And the Correct Standard Is …
Comcast v. Behrend's "Clarification" of the Standard for Class Certification

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Since the Supreme Court granted *certiorari* in *Comcast v. Behrend*, class action watchers eagerly awaited the next installment in the "clarification" of the proper standard for determining when and if class treatment is warranted. If anything, *Comcast* seems to have muddied the waters. An example of the confusion is *Leyva v. Medline Ind., Inc.*, No. 11-56849, 2013 WL 2306567 (9th Cir. May 28, 2013).

The putative class in *Leyva* is a group of current and former hourly employees in defendant's distribution warehouses that distributed the company's medical products. Plaintiffs alleged that defendant violated the California Labor Code, California Industrial Commission Wage Order 1-2001, and California's Unfair Business Practices Law. 2013 WL 2306567 at *1.

The District Court, citing *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2551 (2011), denied class certification on the ground that "the damages inquiry will be highly individualized." *Leyva*, 2013 WL 2306567 at *2.[1] Thus, as the Ninth Circuit characterized the District Court's ruling, individual questions predominated over common questions. *Id.* at *3.

The Ninth Circuit reversed. It did not simply rule that the District Court abused its discretion with regard to the finding; rather, it held that the court "*applied the wrong standard*" in reaching its conclusion. *Leyva*, 2013 WL 2306567 at *3 (emphasis supplied). Specifically, "[t]he only individualized factor that the district court identified was the amount of pay owed." *Id.* Quoting *Yokoyama v. Midland Nat'l Bank Ins. Co.*, 594 F.3d 1087, 1094 (9th Cir. 2010), the court declared that "[i]n this circuit … damage calculations alone cannot defeat certification."

The question of whether this is, in fact, the appropriate "standard" may be an open question in light of *Comcast*. Certainly the dissent in *Comcast* agrees with the Ninth Circuit's reading of the standard, noting that "[r]ecognition that individual damages calculations do not preclude class certification under Rule 23(b)(3) is well-nigh universal." 133 S.Ct. at 1437. The majority opinion, however, casts some doubt on that pronouncement.

For those not yet familiar with *Comcast*, the issue discussed by the majority is whether the damages model proffered by plaintiffs' expert was viable because it calculated damages based on four theories of

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[1] The District Court also held that "because of the size of the class, 'alternative methods for resolving this dispute are superior because of the likely difficulties in managing this case as a class action.'" *Id.* This article discusses only the first part of the decision concerning the damages issues.

liability, and the district court struck all but one of those theories. Neither the district nor the appellate court had looked at whether the model adequately calculated damages based on the one remaining liability theory because, as the Third Circuit noted, "such an attac[k] on the merits of the methodology [had] no place in the class certification inquiry." 133 S.Ct. at 1431 (quoting *Behrend v. Comcast Corp.*, 655 F.3d 182, 207 (3rd Cir. 2011) (bracketed material in 133 S.Ct. at 1431). The Supreme Court reversed the grant of class certification, criticizing the lower courts' view that they need not challenge the damages analysis "because those arguments would also be pertinent to the merits determination…." 133 S.Ct. at 1432-33. To the contrary, the Court held, the refusal to analyze the damages model "ran afoul of precedents requiring precisely that inquiry." *Id.* at 1433. When the damages model was properly analyzed, the majority held that class certification could not be maintained because "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class." 133 S.Ct. at 1433.

The dissent starkly identifies the issue that puts the standard regarding damages in question, noting that, "[i]n 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." Certainly the dissent took care to note that "the decision should not be read to require, as a prerequisite to certification, that damages attributable to a classwide injury be measurable 'on a class-wide basis.'" 133 S.Ct. at 1436 (quoting *id.* at 1431-32). The Ninth Circuit in *Leyva* took the dissent at its word and followed its own precedent to that effect.

The dissent in *Comcast* also attempted to limit the ruling to "this day and case only." 133 S.Ct. at 1437. Whether this was the intent of the majority remains to be seen. Since *Comcast* was decided, the Court has vacated and remanded two products cases in which certification was granted "in light of" the *Comcast* decision. See *Whirlpool Corp. v. Glazer*, 133 S.Ct. 1722 (2013); *Sears Roebuck & Co. v. Butler,* No. 12-1067 (U.S. June 3, 2013). While these subsequent rulings do not necessarily indicate that the Court believes the appellate courts -- in this case the Sixth and Seventh Circuits -- got it wrong, it does suggest that predominance with regard to injury, and perhaps even with regard to damages, may not get the easy pass once afforded putative class plaintiffs.

About the Author

Ms. McCallion is a partner in the firm's Litigation and Arbitration practice group. She is a graduate of Yale Law School, where she served as a Lead Editor of the Yale Journal on Regulation. She has substantial trial and arbitration experience and has litigated a broad array of complex commercial disputes, with an emphasis on products liability, patent and trademark litigation, and international arbitration. She formerly practiced at Debevoise & Plimpton.

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