7 Lessons From 1st Year Of Decisions Under Comcast

Law360, New York (March 21, 2014, 11:56 AM ET) -- On March 27, 2013, the U.S. Supreme Court dropped a depth charge into the deep waters of class action practice with its decision in Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013). After a year of practice under Comcast, we are beginning to see where the shock waves hit, as courts and litigants try to draw up rules that give meaning to the Supreme Court's holding without eliminating Rule 23(b)(3) class actions entirely.

The court originally took Comcast to decide whether the Daubert standard applies to expert testimony at the class certification stage. Instead, the court decertified an antitrust class on the basis of two related flaws in the damages model offered by the plaintiffs' expert: (1) the model failed to show that damages could be determined on a common basis across the class and (2) the model failed to match the plaintiffs' theory of liability — it included three theories of antitrust injury the plaintiffs were no longer pursuing at the class certification stage, and did not separately categorize the harm from each.

We can draw seven lessons from the first year of decisions under Comcast:

1. The courts are still working this out.

Thus far, two circuits (the D.C. and Seventh) have found that Comcast barred the certification of a class due to insufficient proof of common damages or injury; the Third Circuit has also cited Comcast as support for denying class certification on grounds that the plaintiffs failed to provide a working model for ascertaining the membership in the class.[1] Five circuits (the Second, Sixth, Seventh, Ninth and — in a challenge to a settlement class — the Fifth) have rejected Comcast challenges.[2] District courts have likewise reached differing results. While most of these decisions can be reconciled based on their differing facts, they have yet to set forth a clear and consistent rule of decision.

2. Comcast isn't just for antitrust cases.

While Comcast's biggest immediate impact has been in the antitrust area, courts have also denied certification in consumer fraud, securities, insurance, property damage and wage-and-hour class actions.[3] The federal courts have not embraced any limitation of Comcast's requirements to antitrust law.

3. Mismatches matter, but Comcast goes further.

The court in Comcast highlighted the fact that the expert's report incorporated four categories of damages, only one of which was still part of the plaintiffs' claims at the time they sought certification. Comcast has intensified scrutiny of the match between the claims and the damages and the need to separately enumerate how damages would be computed for particular claims, but it has also been applied more broadly to

the commonality of injury and damages where no “mismatch” issue was presented.

4. Comcast requires the plaintiffs to produce a workable damages model.

The immediate procedural impact of Comcast is that plaintiffs bear the initial burden to explain and demonstrate, as a practical matter, how they will determine damages if they prevail on liability. As the D.C. Circuit in In re Rail Freight Fuel Surcharge Antitrust Litigation pithily explained, “No damages model, no predominance, no class certification.”[4] This increases the burden on plaintiffs at the certification stage, given that courts before Comcast often considered damages to be irrelevant as an obstacle to class certification, and were rarely troubled if the plaintiffs offered no model up front for computing damages.

5. Courts are more likely to deny certification where the proposed damages model fails to exclude plaintiffs who were not injured.

While scrutiny of damages models under Comcast extends to wide variations in the recoverable damages, courts are most likely to deny certification under Comcast where the damages model fails to exclude “false positive” class members — i.e., members who would be included in the class definition, but who actually suffered no damages. Courts may also consider whether the damages model fails to consider intervening causes or other factors that may preclude any class member from being damaged, especially if such causes may affect different plaintiffs differently.

For example, the Seventh Circuit in Parko v. Shell Oil cautioned that the district court “should have examined the realism of the plaintiffs’ injury and damages model” where the defendants argued that the plaintiffs’ homes may have lost value due to declining real estate values rather than groundwater contamination, and that the contamination may not even have infected the water supply.[5] By contrast, in many of the cases where classes have been certified over a Comcast challenge, the courts have stressed that the only issue was variation in the amount of damages, not the presence of uninjured class members.

6. Comcast may increase scrutiny of class conflict and the ascertainability of class definitions.

The need to spell out how damages will be claimed by different members of the class exposes plaintiffs to more challenges on other class certification requirements, such as conflicting interests among class members and difficulties in ascertaining who is properly in the class without fact-intensive individual proceedings. Class conflicts will often be easier for defendants to identify and raise with the court after examining a damages model that illustrates how the interests of class members may diverge. And ascertainability problems that were not previously apparent may be created if a damages model tries to fix “false positive” damages issues by including only people who can be included in the class after some aspects of their claims are individually examined.[6]

7. Liability-only classes may solve some problems presented by Comcast, but are not a panacea.

Some courts have followed the Comcast dissenters' suggestion and explored partial certification limited to liability issues under Rule 23(c)(4).[7] But there are practical obstacles to use of partial certification. First, it may not be acceptable under the law of all circuits; even before Comcast, there was a split among the circuits regarding the situations in which classes could be certified only as to particular issues.[8]

Second, issue certification does not resolve ascertainability issues, as the class definition still needs to exclude class members who suffered no injury at all and still needs to be based on some objectively determinable criteria — and if it fails to do so, this can create intractable management problems for the district court later.

Third, damages may not, in every case, be separable from issues such as reliance, materiality, proximate causation and the reasonableness of the defendant's conduct under a contract or tort duty. If the liability and damages phases ask fact-finders to resolve overlapping questions about causation, that presents potential constitutional issues. The Seventh Amendment bars successive fact-finders from revisiting the same issue, so bifurcation is only available where the court can "carve at the joint" in separating parts of the case that require no overlapping determinations.[9]

The sky has not fallen for class action plaintiffs in a year's practice under Comcast. A Comcast challenge is not appropriate in every case, and courts have been resistant to arguments they regard as overreaching or destroying the utility of the class action device. But predictions that Comcast would have no practical effect have been equally mistaken. While the precise contours remain to be worked out, litigants ignore at their peril Comcast's requirement that class action plaintiffs produce a workable classwide damages model that can withstand judicial scrutiny.

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Sidley Austin LLP represented certain of the defendants in In re Rail Freight Fuel Surcharge Antitrust Litigation and represents parties to a number of pending cases raising similar issues.

[1] See Parko v. Shell Oil Co., 739 F.3d 1083, 1084-87 (7th Cir. 2014) (Posner, J.); Carrera v. Bayer Corp., 727 F.3d 300, 311-12 (3d Cir. 2013); In re Rail Freight Fuel

Surcharge Antitrust Litig., 725 F.2d 244, 252-55 (D.C. Cir. 2013).

[2] See In re Deepwater Horizon, 739 F.3d 790, 815-18 (5th Cir. 2014); In re U.S. Foodservice Inc. Pricing Litig., 729 F.3d 108, 123 n. 8 & 130 (2d Cir. 2013); Butler v. Sears, Roebuck & Co., 727 F.3d 796, 798-802 (7th Cir. 2013) (Posner, J.); In re Whilrpool Corp. Front-Loading Washer Prods. Liab. Litig., 722 F.3d 838, 859-61 (6th Cir. 2013); Leyva v. Medline Indus., Inc., 716 F.3d 510, 514 (9th Cir. 2013).

[3] See, e.g., Parko, 739 F.3d at 1085-86 (groundwater contamination); Bruce v. Teleflora, LLC, 2013 WL 6709939, at *7 (C.D. Cal. Dec. 18, 2013) (consumer fraud); In re BP P.L.C. Secs. Litig., 2013 WL 6388408 (S.D. Tex. Dec. 6, 2013) (securities); Turnbow v. Life Partners, Inc., 2013 WL 3479884, at *15-18 (N.D. Tex. July 9, 2013) (insurance); Forrand v. Federal Express Corp, 2013 WL 1793951, at *5 (C.D. Cal. Apr. 25, 2013) (wage and hour).

[4] Rail Freight, 725 F.3d at 252-53.

[5] Parko, 739 F.3d at 1086.

[6] See, e.g., Rail Freight, 725 F.3d at 253; Bruce 2013 WL 6709939, at *7 (plaintiffs' "cart-before-the-horse" damages model "only compounded the problem" by limiting the model so it "only comes into play once one assesses each putative class member's case on a singular basis").

[7] See Whilrpool, 722 F.3d at 859-61; Jacob v. Duane Reade, Inc., 293 F.R.D. 578, 592-94 (S.D.N.Y. 2013), appeal pending, No. 13-3873-cv (2d Cir.).

[8] See Gates v. Rohm & Haas Co., 655 F.3d 255, 272-73 (3d Cir. 2011); Jacob, 293 F.R.D. at 585-86. The Jacob case is currently on a consolidated appeal before the Second Circuit. See Appeal Nos. 13-3070 & 13-3873-cv (2d Cir.).

[9] In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1302-03 (7th Cir. 1995) (Posner, J.). See also Blyden v. Mancusi, 186 F.3d 252, 268-69 (2d Cir. 1999); Castano v. Am. Tobacco Co., 84 F.3d 734, 750-51 (5th Cir. 1996).