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Recent U.S. Supreme Court Decision Has Potential to Impact Class Actions Against Employers

By Alejandro Valle

Following the landmark ruling in the 2011 case *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), another more recent decision by the United States Supreme Court, [Comcast Corp. v. Behrend](#), 133 S. Ct. 1426 (2013), has further limited the ability of employees to bring class actions against employers in federal courts.

Class actions are lawsuits brought by one or a group of plaintiffs who represent others sharing the same legal circumstances and who seek a remedy for all who share that same legal condition. In federal courts, class actions are allowed only when there is "commonality," that is, one or more legal or factual claims common to the entire class that predominate over individual issues, as well as other conditions required under Federal Rule of Civil Procedure 23.

In the *Dukes* case in 2011, the Supreme Court addressed the issue of commonality and overturned a lower court's decision to certify a purported class by applying a more stringent view of this portion of the analysis. In that decision, the Court held that it was not sufficient for a plaintiff in a purported class action to merely raise common questions, but instead the plaintiff needed to demonstrate that the purported class action would generate common answers with the potential to drive resolution of the entire litigation. The *Dukes* case was an employment action alleging company-wide gender discrimination, and ultimately the employer prevailed because the purported class of employees came from too many different job positions and was subject to too many different policy provisions to meet the commonality requirement as defined by the Court.

The outcome in the *Dukes* lawsuit (which did not decide that there was no discrimination at the employer, but only that any such claim could not be addressed within a class action) was a significant victory for employers because class actions, by their nature, are very costly to litigate and expose the employer-defendant to potentially large damages awards, thereby increasing the pressure to settle as opposed to defend a case on its merits. To the extent it is more difficult for employees to bring federal claims within a class action, employers are saved the added expense and burden of defending against such lawsuits on a class-wide basis, as opposed to one single case at a time.

Within this context, the recent decision in *Comcast*, although not an employment law decision, is another positive development for employers facing potential class actions, as it both reinforces the *Dukes* holding and may provide another hurdle for plaintiffs seeking to assert their claims as class actions on behalf of a broader group.

The *Comcast* case involves antitrust allegations related to charges imposed on cable television subscribers by the defendant. The plaintiffs originally alleged four different theories of antitrust impact, but ultimately the trial court allowed certification on only one theory: that the company's strategy for swapping cable systems with other providers or buying other providers (termed "clustering") decreases competition and results in higher prices for the plaintiffs. The plaintiffs also presented the testimony of an expert who, using a regression model, estimated the damages to the proposed class of plaintiffs to be approximately \$875 million. However, the expert acknowledged that his model did not isolate damages resulting from the one theory of antitrust impact the trial court allowed to go forward. Rather, the expert's model took all four theories, including the three theories rejected by the trial court, into account. Still, the district court certified the class, at which point Comcast appealed to the United States Court of Appeals for the Third Circuit.

On appeal, Comcast argued, among other things, that the class could not be certified because the model used for the alleged damages failed to isolate the damages allegedly caused by the sole remaining theory of antitrust impact allowed to go forward. Thus, Comcast argued, it was impossible to determine that the damages were calculated on a class-wide basis because it was possible not all persons in the plaintiff class were damaged by the one remaining antitrust impact being litigated. This made class certification improper. The Third Circuit disagreed, stating that it could not examine the methodology of the damages model at the certification stage because that examination would improperly consider some of the merits of the case. Comcast then appealed to the Supreme Court.

In a 5-4 decision, the Supreme Court reversed the lower courts and held that the class was improperly certified. According to the majority opinion, the Third Circuit failed to follow Supreme Court precedent when

it failed to entertain arguments against the damages model that bore upon the propriety of the class certification. Rather, according to the Supreme Court, it is sometimes necessary to examine arguments that bear upon the merits of the case to determine whether class certification is proper. Because the damages model failed to isolate the damages caused by the "clustering" argument, it could not be established that damages were capable of being measured on a class-wide basis.

Commentators have been split on the long-term significance of the Comcast decision. It remains unknown whether expert evidence presented at the certification stage needs to meet evidentiary requirements for admissibility known as the *Daubert* test, after the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). Many hoped that the *Comcast* case would decide that issue, but for various procedural reasons, the Court could not rule on the issue. However, the *Comcast* decision, despite not being an employment case, demonstrates another potential avenue for employers to challenge class certifications and demonstrates the scrutiny courts are to apply to certification requests.

Regardless of the *Comcast* and *Dukes* decisions, employment litigation, class-wide and otherwise, remains a significant expense for employers, who should therefore continue to work closely with their legal advisors whenever the potential for employment-related litigation arises.

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