JJ., dissenting)
(emphasis in original)

Q & A