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Comcast Creates Roadblocks for Securities Plaintiffs But Does Not Foreclose All Claims

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Class action lawsuits are a procedural tool where a group of people who all suffer the same injury pursue the same claims as a group or "class." In a class action, a lead plaintiff can litigate a dispute on behalf of the "class" so long as the class is numerous, its members have common legal and factual questions, and the plaintiff serving as the class representative has claims typical of the class and can adequately represent the class. To proceed on a class-wide basis, a lead plaintiff must submit proof that each of these prerequisites is satisfied so the court overseeing the dispute can "certify" the class.

Since the Supreme Court's decision in *Comcast v. Behrend,* it's been clear that a plaintiff and would-be class representative, on a motion for class certification, must put forth a damages model that can be applied to the proposed class in a manner consistent with the plaintiff's overall theory of liability. *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013). In other words, to satisfy the requirement of "common questions of law or fact" among the proposed class, the plaintiff needs to have a coherent theory of damages that can justifiably be applied on a class-wide basis. The measure of damages must be tied to a theory of liability and "measure only those damages attributable to that theory." If, on the other hand, "questions of individual damage calculation will inevitably overwhelm questions common to the class," then a motion for class certification should be denied.

The high court's decision, five years old, has now been examined and applied in variety of contexts, and a body of interpretive case law has emerged. Under those cases, it is clear that *Comcast* has already had a meaningful impact in securities fraud actions, particularly where the individual investors' circumstances may be different.

The Court's Decision in Comcast

Comcast itself was not a securities action. Rather, it was a putative class-action case arising under federal antitrust laws. The plaintiffs in the case were cable TV subscribers in and around Philadelphia. Citing federal antitrust laws, the plaintiffs alleged that Comcast, the cable provider, stifled competition in the region which led to non-competitive prices. In seeking class certification, the plaintiffs advanced four distinct theories of "antitrust impact," *i.e.*, theories whereby Comcast would be liable for the potential class members' alleged losses. The damages model proffered on class certification was a general model that "assumed the validity of all four theories of antitrust impact." The U.S. District

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Court for the Eastern District of Pennsylvania, however, had rejected three of those four proposed theories as legally baseless. Nonetheless, the trial court certified the class over the defendant's opposition, holding that the proffered damages model was adequate for class certification. The Third Circuit affirmed and went even further, holding that "attacks on the merits of the methodology … have no place in the class certification inquiry."

The Supreme Court reversed. It held that it was erroneous for the court to refuse to consider, at the class certification stage, whether the plaintiffs' damages model was tethered to the theory of liability. Because "the model assumed the validity of all four theories of antitrust impact initially advanced by [the plaintiffs]," the model was not reliable in a context where three of those theories were rejected.

The Securities Fraud Context

While *Comcast* arose in an antitrust context, its holding was not limited to any one area of law. Rather, its holding has been made applicable to class certification generally, and it has been invoked by securities fraud defendants facing class certification motions. A number of these defendants were successful in challenging class certification.

The *BP* case was an early victory for the defense bar. In that case, the plaintiffs brought claims under Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5 after the Deepwater Horizon explosion and related oil spill. *In re BP p.l.c. Sec. Litig.*, 2014 WL 2112823 (S.D. Tex. May 20, 2014), aff'd, 800 F.3d 674 (5th Cir. 2015). They sought certification for two subclasses of investors: (1) those who had purchased BP securities before the spill and (2) those who had purchased BP securities after the spill. While the court certified the latter class, the former class was rejected under *Comcast*. The plaintiffs' fraud theory as to the pre-spill class was based, first, on BP's alleged understatement of the risk of an accident and, second, on an assumption that all investors would have refrained from purchasing BP securities if they had known about the risk. The Southern District of Texas rejected this theory in an opinion later affirmed by the Fifth Circuit. Both courts found that, because individual investors have different risk tolerances, a damages model presuming that they all have the same tolerance is unacceptable. As the district court put it, "Plaintiffs' proposed measurement of damages cannot be deployed without an individualized inquiry into each investor's subjective motivations."

A similar holding was reached in *Loritz v. Exide Technologies*, where plaintiffs brought Section 10(b) and Rule 10b-5 claims against a battery company for allegedly failing to disclose its noncompliance with certain environmental regulations and its liquidity issues. *Loritz v. Exide Techs.*, 2015 WL 6790247 (C.D. Cal. July 21, 2015). In *Loritz*, "(1) there are multiple alleged misrepresentations, (2) corrective information was allegedly disclosed at multiple times, (3) corrective information regarding different alleged misrepresentations was allegedly disclosed on the same day, and (4) some of the allegedly concealed facts arose or were made known to the company (and thus for the first time could have been disclosed) during the class period." But on their motion for class certification, the plaintiffs only advanced "general techniques for computing damages in securities fraud cases" and "fail[ed] to tie these theories to the facts of this case or to each other." Citing *Comcast,* the court certified a class as to liability only, and not damages.

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But while it is clear that a plaintiff's burden is now higher, it is still a burden that courts have found plaintiffs have been able to meet in certain cases. *Waggoner v. Barclays* is an example of such a case. There, investors brought Section 10(b) and Rule 10b-5 claims against an investment bank for allegedly providing secret advantages to high-frequency traders—people who buy and sell stocks at very fast speeds—the revelation of which precipitated a drop in stock the bank's stock price. *Waggoner v. Barclays PLC*, 875 F.3d 79 (2d Cir. 2017). The trial court certified a class based on a "damages model [that] directly measured that harm by examining the drop in price that occurred when the New York Attorney General's action revealed ongoing problems related to [the bank's] management." The U.S. Court of Appeals for the Second Circuit affirmed class certification as compliant with the requirements of *Comcast*, noting: "This is not a case where a plaintiff's damages model does not track his theory of liability."

Howard v. Liquidity Services Inc. is another example. Plaintiffs in that matter brought Section 10(b) and Rule 10b-5 claims against a seller of surplus and overstock goods based on alleged misstatements about its deteriorating margins and heightened competition. *Howard v. Liquidity Servs. Inc.*, 322 F.R.D. 103 (D.D.C. 2017). The plaintiffs advanced an event study as evidence of class-wide damages. And while the plaintiffs cited multiple misrepresentations made at different times, they "explained how an event study could be used to ascertain the effect of each alleged misrepresentation on [the company's] stock price, and how the study could be applied 'formulaically' to calculate out-of-pocket expenses for an individual class member." The court concluded that, unlike in other post-*Comcast* securities cases in which certification had been denied, the event study before it "tracks the plaintiffs' theory of liability in the case."

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