

Comcast Corp. v. Behrend:
The Supreme Court holds that Rule 23(b)(3) class certification
requires consistent proof of predominance with respect to liability and damages

In a 5-to-4 decision, the Supreme Court held in *Comcast Corp. v. Behrend* that class certification under Rule 23(b)(3) of the Federal Rules of Civil Procedure (“Rule 23(b)(3)”) requires courts to engage in a “rigorous analysis” to determine that plaintiffs have sufficiently demonstrated that both liability and damages are capable of proof on a classwide basis and that although damages calculations offered at this stage need not be exact, they must be “consistent” with the theory of liability offered by plaintiffs.¹

I. Procedural History

Current and former customers of cable television company Comcast Corporation (“Comcast”) brought a class-action antitrust suit against Comcast for violations of the Sherman Act arising out of Comcast’s “clustering” activities in the Philadelphia, Pennsylvania market which allegedly eliminated competition and held prices for cable services above competitive levels.²

Plaintiffs sought class certification under Rule 23(b)(3) proposing four theories of antitrust impact that could be proven on a classwide basis: (1) Comcast’s clustering practices made it profitable to withhold local sports programming from competitors which resulted in decreased market penetration by direct broadcast satellite providers; (2) Comcast’s clustering practices reduced competition from “overbuilders” (companies that normally build competing networks in areas where existing companies already operate); (3) the clustering reduced the level of “benchmark” competition (used by consumers to compare prices); and (4) the clustering allowed Comcast to gain bargaining power relative to content providers. To establish that damages could be calculated on a classwide basis, Plaintiffs submitted testimony of an expert witness, who provided a regression model comparing actual cable prices in the Philadelphia area with hypothetical prices that would have existed but for Comcast’s allegedly anticompetitive activities. The district court certified the class on the basis of Plaintiffs’ “overbuilder” theory of antitrust impact, which the court found was capable of classwide proof, and determined that damages resulting from the overbuilder-deterrence could be calculated on a classwide basis as demonstrated by the regression model submitted by Plaintiffs’ expert.³

Comcast appealed the district court’s certification order, arguing that certification was improper because Plaintiffs failed to demonstrate that the damages allegedly arising from the overbuilder theory of antitrust impact were capable of measurement on a classwide basis, noting that Plaintiffs’ damages expert was only able to calculate damages arising from the four antitrust impact theories generally, and “failed to attribute damages resulting from overbuilder deterrence, the only theory of injury remaining in the case.”⁴ The Third Circuit affirmed the certification order of the district court, holding that Comcast’s argument amounted to an improper “attac[k] on the merits of the methodology” offered by Plaintiffs, which had “no place in the class certification

¹ *Comcast Corp. et al. v. Behrend et al.*, 569 U.S. ___ (2013), No. 11–864, slip op. (Mar. 27, 2013) at 6–7. Citations to the Court’s opinion are to the slip opinion available at http://www.supremecourt.gov/opinions/12pdf/11-864_k537.pdf.

² Plaintiffs alleged that Comcast pursued a “clustering strategy” in which the company concentrated its operations within a certain region by purchasing competing cable companies and swapping its systems outside the region for competitor systems located in the region. *See Id.* at 1–2.

³ *Id.* at 2–3.

⁴ *Id.* at 4.

inquiry.”⁵ The Third Circuit explained that at the class certification stage, Plaintiffs were not required to “tie each theory of antitrust impact to an exact calculation of damages” and need only “assure [the court] that if they can prove antitrust impact, the resulting damages are capable of measurement and will not require labyrinthine individual calculations.”⁶ Because the Plaintiffs’ damages model calculated “supra-competitive prices regardless of the type of anticompetitive conduct,” the Third Circuit found that Plaintiffs had satisfied their burden of demonstrating damages were measureable on a classwide basis.⁷

Comcast appealed. The Supreme Court granted certiorari on 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.”⁸

The Supreme Court answered this question in the negative.

II. The Supreme Court’s Decision

In a decision delivered by Justice Scalia, the Court reversed the decision of the Third Circuit Court of Appeals, holding that class certification was improperly granted under Rule 23(b)(3) because the district court failed to conduct a proper analysis to satisfy itself that the damages alleged under Plaintiffs’ overbuilder theory of antitrust impact were capable of measurement on a classwide basis.

Rule 23(b)(3) requires a court to find that “the questions of law or fact common to class members predominate over any questions affecting only individual members.”⁹ The Court explained that Rule 23 is not a “mere pleading standard.” Rather, a party seeking certification must “satisfy through evidentiary proof” the requirements set forth under Rule 23.¹⁰ As with Rule 23(a), which requires “rigorous analysis” for the trial court to determine that the prerequisites have been satisfied, and which “frequently entail[s] ‘overlap with merits of the plaintiff’s underlying claim,’” Rule 23(b)(3) is governed by the “same analytical principles” but has an even “more demanding” predominance criteria than Rule 23(a) as well as Rules 23(b)(1) and (2).¹¹

To satisfy Rule 23(b)(3) with respect to damages, courts must perform a “rigorous analysis” to determine that the evidence supporting a plaintiff’s damages case is “consistent with its liability case, particularly with respect to the alleged anticompetitive effect of the violation.”¹² Although “[c]alculations need not be exact,” evidence of damages “must measure only those damages attributable to that theory.”¹³

Applying this framework, the Court held that the Third Circuit “ran afoul of our precedents” by “refusing to entertain arguments against [Plaintiffs’] damages model that bore on the propriety of class certification, simply

⁵ *Id.*

⁶ *Id.* at 4-5.

⁷ *Id.* at 5.

⁸ *Id.* at 5, note 4.

⁹ *Id.* at 6 (quoting Rule 23(b)(3)).

¹⁰ *Id.* at 5.

¹¹ *Id.* at 6 (internal citations omitted).

¹² *Id.* at 7-8 (internal citations omitted).

¹³ *Id.* at 7.

because those arguments would also be pertinent to the merits determination.”¹⁴ In rejecting the Third Circuit’s conclusion that merits had “no place in the class certification inquiry,” the Court explained that this reasoning “flatly contradicts our cases requiring a determination that Rule 23 is satisfied, even when that requires inquiry into the merits of the claim.”¹⁵ Additionally, the Court opined that the Third Circuit’s refusal to decide “whether the [Plaintiffs’ damages] methodology [was] a just and reasonable inference or speculative” effectively reduced Rule 23(b)(3)’s predominance requirement to a “nullity” because such logic would allow class certification under “any method of [damages] measurement . . . so long as it can be applied classwide, no matter how arbitrary the measurements may be.”¹⁶

Noting that Plaintiffs’ expert expressly admitted that the damages model calculated damages arising generally from “the alleged anticompetitive conduct as a whole” and “did not attribute damages to any one particular theory of anticompetitive conduct,” the Court concluded that “it is clear that . . . [Plaintiffs’] model falls far short of establishing that damages are capable of measurement on a classwide basis” because it “failed to measure damages resulting from the particular antitrust injury on which [Defendants’] liability in this action is premised.”¹⁷ As such, the Court concluded that Plaintiffs’ class action was improperly certified under Rule 23(b)(3).

III. The Dissent

The dissenting justices focused their opinion on the majority’s holding that Rule 23(b)(3) requires a showing that damages attributable to a classwide injury be measurable on a classwide basis, noting that “[r]ecognition that individual damages calculations do not preclude class certification under Rule 23(b)(3) is well nigh universal.”¹⁸ Rather, the dissent argued, Rule 23(b)(3) is meant to “‘tes[t] whether proposed classes are sufficiently cohesive to warrant adjudication by representation,’ but it scarcely demands commonality as to all questions.”¹⁹ The dissent argued that this is particularly the case “when adjudication of questions of liability common to the class will achieve economies of time and expense . . . even if damages are not provable in the aggregate.”²⁰ In such instances the class could be divided into subclasses for adjudication of damages, or a class might be certified for liability purposes only, leaving individual damages calculations for subsequent proceedings. As such, the dissent concluded, the majority’s ruling “is good 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.”²¹

IV. Significance of the Decision

The Court’s decision imposes a heightened standard for class certification under Rule 23(b)(3) by requiring a showing that both liability and damages are capable of measurement on a classwide basis and that the evidence of each is “consistent” with one another such that particular damages flowing from a particular theory of liability are capable of classwide proof and measurement. The Court’s decision also makes clear that courts’ class

¹⁴ *Id.* at 6-7.

¹⁵ *Id.* at 8.

¹⁶ *Id.* [emphasis in original].

¹⁷ *Id.* at 7-9.

¹⁸ Ginsburg, J., Breyer, J., Sotomayor, J., Kagan, J. dissenting, Dissent at 4.

¹⁹ *Id.*

²⁰ *Id.*

²¹ Dissent at 5.

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certification analyses should not be hampered by a hesitance to address issues of “merits” to the extent consideration of such issues is necessary to the class certification determination.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Jon Mark at 212.701.3100 or jmark@cahill.com; John Schuster at 212.701.3323 or jschuster@cahill.com; or Christine Mott at 212.701.3015 or cmott@cahill.com.

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