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Recent high court cases display an abiding disagreement about permissible 'merits' inquiries at class certification.

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**BODY:**

Somewhat obscured among the highly publicized marriage-equality appeals, the U.S. Supreme Court recently issued three opinions in six of the class action cases on the court's docket. See *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, No. 11-1085 (February 27, 2013); *Standard Fire Ins. Co. v. Knowles*, No. 11-1450 (March 19, 2013); and *Comcast Corp. v. Behrend*, No. 11-864 (March 27, 2013).

The decisions reflect the court's liberal and conservative divide, providing class action plaintiffs and defendants with something to cheer about, as well as expansive fertile dicta for future use. Despite the split decisions, the justices agreed that their opinions broke no new ground regarding black-letter class certification doctrines. Moreover, the decisions display an abiding disagreement about what constitutes a permissible "merits" inquiry at class certification and suggest an ever growing cacophony in the class action arena.

'AMGEN' AND 'COMCAST'

Clearly, the court's Amgen and Comcast decisions are the most significant to date. In a 6-3 decision, the court's liberals (joined by Chief Justice John Roberts Jr. and Justice Samuel Alito Jr.) in *Amgen* saved the fraud-on-the-market presumption for another day. The fraud-on-the-market presumption, articulated in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), provides securities fraud plaintiffs a means to assert classwide reliance in order to satisfy the Rule 23(b)(3) predominance requirement. Without the presumption, plaintiffs face an insurmountable barrier to certifying securities fraud class actions.

In a decision by Justice Ruth Bader Ginsburg, the majority held that plaintiffs need not prove the materiality of statements as a prerequisite to a Rule 23(b)(3) class certification seeking monetary damages for alleged violations of the securities laws. Justices Anthony Kennedy, Antonin Scalia and Clarence Thomas dissented. The *Amgen* majority's rescue of the fraud-on-the-market presumption follows closely on *Erica P. John Fund Inc. v. Halliburton*, 131 S. Ct.

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2179 (2011), in which a unanimous court held that security-fraud plaintiffs need not prove "loss causation" in order to establish the presumption at class certification.

In contrast, the court's conservatives (joined by Kennedy) prevailed in *Comcast* in a 5-4 decision to hold that the lower courts improperly certified a Rule 23(b)(3) antitrust class action by Philadelphia-area Comcast cable subscribers. In a decision by Scalia, the majority held that the district court and the U.S. Court of Appeals for the Third Circuit erred in refusing to entertain defense arguments that the plaintiffs' damages model could not establish damages susceptible to classwide measurement. The court's four liberals dissented.

Scalia indicated that the lower courts "ran afoul" of the Supreme Court's precedents when they decided that the defendant's challenge to the plaintiffs' damages model should not be considered because this inquiry was pertinent to the merits of the antitrust claim. Rejecting this conclusion, Scalia indicated that the defendant's challenge instead was germane to the plaintiffs' ability to establish Rule 23(b)(3) predominance, even though the question overlapped with a merits question. Hence, in evaluating whether the plaintiffs' expert damages testimony sufficed to satisfy Rule 23(b)(3), the majority concluded that the plaintiffs' damages model fell far short of establishing that damages were capable of measurement on a classwide basis.

The *Amgen* and *Comcast* decisions nonetheless are striking for their similar embrace of fundamental class certification principles, relying on the Supreme Court's decision in *Wal-Mart Stores Inc. v. Dukes*, 131 S. Ct. 2541 (2011). The justices agreed that: (1) Rule 23 does not set forth a mere pleading standard; (2) a party affirmatively must demonstrate compliance with Rule 23(a) and (b) requirements; (3) a court necessarily may have to probe beyond the pleadings to decide the certification question; (4) a court must be satisfied, after a rigorous analysis, that Rule 23 prerequisites have been met; and (5) a court's analysis frequently will overlap with the merits of the plaintiff's claims.

The *Amgen* and *Comcast* decisions highlight the justices' evolving disagreement over the extent to which courts may "probe beyond the pleadings" to inquire into the merits of claims to ascertain whether a case may be maintained as a class action. Although the court's liberal and conservative wings agree on the general principle, they disagree on its application. Ironically, in *Amgen* and *Comcast*, Ginsburg and Scalia performed the same sleight-of-hand trick, transforming the "merits" problem into a Rule 23(b)(3) analysis.

In *Amgen*, Ginsburg asserted that "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent-but only to the extent-that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Slip. op. at 9*. Thus, Ginsburg rejected *Amgen's* arguments that proof of materiality at class certification would impermissibly entail a merits evaluation of an element of the antitrust claim, involving the court in a burdensome minitrial on a merits question before class certification.

Instead-holding that the defendant improperly would have the court engage in a "cart before the horse" exercise- Ginsburg suggested that the pivotal question was whether proof of materiality was needed to ensure that common questions would predominate over questions affecting individual class members (a question the majority answered in the negative).

Addressing this same "merits" debate, Scalia in *Comcast* directly attacked the Third Circuit's refusal to consider the defendant's challenge to the plaintiffs' expert damages testimony because the court concluded that "an attack on the merits of the methodology [had] no place in the class certification inquiry." *Slip. op. at 4*. Taking a page from Ginsburg's analysis in *Amgen*, Scalia similarly opined that the proper inquiry focused on the Rule 23(b)(3) predominance inquiry.

Hence, redirecting the merits question to a Rule 23(b)(3) predominance inquiry, Scalia concluded that "[b]y refusing to entertain arguments against [the plaintiffs'] 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." *Slip. op. at 7*. Scalia asserted that the case turned on straightforward application of class-certification principles under which the plaintiffs' proposed damages model failed to satisfy the Rule 23(b)(3) predominance requirement.

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Amgen and Comcast left several residual issues, providing ample fodder for further class litigation. In Amgen, Alito-in a oneparagraph concurrence-agreed with Thomas' dissent that recent economic evidence suggests that the fraud-on-themarket presumption may rest on a faulty economic premise. Hence, Alito suggested, it may be appropriate for the court to reconsider its Basic decision. Amgen suggests there are at least four votes to reconsider Basic.

The Comcast decision has left the door wide open to the important issue the court did not decide: whether a court may certify a class action without resolving whether the plaintiff introduced admissible evidence (including expert testimony) to show that the case was susceptible to classwide damages. The Comcast dissenters strenuously objected to the majority's reformulation of the issue on which the court granted certiorari. Thus, significant issues relating to the nature of evidentiary proof at class certification remained unanswered in Comcast.

'STANDARD FIRE V. KNOWLES'

Finally, a unanimous court in Standard Fire agreed that a state class action plaintiff's stipulation to damages of less than \$5 million could not be enforced to defeat removal under the Class Action Fairness Act of 2005, 28 *U.S.C.* 1332(d)(2), (5), (6) and 28 *U.S.C.* 1453. In an opinion by Justice Stephen Breyer, the court held that the plaintiff could only bind himself to a stipulation limiting the amount of damages, but could not legally bind absent class members before the class was certified.

Therefore, because the plaintiff lacked the authority to concede the amount in controversy for absent class members, the district court improperly held that the plaintiff's stipulation could overcome its finding that the Class Action Fairness Act threshold jurisdictional amount was satisfied in the aggregate.

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