Comcast v. Behrend

Brief of the CATO Institute as Amicus Curiae in Support of the Petitioners

by Cato Institute on 8/27/2012

Getting the rules governing class actions right means balancing the need to keep the courthouse door open for legal claims not lucrative enough to pursue individually with the need to prevent wholesale extortion by opportunistic would-be plaintiffs (and their lawyers) who know that the settlement values of class actions are generally much larger than those of individual lawsuits. In its recent (2011) decision in Wal-Mart v. Dukes, the Supreme Court reiterated that when considering whether to certify a lawsuit as a class action (which aggregates presumptive claims from a national "class" of plaintiffs), a trial court must conduct a "rigorous analysis" to determine that the putative plaintiffs satisfy the key requirements of Federal Rule of Civil Procedure 23: (1) the class is so large that each potential plaintiff can't join the suit individually ("numerosity"); (2) questions of law or fact are common to the class ("commonality"); and (3) the claims/defenses of the plaintiff representatives are typical of the class as a whole ("typicality"). Despite Dukes, many courts have fallen back on a misinterpretation of an earlier Supreme Court decision, Eisen v. Carlisle & Jacquelin, to hold that a court can't consider at the class-certification stage any issue that will overlap with the merits of the case. In Comcast v. Behrend, the Philadelphia-based U.S. Court of Appeals for the Third Circuit affirmed the district court's certification of a class of nearly two million past and present Comcast cable customers in an antitrust action against the company. In certifying the class, the district court refused to evaluate the admissibility of testimony presented by plaintiffs' expert witness regarding the ability to calculate class-wide damages, considering such an inquiry to go to the merits of the case. The court thus failed to conduct "rigorous analysis" with respect to that issue, and so the Supreme Court decided to review whether a class can be certified without first determining, as part of the Dukes analysis, whether a plaintiff's methodology for calculating damages is admissible. Cato has filed an amicus brief urging the Court to clarify that what it meant in Dukes was that a full inquiry into the reliability and admissibility of expert testimony (a so-called Daubert inquiry) is required at the class-certification

stage. A lower standard would obviously prejudice defendants because class certification "magnifies and strengthens the number of unmeritorious claims" and creates "insurmountable pressure on defendants to settle." But it would also prejudice absent class members because certification based on inadmissible evidence may distort their perception of the likelihood of success and encourage the members to stay in the class. Since all class members who don't opt out of the class are ultimately bound by a class action judgment, there's a large potential for harm to these potentially valid claims as well. The only way to sufficiently protect the interests of defendants and absent class members, as well as to stay faithful to the basic commonality requirement of Rule 23 — which balances the overall social interests described above — is for the Supreme Court to reverse the Third Circuit and clarify that the Daubert standard applies at the class-certification stage, not just at trial.

Please see full brief below for more information.

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