

Supreme Court Makes Certification of Damages Classes More Difficult

The Supreme Court, in a significant ruling that further heightens the requirements for class certification after the Court's 2011 landmark ruling in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), held on March 27 that, in order to certify a class seeking damages under Rule 23(b)(3), plaintiffs must demonstrate that damages are provable on a classwide basis with common proof, such that individual damages assessments will not overwhelm the litigation. *Comcast Corp. v. Behrend*, No. 11-864, 2013 U.S. LEXIS 2544 (Mar. 27, 2013).

Practical Significance

The Court's decision in *Comcast* will make it more difficult to obtain certification of damages classes. Justice Scalia's opinion makes clear that the rigorous analysis *Wal-Mart* requires applies to all claims for relief at the class certification stage and that this review includes not just examination of the elements of liability, but plaintiffs' damages theories as well. In particular, if damages cannot be determined with a mathematical formula (e.g., the amount of overcharge in a price-fixing case) or by review of undisputed documents (e.g., records showing the number of shares of stock and the date and price of purchase in a securities fraud case), and, instead, require individual inquiries of class members, sellers or others, it is unlikely that plaintiffs can meet their burden of establishing the requirements for certification of a Rule 23(b)(3) damages class.

Analysis

In *Comcast*, a putative class of more than two million cable television subscribers claimed that a series of transactions concentrating operations within a particular region constituted monopolization and attempted monopolization in violation of Sections 1 and 2 of the Sherman Act under any one of four theories of harm. Although the district court had held that only one of the plaintiffs' antitrust injury theories was legally viable, Plaintiffs' expert submitted a damages model in support of their class certification motion that did not isolate damages resulting from that theory. Instead, the model compared "actual prices in the [geographic market] with hypothetical prices that would have prevailed but for" all of Comcast's allegedly anticompetitive practices, including those the district court rejected as not a basis for antitrust injury. The district court nevertheless certified the class, a decision that the Third Circuit affirmed.

In a 5-4 opinion by Justice Scalia – the author of *Wal-Mart* – the Supreme Court reversed. The Court reiterated that *Wal-Mart* held that the plaintiff "must," *inter alia*, "satisfy through evidentiary proof" that "'the questions of law or fact common to class members predominate over any questions affecting only individual members'" and that this requires "a rigorous analysis," which "will frequently entail 'overlap with the merits of the plaintiff's underlying claim.'" (Quoting Fed. R. Civ. P. 23(b)(3) and *Wal-Mart*, 131 S. Ct. at 2551). Justice Scalia further explained that the Court of Appeals' refusal "to entertain arguments against respondents' damages model ... simply because those arguments would also be pertinent to the merits determination ... ran afoul of our precedents requiring precisely that inquiry."

Applying that standard in this case, the Court held that because plaintiffs' damages model did not "measure only those damages attributable" to "the only theory of antitrust impact accepted for class-action treatment by the District Court," "it cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3)."

The Court also deemed irrelevant the question whether Comcast had waived its objection to the evidentiary admissibility of plaintiffs' damages model, holding that certification was nonetheless "improper because [plaintiffs] had failed to establish that damages could be measured on a classwide basis" and that "[t]hat is the question we address here."

Finally, the Court emphasized that, in order to satisfy the requirement of Rule 23(b)(3) that common issues "predominate," plaintiffs must establish that damages as well as the elements of liability can be proved with classwide evidence: "Without presenting another methodology, [plaintiffs] cannot show Rule 23(b)(3) predominance: Questions of individual damage calculations will inevitably overwhelm questions common to the class."

In a joint opinion for the four-justice dissent, Justices Ginsburg and Breyer argued that the ruling "breaks no new ground on the standard for certifying a class action" and "should not be read to require, as a prerequisite to certification, that damages attributable to a classwide injury be measurable 'on a classwide basis.'" As explained above, as a practical matter, it is difficult to read the majority opinion any other way.

Authors [Saul P. Morgenstern](#), [Kerry Alan Scanlon](#) and [Richard A. De Sevo](#) are lawyers in Kaye Scholer's Class Actions Practice. For more, visit our [website](#).

Chicago Office
+1.312.583.2300

Frankfurt Office
+49.69.25494.0

London Office
+44.20.7105.0500

Los Angeles Office
+1.310.788.1000

New York Office
+1.212.836.8000

Palo Alto Office
+1.650.319.4500

Shanghai Office
+86.21.2208.3600

Washington, DC Office
+1.202.682.3500

West Palm Beach Office
+1.561.802.3230

Copyright ©2011 by Kaye Scholer LLP. All Rights Reserved. This publication is intended as a general guide only. It does not contain a general legal analysis or constitute an opinion of Kaye Scholer LLP or any member of the firm on the legal issues described. It is recommended that readers not rely on this general guide but that professional advice be sought in connection with individual matters. References herein to "Kaye Scholer LLP & Affiliates," "Kaye Scholer," "Kaye Scholer LLP," "the firm" and terms of similar import refer to Kaye Scholer LLP and its affiliates operating in various jurisdictions.