Once Again, SCOTUS Skirts Expert Issue for Class Actions

by Robert Ambrogi, Contributing Author

OK, this time we thought for sure the Supreme Court would give us a decisive ruling on the extent to which a trial court must vet an expert witness under the *Daubert* standard prior to certification of a class action.

We had thought that before, of course. We were sure the court would decide the *Daubert* issue in its 2011 case, *Wal-Mart Stores, Inc. v. Dukes*. Instead, the court adeptly stepped around it, delivering only a bit of dictum that many saw as a preview of how it would rule the next time around. "The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings," Justice Antonin Scalia wrote. "We doubt that is so."

But in this latest case, *Comcast Corp. v. Behrend*, there seemed no doubt. After all, the court itself had taken the initiative to reformulate the question presented to specifically target the issue of expert testimony:

> Whether a district court may certify a class action without resolving whether the plaintiff class had introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis."

At oral arguments last November, this was precisely the issue the parties addressed. (See our recap: Daubert and Class Actions: All Just Magic Words?) While the oral arguments gave few indications of how the justices would rule, they certainly suggested that the ruling would in some manner address *Daubert*.

Imagine our disappointment, then, when the court released its opinion on March 27. Once again, the majority opinion appears to kick the *Daubert* issue down the road, to be decided another day. In fact, the majority opinion, written by Justice Scalia, mentions *Daubert* only once, in a footnote.

Class Certification Improper

Instead of deciding the expert testimony issue, the court held that class certification was improperly granted because the plaintiffs (the respondents on appeal) had failed to satisfy the requirement of Federal Rule of Civil Procedure 23(b)(3) that "the questions of law or fact common to class members predominate over any questions affecting only individual members."

Although the court did not decide the *Daubert* issue, its ruling nonetheless turned on the evidence provided by the plaintiffs' expert. In the trial court, the plaintiffs had advanced four theories to support their claims that Comcast had violated antitrust law. The trial judge accepted only one of these theories – the so-called

"overbuilder" theory that Comcast's activities had reduced the level of competition from competing cable companies in areas where Comcast already operated.

Relying on plaintiffs' expert, the lower court also found that the damages resulting from Comcast's deterrence of overbuilders could be calculated on a class-wide basis. The expert had calculated damages by designing a regression model that compared actual cable prices in the area with hypothetical prices that would have prevailed but for Comcast's allegedly unlawful activities. The model used by the expert was not tied to any specific theory of antitrust impact.

On appeal to the 3rd U.S. Circuit Court of Appeals, Comcast argued that the class was improperly certified because the expert failed to attribute damages resulting specifically from overbuilder deterrence. The 3rd Circuit rejected this argument, concluding that an attack on the merits of the damages methodology was not appropriate at the class-certification stage. Plaintiffs were not required to "tie each theory of antitrust impact to an exact calculation of damages," the court said.

But the five-justice Supreme Court majority disagreed, holding that the 3rd Circuit was wrong to refuse to entertain arguments against plaintiffs' damages model that bore on the propriety of class certification, simply because those arguments would also be pertinent to the merits determination.

"If respondents prevail on their claims, they would be entitled only to damages resulting from reduced overbuilder competition, since that is the only theory of antitrust impact accepted for class-action treatment by the District Court," Justice Scalia wrote. "It follows that a model purporting to serve as evidence of damages in this class action must measure only those damages attributable to that theory. If the model does not even attempt to do that, it cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3)."

Blistering Dissent

Four justices joined in a blistering dissent, written by Justices Ruth Bader Ginsburg and Stephen G. Breyer and joined by Justices Sonia Sotomayor and Elena Kagan. They argued that the court had been "misguided" in ever reformulating the question presented. However, once having done so, they asserted, the court should have dismissed the writ of certiorari for the reason that Comcast never objected to the admission of the expert testimony.

"As it turns out, our reformulated question was inapt," the dissenters said. "To preserve a claim of error in the admission of evidence, a party must timely object to or move to strike the evidence. … In the months preceding the District Court's class certification order, Comcast did not object to the admission of [the expert's]

damages model under Rule 702 or *Daubert*. Nor did Comcast move to strike his testimony and expert report. Consequently, Comcast forfeited any objection."

The dissenters go on to chastise the majority for "abandoning the question we instructed the parties to brief." By failing to give respondents a full and fair opportunity to argue the issue that was actually decided, they assert, the majority was unfair to respondents and invited "the error into which it has fallen."

Nonetheless, the dissenters assert that the opinion is narrow in its holding and breaks no new ground on the standard for certifying a class action. "In particular, 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.'"

What Goes Around Comes Around?

So once again, it appears, the Supreme Court has sidestepped the *Daubert* issue for class actions. Or has it? At least one set of commentators suggest that, even though the court did not directly answer the *Daubert* question, the impact of the decision will nonetheless be to require *Daubert* hearings at the class-certification stage.

In their article, Cables Sliced on Class Action in *Comcast Corp. v. Behrend*, Dechert LLP attorneys Christine C. Levin and Carolyn E. Budzinski, write, "While [the holding] does not directly address the *Daubert* issue, a fair reading of the Court's decision, which analyzed the expert opinion, is that expert testimony must in fact meet the *Daubert* standard of admissibility at the class certification stage."

Whether they are correct is for scholars to debate. But this is not the last we will hear of this issue. Another case pending on the Supreme Court's docket, *Zurn Pex, Inc. v. Cox*, raises this issue even more directly. In *Zurn*, the issue is:

> When a party proffers expert testimony in support of or in opposition to a motion for class certification, may the district court rely on the testimony in ruling on the motion without conducting a full and conclusive examination of its admissibility under Federal Rule of Evidence 702 and this Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*?"

OK, this next time, for certain, the court will squarely address the issue. Won't it?

This article was originally published in BullsEye, an expert witness and litigation news blog published by IMS ExpertServices. IMS ExpertServices is a full service expert witness and litigation consultant search firm, focused exclusively on providing best-of-class experts to attorneys. We are proud to be the choice of nearly all of the AmLaw Top 100.