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# *Comcast Corp. v. Behrend*: Game Changing or Business as Usual?

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IN THE PAST TWO YEARS THE SUPREME Court has decided three cases presenting questions concerning the requirements for class certification under Rule 23 of the Federal Rules of Civil Procedure:

*Walmart Stores, Inc. v. Dukes*[1] involved claims of employment discrimination under Title VII and addressed the "commonality" requirement of Rule 23(a)(2). The Supreme Court reversed certification of an injunction class on the grounds that the challenged employment practice of "allowing discretion" to local supervisors in hiring and promotion decisions was not a "uniform employment practice" presenting a "single common question" capable of resolution on a class-wide basis.[2]

*Amgen, Inc. v. Connecticut Retirement & Trust Fund*[3] involved claims of securities fraud under Section 10(b) of the Securities Exchange Act of 1934. The Court held that the materiality of the alleged misrepresentation or omission did not need be proven at the class certification stage because the question of materiality—an objective one—was plainly common to the class and thus capable of common proof at trial.[4]

*Comcast Corp. v. Behrend*[5] involved antitrust claims under Sections 1 and 2 of the Sherman Act. The Supreme Court reversed certification of a class of Comcast subscribers in the Philadelphia market. In a 5–4 decision, the Court held that the plaintiffs had not met the predominance requirement of Rule 23(b)(3) because they had not adequately demonstrated that damages were "susceptible of measurement across the entire class for Rule 23(b)(3) purposes."[6]

In articles published in this magazine in 2011, practitioners on both sides of the issue predicted that *Dukes* would have little effect on the outcome of certification of class actions under the antitrust laws, at least where certification of damages classes is sought under Rule 23(b)(3).[7] *Amgen* also arguably left class certification standards untouched, failing to impose an additional requirement to achieve certification in federal securities cases.

*Dukes* and *Amgen*, unlike *Comcast*, were rendered outside the context of antitrust class actions. Although it is too soon to say what effect *Comcast* will have on class certification in antitrust cases, the early predictions are quite varied. Has the case altered the standards by which courts are required to decide class certification? Or is it a fact-specific decision that reiterates current standards and will have limited applicability in future antitrust cases? Some commentators argue that nothing has changed with respect to class-wide proof of damages and that class actions will move forward much as they have in the post-*Hydrogen Peroxide* era.[8] Others assert that the decision effects a sea change in class certification law and stands for the proposition that a class-wide mechanism to prove the individual damages suffered by class members is now required for certification under Rule 23.[9]

How courts will apply *Comcast* remains to be seen.[10] The Supreme Court itself purports to break no new ground with the decision.[11] And while the holding of the case within its factual context provides little support for a conclusion that the decision has significantly altered the class certification landscape, certain of the Court's comments may provide fodder for defense arguments that plaintiffs must offer a damages model capable of proving damages for individual class members.[12]

## The District Court Decision

*Behrend v. Comcast* was originally commenced in 2003 when plaintiffs—six cable television subscribers of Comcast Corp.—brought suit against Comcast alleging violations of Sections 1 and 2 of the Sherman Act.[13] Plaintiffs alleged that beginning in 1998, Comcast engaged in a series of transactions with other multisystem cable operators that had the effect of increasing Comcast's share of nonbasic cable subscribers in the Philadelphia "designated marketing area" (DMA).[14] In these transactions, Comcast either acquired other companies that had cable subscribers in the Philadelphia DMA, or "swapped" its existing cable customers in other areas, such as Florida and California, for cable customers of rival firms within the Philadelphia DMA.[15] On account of these various acquisition and swap transactions, Comcast's share of subscribers in the Philadelphia DMA increased from approximately 24 percent in 1998 to almost 70 percent in 2007.[16] Plaintiffs alleged that by engaging in this conduct, known as "clustering,"[17] Comcast harmed the class by eliminating competition, raising barriers to entry, and maintaining prices for nonbasic cable television services at supracompetitive levels.[18]

During a four-day evidentiary hearing on class certification, the district court heard live testimony from fact and expert witnesses, considered thirty-two expert reports, examined deposition excerpts, and reviewed other documentary evidence.[19] The plaintiffs presented arguments and evidence on four theories of antitrust impact, i.e., four theories pur-

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suant to which the defendants' clustering activities could be shown, with class-wide evidence, to have deterred competition and raised prices to members of the class, as follows:

(1) Comcast's clustering conduct deterred competition from "overbuilders," that is, "companies that build and offer customers a competitive alternative where a telecommunications company already operates";

(2) The high market share generated by Comcast's clustering made it profitable for Comcast to deny access by competing satellite broadcasters (such as Direct TV) to Comcast Sports Net (CSN) Philadelphia,[20] thus impeding the entry of satellite broadcasters into the Philadelphia market (direct broadcast satellite or "DBS" foreclosure);

(3) Comcast's clustering reduced "benchmark competition," i.e., the ability of customers to compare service and prices among competing providers; and

(4) Comcast's clustering increased its bargaining power vis-à-vis content providers, allowing Comcast to raise the prices for its services.[21]

As reflected in the district court's opinion, the court considered at length and weighed the conflicting evidence and arguments submitted by the plaintiffs and Comcast as to each of these theories of antitrust impact.[22] The court accepted only one of the plaintiffs' four theories of antitrust impact, the "overbuilder" theory. As to this theory, the plaintiffs presented evidence that Comcast interfered with RCN, which had been licensed to overbuild in Philadelphia County and its four surrounding suburban counties, and that this interference so delayed RCN's entry into the Philadelphia market that it eventually withdrew its application to build a competitive cable system.[23] The plaintiffs also submitted evidence to support the conclusion that Comcast's conduct in deterring overbuilding by RCN in the five counties in which it had been licensed had an anticompetitive effect throughout the Philadelphia DMA because once RCN had successfully overbuilt in the five counties, it would have entered and overbuilt in the remainder of the DMA.[24] The plaintiffs also presented evidence that the absence of overbuilders resulted in higher prices for consumers throughout the Philadelphia DMA.[25] The district court concluded on the basis of this evidence that "the class has met its burden to demonstrate that the anticompetitive effect of clustering on overbuilder competition is capable of proof at trial through evidence that is common to the class."[26]

The district court next turned to the question of whether the plaintiffs had shown a common methodology existed for determining damages suffered by the class. Plaintiffs relied on the expert report of Dr. James McClave, who submitted the opinion that prices in areas of effective competition were consistently and substantially less than prices paid by class members in the Philadelphia market. Dr. McClave conducted an econometric analysis by estimating benchmark prices against which to compare the actual prices charged during the relevant period in the Philadelphia DMA.[27]

Dr. McClave selected the markets to use in his benchmark analysis by applying two screens: a "market share" screen and a "DBS"[28] screen. The market share screen required that the comparative county had a Comcast subscriber penetration rate of less than 40 percent. The DBS screen selected counties where the penetration levels of alternative delivery systems (such as satellite broadcasters) were at or above the national average of such penetration rates in other markets served by Comcast.[29] Once counties were selected using these criteria, Dr. McClave then used the data from the selected counties to estimate "but-for" prices to compare with Comcast prices in the Philadelphia area. Using a multiple regression analysis, his model indicated that prices were elevated above but-for prices in every county in the Philadelphia DMA by between 11 percent and 17 percent.[30] By applying the overcharge percentage to the relevant revenues that Comcast obtained from class members during the class period, Dr. McClave calculated that class members were overcharged in the aggregate an amount in excess of $875 million.[31]

Comcast critiqued Dr. McClave's analysis on various grounds. Comcast argued that the screens Dr. McClave used were inappropriate because, among other reasons, they did not correctly estimate the competitive conditions that would have existed in Philadelphia absent Comcast's alleged anticompetitive conduct.[32] Specifically, Comcast challenged Dr. McClave's use of the DBS screen because the court had rejected the "DBS foreclosure theory" as a basis to prove antitrust impact on a class-wide basis.[33] Comcast also challenged Dr. McClave's regression analysis on various grounds, including that it failed to account for population density and utilized list prices instead of discounted or promotional prices.[34]

The district court considered and discussed each of these critiques of Dr. McClave's methodology,[35] and directed the parties to separately address the question, "How do we interpret Dr. McClave's damages models if, as we anticipated would occur, we credited at least one but not all of [plaintiffs'] four bases for antitrust impact?"[36] As to this issue, the district court rejected Comcast's contention that a screen which utilized the extent of DBS penetration as a source for estimating but-for damages was inappropriate, holding:

> [Dr. McClave's] selection of the DBS screen to serve this purpose is entirely unrelated to Dr. Williams' DBS foreclosure theory. It was merely his method of choosing counties to serve as comparators. Any anticompetitive conduct was reflected in the Philadelphia DMA price, not in the selection of the comparison counties. Thus, whether or not we accepted all of Dr. Williams' theories of antitrust impact is inapposite to Dr. McClave's methods of choosing benchmarks. Because we have determined that the national average DBS penetration rate for Comcast markets is a valid screen, we conclude that the McClave's model is a common methodology available to measure and quantify damages on a class-wide basis.[37]

The district court concluded that the plaintiffs had demonstrated that "at least one theory of antitrust impact and a common damages methodology" and accordingly certified a class of Comcast subscribers in the Philadelphia DMA.[38]

### The Third Circuit's Decision

In a 2–1 decision, the Third Circuit affirmed the district court's ruling granting class certification.[39] The court unanimously concluded that the plaintiffs had demonstrated that the issue of antitrust impact "was capable of proof at trial through evidence common to the class, rather than individual to its members."[40] The panel disagreed, however, over whether plaintiffs had "established that the alleged damages are capable of measurement on a class-wide basis using common proof," with the majority ruling for the plaintiffs and Judge Jordan dissenting.[41]

The panel began its analysis by citing the court's prior decision in *In re Hydrogen Peroxide Antitrust Litigation*:

> Plaintiffs' burden at the class certification stage is not to prove the element of antitrust impact, although in order to prevail on the merits each class member must do so. Instead, the task for plaintiffs for class certification is to demonstrate that the element of antitrust impact *is capable of proof at trial* through evidence that is common to the class rather than individual to its members.[42]

Characterizing the issue as "evidentiary," the majority stated that "Comcast has a heavy burden in convincing us that the district court's factual findings were clearly erroneous."[43]

After reviewing the evidentiary record that the district court considered and the arguments of the parties, the court ruled that Comcast did not carry its burden of demonstrating that the district court's view of the evidence was clearly erroneous: "In short, the district court's task was to weigh expert testimony and make a determination, and we discern no error in the court's determination that [plaintiffs'] analysis demonstrated the class-wide antitrust impact was susceptible to common proof."[44] Thus, the court held that "the District Court's determination—that plaintiffs have demonstrated by a preponderance of the evidence that they can establish class-wide antitrust impact through common evidence—did not exceed its discretion."[45]

The panel then moved to the damages question: whether the district court had abused its discretion in concluding that plaintiffs had established "that the alleged damages are capable of measurement on a class-wide basis using common proof."[46] Judge Jordan in dissent disagreed with the analysis of the panel majority, as explained below.

The panel majority reviewed the evidence, the experts' analyses, and the arguments presented by both sides to the district court.[47] The panel examined Dr. McClave's selection of screens to estimate but-for prices and reviewed Comcast's argument that because the damages model was based on the cumulative effect of alleged anticompetitive conduct (some of which conduct had been rejected by the district court as a basis for antitrust impact), the district court erred in accepting it as class-wide proof of damages.[48]

The panel majority rejected Comcast's arguments, stating that the district court correctly concluded that the screens were selected not to calculate liability for specific anticompetitive conduct, but instead "to estimate typical competitive market conditions."[49] The majority concluded that "at the class certification stage we do not require that Plaintiffs tie each theory of antitrust impact to an exact calculation of damages, but instead that they assure us that if they can prove antitrust impact, the resulting damages are capable of measurement and will not require labyrinthine individual calculations."[50] The majority held that plaintiffs had met this burden.

### Judge Jordan's Dissent

Judge Jordan dissented in part, arguing that the district court abused its discretion in certifying a single class to prove damages.[51] Judge Jordan agreed with Comcast that Dr. McClave's use of the DBS screen in selecting benchmark counties against which to determine but-for prices was inappropriate, and consequently that the expert report failed to demonstrate that common evidence was available to estimate damages on a class-wide basis. Invoking Rule 702 of the Federal Rules of Evidence and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[52] Judge Jordan concluded that Dr. McClave's report "is irrelevant and should be inadmissible at trial . . . as lacking fit, because it failed to isolate damages caused by anticompetitive overbuilding alone."[53] As Judge Jordan explained, "Dr. McClave's opinion failed the requirement of 'fit' because it was disconnected from plaintiffs' only viable theory of antitrust impact, i.e., reduced overbuilding, and thus the proffered expert testimony cannot help the jury determine whether reduced overbuilding caused damages."[54]

Judge Jordan also questioned the district court's conclusion that a single class could be certified where RCN as the potential overbuilder had been licensed to overbuild in only five of the nineteen counties in the Philadelphia DMA, and thus the extent of overbuilding (and presumably the extent of damages) would have varied from county to county. Judge Jordan would have vacated the certification order to require revisions to Dr. McClave's model to account only for damages relating to overbuilding alone and to consider whether subclasses should be certified to reflect differing competitive conditions around the Philadelphia DMA.[55]

### The Supreme Court's Decision

***The* Daubert *Question.*** *Daubert* and admissibility were first raised by Judge Jordan in his dissenting opinion. Comcast had not challenged the admissibility of Dr. McClave's testimony in the district court, nor did it mention *Daubert* in its petition for certiorari.[56] Nevertheless, in granting certiorari, the Supreme Court sought review of 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 the case is susceptible to awarding damages on class-wide basis."[57] The parties focused the bulk of their briefing and oral argument on issues relating to the preservation or waiver of the question of admissibility of the plaintiffs' expert report and the application of *Daubert* in class certification proceedings.[58]

The case was expected to finally decide the issue of the applicability of *Daubert* in class certification proceedings, a question left open in *Dukes*.[59]

Despite this expectation, the majority conceded in its decision that the *Daubert* issue had not been properly preserved and consequently again failed to decide the issue.[60] Nevertheless, the Court elected to consider Comcast's argument "that certification was improper because respondents had failed to establish that damages could be measured on a class-wide basis."[61]

***The Merits Decision.*** Writing for the majority, Justice Scalia reiterated the principle first articulated over thirty years ago in *General Telephone Co. of Southwest v. Falcon*, that class certification is proper only if "the trial court is satisfied after a rigorous analysis that the prerequisites of Rule 23(a) have been satisfied."[62] The Court also reiterated the now well-accepted view that "[s]uch an analysis will frequently entail 'an overlap with the merits of the plaintiffs' underlying claim.'"[63] It was these precepts that the majority held were violated by the Third Circuit when it affirmed the district court's certification of the class: "By refusing to entertain arguments against respondent's damages model that bore on the propriety of class certification, simply because those arguments would also be pertinent to the merits determination, the Court of Appeals ran afoul of our precedents requiring precisely that inquiry."[64]

The majority held that the plaintiffs' model fell "far short of establishing that damages are capable of measurement on a class-wide basis," because it failed to measure only those damages attributable to Comcast's anticompetitive conduct. Because the plaintiffs would be entitled to recover only damages resulting from reduced overbuilder penetration, "a model purporting to serve as evidence of damages in this class action must measure only those damages attributable to that theory."[65] "[A]t the class certification stage (as at trial) 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.'"[66] The Court therefore held: "In light of the model's inability to bridge the differences between supra-competitive prices in general and supra-competitive prices attributable to the deterrence of overbuilding, Rule 23(b)(3) cannot authorize treating subscribers within the Philadelphia cluster as members of a single class."[67]

***Future Impact of the Decision.*** As noted above, opinion varies on the likely impact of the *Comcast* decision. In the first thirty days after its issuance, some courts have construed it very narrowly, while others have suggested it may have broader ramifications.[68] The opinions of lawyers and other commentators vary as well, with some suggesting that "[t]he *Comcast* decision is not likely to have a substantial impact on class certification procedures in antitrust cases," and others contending that *Comcast* "eviscerates a line of lower court authority that held that inability to prove damages on a class-wide basis was not a real impediment to class certification."[69]

There is little textual (or contextual) support for the conclusion that *Comcast* has significantly changed class certification standards in a way that will affect the outcomes of antitrust class certification decisions. First, the case presented a complex monopolization claim involving four distinct theories of injury, which required testimony from numerous experts to address whether, how, and to what extent the various types of monopoly conduct had impacted customers in the relevant market. Although three of the four theories of anticompetitive impact were rejected, the original damages model remained unchanged. These complications are not likely to repeat themselves in many antitrust cases, especially Section 1 cases, where conspiracy and resulting overcharge involve more straightforward theories and expert methodologies.

Second, neither the posture of the case nor the specific holding would appear to suggest that the necessity for individual damages calculations will be a bar to class certification, at least where plaintiffs proffer a damages model capable of measuring class-wide damages.[70] The damages model that plaintiffs proffered in Comcast did not purport to calculate the damages suffered by each individual member of the class, and was not challenged or rejected for that reason. Instead, the Supreme Court rejected the model as insufficient under Rule 23 because it failed to "establish that damages are capable of measurement across the entire class," that is, it failed to properly measure aggregate damages suffered by class members.[71] The Court stated that "*[w]ithout presenting another methodology* . . . [q]uestions of individual damages calculations will inevitably overwhelm questions common to the class," suggesting that a damages model that properly measured aggregate class-wide damages would not have had the same result.[72]

Third, as the dissent points out, recognition of the principle that "individual damages calculations do not preclude certification under 23(b)(3) is well-nigh universal."[73] And while "labyrinthine individual calculations" or "complex and individual" damages questions weigh against certification,"[74] the majority does not take aim at this general principle; to the contrary, it states "[t]his case turns on the straightforward application of class certification principles."[75]

On the other hand, and in contrast to the comments above, footnote 6 of the opinion may suggest that the "extent" of damage would need to be common:

> We might add that even if the model had identified subscribers who paid more solely because of the deterrence of overbuilding, it still would not have established the requisite commonality of damages unless it plausibly showed that the extent of overbuilding (absent deterrence) would have been the same in all counties, or that the extent is irrelevant to effect upon ability to charge supra-competitive prices.[76]

Exactly what this footnote means, especially the reference to the "requisite commonality of damages," is unclear. The plaintiffs' damages model (presumably) would not have shown anything about "the extent of overbuilding" in each of the counties, as that is a liability issue, let alone that the

extent would have been "the same." And in light of the fact that "it has uniformly been held that differences among the members as to the *amount* of damages incurred does not mean that a class action would be inappropriate,"[77] interpreting footnote 6 to require that a damages model show that all class members have been affected to the same extent would be a dramatic pronouncement, and an unlikely one to be relegated to dicta in a footnote.

In the short time that has passed since the decision was issued, several courts have interpreted the decision in a variety of ways. The only antitrust decision to address the case, *In re High-Tech Employee Antitrust Litigation*,[78] interpreted it narrowly as holding that "[c]alculations need not be exact, but at the class-certification stage (as at trial), 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.'" That case also cites the dissent for the proposition that "that the majority opinion '*breaks no new ground on the standard of certifying a class action under Federal Rule of Civil Procedure 23(b)(3)*.'"[79]

Outside the antitrust context, courts issued conflicting decisions in *Roach v. T.L. Cannon Corp.*[80] and *In re Motor Fuel Temperature Sales Practices Litigation*.[81] In *Roach*, the plaintiffs sought certification under Rule 23 for claims arising under the New York Labor Law. The court held that under *Comcast*, plaintiffs were required to offer a damages model demonstrating that damages "are susceptible of measurement across the entire class." The court rejected the plaintiffs' contention that the class could be certified as to liability issues, with separate proceedings in which individual damages would then be determined.[82]

In *In re Motor Fuel Temperature Sales Practices Litigation*, the court reached the opposite conclusion. There, citing Judge Ginsburg's dissent, the court stated that "[t]he possibility that individual issues may predominate the issue of damages . . . does not defeat class certification by making [the liability] aspect of the case unmanageable."[83] If "individualized issues (rather than common issues) were to predominate the damage inquiry, the more appropriate course of action would be to bifurcate a damages phase and/or decertify the class as to individualized damages determinations."[84] The court found this approach to be "consistent with Rule 23(c)(4), which permits "an action [to] be brought or maintained as a class action with respect to particular issues." The court also cited to the Advisory Committee Note on Rule 23(b)(3), which states that "a fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class."[85]

Other early court decisions interpreting *Comcast* have been similarly varied, although no court has rejected certification because the proffered damages model failed to compute damages for each member of the class. Examples include the following:

- *Harris v. comScore, Inc.*, where the court viewed as nonbinding dicta the statement that "questions of individual damage calculations will inevitably overwhelm questions common to the class," and cited the dissent for the proposition that "the decision should not be read to require, as a prerequisite to certification, that damages attributable to a class-wide injury be measurable 'on a class-wide basis.'"[86]
- *Smith v. Family Video Movie Club, Inc.*, where the court denied certification of a class arising under the Illinois Minimum Wage Law, citing *Comcast* for the proposition that "damages must be susceptible to measurement across the entire class, and individual damage calculations cannot overwhelm questions common to the class."[87]
- *Phillips v. Asset Acceptance, LLC*, where the court stated in dicta that *Comcast* "may portend a tightening of class certification standards, particularly as to the circumstances under which the task of measuring damages sustained by absent members destroys predominance under Rule 23(b)(3)."[88]
- *Martins v. 3PD, Inc.*, where the court interpreted *Comcast* "not to foreclose the possibility of class certification where some individual issues of the calculation of damages might remain, as in the current case, but those determinations will neither be particularly complicated nor overwhelmingly numerous."[89]

Defendants will no doubt use the decision to argue for even greater rigor in the analysis of plaintiffs' damages models, or even that the decision precludes certification where individual damages calculations are necessary. Plaintiffs, on their part, will have little difficulty distinguishing the case on its facts, and will point to the majority's language that the decision involves a straightforward application of well-settled principles under Rule 23. Plaintiffs may be well advised to carefully connect their expert's analysis to the evolving theories of liability, and to supplement or revise their expert's analysis to address developments in the case. ■

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1 131 S. Ct. 2531 (2011).

2 *Id.* at 2554.

3 133 S. Ct. 1184 (2013).

4 *Id.* at 1196.

5 133 S. Ct. 1426 (2013).

6 *Id.* at 1435.

7 Ellen Meriwether, *The "Hazards" of* Dukes*: Antitrust Class Action Plaintiffs Need Not Fear the Supreme Court's Decision*, ANTITRUST, Fall 2011, at 18; Steven E. Bizar & Allison Khaskelis, Wal-Mart v. Dukes*: A Non-Event for Antitrust Defendants*, ANTITRUST, Fall 2011, at 25.

8 *See Lawyers Weigh In on Supreme Court's Comcast Ruling*, LAW 360 (Mar. 27, 2013), http://www.law360.com/competition/articles/427805 ("The Supreme Court's succinct *Comcast* opinion makes clear that nothing has changed as to the requirements to meet predominance under Rule 23(b)(3), particularly with respect to classwide proof of damages.") (Asciolla comment).

9 *See id.* ("The *Comcast* decision clearly raised the bar for plaintiffs to obtain certification of antitrust class actions.") (Hanselman comment).

10 *See infra* text accompanying notes 78–89 (discussing cases).

[11] 137 S. Ct. at 1433 ("This case thus turns on a straightforward application of class certification principles. . . .").

[12] *See infra* text accompanying note 76.

[13] Behrend v. Comcast Corp., 264 F.R.D. 150, 153 (E.D. Pa. 2010).

[14] *Id.* at 156. "A DMA is a specific media research area that is used by Nielsen Media Research to identify television stations whose broadcasting signals reach a significant area and attract the most viewers. DMA boundaries are widely accepted and used by all types of companies to target and to track advertising." Behrend v. Comcast Corp., 665 F.3d 182, 186 n.1 (quoting Steak 'n Shake Co. v. Burger King Corp., 323 F. Supp. 2d 983, 986 n.2 (E.D. Mo. 2004)).

[15] 264 F.R.D. at 156 n.8 (listing challenged transactions).

[16] *Id.* at 160.

[17] "Clustering" is defined as "a strategy whereby cable [operators] concentrate their operations in regional geographic areas by acquiring cable systems in regions where the operator already has a significant presence while giving up holdings scattered across the country. This strategy is accomplished through purchases and sales of cable systems or by system 'swapping'" among cable operators. *See* 665 F.3d at 187 (quoting Implementaion of the Cable Television Consumer Protection and Competition Act of 1992, 22 F.C.C. Rcd. 17791, 17810 n.134 (2007) (citation omitted)).

[18] *Id.*

[19] *Id.* at 188.

[20] CSN Philadelphia carries televised regional sports events, including Philadelphia Phillies, Flyers, and 76ers games. 164 F.R.D. at 162.

[21] *See* 264 F.R.D. at 162; *see also* 655 F.3d at 210 n.6 (Jordan, J., dissenting, describing theories).

[22] 264 F.R.D. at 162–81.

[23] *Id.* at 166–75.

[24] *Id.* at 174.

[25] *Id.*

[26] *Id.*

[27] *Id.* at 181–82.

[28] *See supra* note 20 and accompanying text (noting that "DBS" refers to "direct broadcast satellite" providers such as Direct TV).

[29] *Id.* at 182–83.

[30] 264 F.R.D. at 182.

[31] *Id.* at 183.

[32] *Id.*

[33] *See supra* note 20 and accompanying text.

[34] 264 F.R.D. at 184–90.

[35] *Id.* at 183–90.

[36] *Id.* at 191.

[37] *Id.* at 190–91.

[38] *Id.* at 191.

[39] 655 F.3d at 208.

[40] *Id.* at 197, 213.

[41] *Id.* at 209.

[42] *Id.* at 197 (citing *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311–12 (3d Cir. 2008) (emphasis added).

[43] *Id.* at 197.

[44] *Id.* at 199 (citation omitted); *see also id.* at 213 ("It was not an abuse of discretion for the District Court to hold that Plaintiffs could show, by common evidence, the antitrust impact of clustering throughout the Philadelphia DMA.") (Jordan, J., dissenting).

[45] *Id.* at 200.

[46] *Id.* (citing *Hydrogen Peroxide*, 552 F.3d at 311, 325–26).

[47] *Id.* at 200–207.

[48] *Id.* at 200–201.

[49] *Id.* at 205 (citations omitted).

[50] *Id.* at 206 (citing Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 166, 168 (3d Cir. 2001)).

[51] *Id.* at 208.

[52] 509 U.S. 579 (1993).

[53] 655 F.3d at 214 (citations omitted).

[54] *Id.* at 216.

[55] *Id.* at 225.

[56] *Id.* at 215 n.18; *see also* 133 S. Ct. at 1435 (citing Comcast Petition for Certiorari). The Petition sought review of the following question: "[W]hether a district court may certify a class action without resolving 'merits arguments' that bear on [Federal Rule of Civil Procedure] 23's prerequisites for certification, including whether purportedly common issues dominated over individual ones under Rule 23(b)(3).

[57] 133 S. Ct. at 1435.

[58] *Id.*

[59] *See* Wal-Mart Inc. v. Dukes, 131 S. Ct. 2531, 2553–54 (2011); *see also* Isabella C. Lacoyo, *Supreme Court to Decide Whether Daubert Applies at Class Certification Stage*, PRODUCT LIABILITY MONITOR (Weil, Gotshal & Manges LLP) (Feb. 13, 2013), http://product-liability.weil.com/class-action-law-suits/supreme-court-to-decide-whether-daubert-applies-at-class-certification-stage.

[60] 133 S. Ct. at 1426 n.4.

[61] *Id.* The four dissenting justices (Ginsburg, Breyer, Sotomayor, Kagan) dissented on both procedural and substantive grounds. In the dissent's view, "[T]he court's newly revised question, focused on predominance, phrased only after briefing was done, left respondents without an unclouded opportunity to air the issue the Court today decides against them." *Id.* at 1436.

[62] *Id.* at 1432 (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 160–61 (1982).

[63] *Id.* (quoting Falcon, 457 U.S. at 160).

[64] *Id.* at 1433.

[65] *Id.*

[66] *Id.* (quoting ABA SECTION OF ANTITRUST LAW, PROVING ANTITRUST DAMAGES: LEGAL AND ECONOMIC ISSUES 57, 62 (2d ed. 2010)).

[67] *Id.* at 1435.

[68] *See infra* text accompanying notes 78–89.

[69] *See, e.g.*, LAW 360, *supra* note 8. (quoting Rodgers' and Pennington's comments).

[70] *But see infra* text accompanying note 76.

[71] 133 S. Ct. at 1433.

[72] *Id.*

[73] *Id.* at 1437 (citing authorities).

[74] *See* 655 F.3d at 206 (citing *Newton*, 259 F.3d at 187).

[75] *Id.* at 1433.

[76] *Id.* at 1435 n.6.

[77] *See* 655 F.3d at 206 (quoting 7AA CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1781 (3d ed. 2005)).

[78] No. 11-02509, 2013 WL 1352016 (N.D. Cal. Apr. 5, 2013).

[79] *Id.* at *29 (emphasis added).

[80] No. 10-0591, 2013 WL 1316452 (N.D.N.Y. Mar. 29, 2013).

[81] MDL No. 1840, 2013 WL 1397125 (D. Kan. Apr. 13, 2013).

[82] *Roach*, 2013 WL 1397125 at *3.

[83] *In re Motor Fuel*, 2013 WL 1397125 at *18.

[84] *Id.*

[85] *Id.*

[86] No. 11-5807, 2013 WL 1339262, at *10 n.9 (N.D. Ill. Apr. 2, 2013).

[87] No. 11-1773, 2013 WL 1628176, at *10 (N.D. Ill. Apr. 15, 2013).

[88] No. 09-7993, 2013 WL 1568092, at *3 (N.D. Ill. Apr. 12, 2013).

[89] No. 11-11313, 2013 WL 1320454, at *8 n.3 (D. Mass. Mar. 28, 2013).