Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

The Economic Underpinnings Of Comcast V. Behrend

Law360, New York (April 04, 2013, 8:37 PM ET) -- The United States Supreme Court's most recent antitrust ruling in Comcast Corp. v. Behrend is an extension of a body of case law focused on the appropriate standards of proof and the requisite analysis a court must undertake in certifying a class.

In Comcast, the putative class of more than 2 million current and former Comcast Cable subscribers alleged that a practice of clustering cable television operations within a particular region violated antitrust laws by lessening competition and raising prices above competitive levels.[1] According to the Supreme Court, the Third Circuit erred by not conducting the rigorous analysis required to ascertain whether the prerequisites of Rule 23 had been met. In particular, the Third Circuit disregarded arguments from the defendants pertaining to the damages model put forward by plaintiffs on the grounds that those arguments overlapped with the merits of the plaintiffs' claim.

There is a well-established role for economic analysis in antitrust class actions. Specifically, economic analysis can be used to provide evidence as to whether "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[2]

An analysis of class certification asks whether the type of economic analysis that would be required to (1) prove injury and (2) quantify damages is inherently individualized. In an antitrust case, a class member has suffered injury if the alleged anti-competitive conduct resulted in that class member paying an artificially inflated price. Damages indicate the extent of the injury. If proof of antitrust injury (or impact) for an individual class member requires an analysis of factors that are specific to that class member, then class certification is not appropriate. On the other hand, if proof of antitrust injury for all class members requires the same evidence for all class members, then class certification is appropriate.

This is often referred to as an assessment of common impact. In practice, this assessment requires economists to address two questions: (1) Were all or substantially all class members impacted (or injured) by the alleged conduct? (2) And if so, can class member impact be demonstrated using common proof? Meanwhile, the inquiry into damages requires the determination of whether a formulaic method exists for the calculation of damages for the proposed class, i.e., a method that relies on class-wide evidence and not evidence that is unique or individual to each class member.

Regression analysis is a statistical methodology that is frequently put forward as a means to calculate damages resulting from the anti-competitive conduct at issue, including in monopolization and price-fixing cases. Regression analysis, under certain conditions, can identify and measure the causal effect of one economic factor on another. In the context of a monopolization case, regression analysis may be used to determine whether a customer (or customers) paid a supracompetitive price due to the alleged conduct and also to determine the extent to which the price was inflated by the conduct at issue.

On the other hand, regression analysis can yield an unreliable and misleading result if the regression model used is based upon invalid assumptions. For example, the regression model will yield an unreliable result if the estimated artificial inflation in price is not causally linked to the alleged conduct. Thus, an important question at the class certification stage is whether the methodology proposed by the plaintiffs can be used to reliably assess damages to proposed class members.

In accepting the Comcast case, the Supreme Court granted review of a very specific question — "whether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class wide basis?" From the outset, the Supreme Court focused not on the economic analysis related to impact, but on the damages analysis.

To understand the economic issue the Supreme Court raised, however, it is useful to explain the plaintiffs' theories of anti-competitive harm in this case. In the initial case, there were four theories of harm:

- Comcast's clustering made it profitable for Comcast to withhold local sports programming from its competitors, resulting in decreased market penetration by direct broadcast satellite providers;
- Comcast's activities reduced the level of competition from overbuilders, companies that build competing cable networks in areas where an incumbent cable company already operates;
- Comcast reduced the level of benchmark competition on which cable customers rely to compare prices; and
- Clustering increased Comcast's bargaining power relative to content providers.

The plaintiffs, through expert testimony, put forward a regression model for the calculation of damages and compared actual prices to but-for prices, i.e., prices that would have prevailed absent the alleged anti-competitive conduct. However, the but-for prices predicted by the plaintiffs' regression model were not tied to any particular theory of antitrust impact. Instead, as the plaintiffs' expert acknowledged, the but-for prices and, therefore, the extent to which actual prices were artificially inflated, were based on "the alleged anticompetitive conduct as a whole."[3]

Of the four theories of antitrust harm put forward by the plaintiffs, the district court accepted only one as being amenable to classwide proof — the overbuilder theory. The Supreme Court took issue with the approach that the proposed damages model measured damages "regardless of the type of anticompetitive conduct."[4] The Supreme Court held that if the damages model put forward by plaintiffs did not attempt to causally link damages to the particular anti-competitive conduct at issue, then "it cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3)."[5]

The underlying economic principle of establishing a causal link between damages and the particular anti-competitive conduct at issue is foundational in damages analyses in antitrust cases.[6] Courts have referred to a plaintiff's burden to prove not only an antitrust violation, but "a causal relationship between the violation and the injury, and the amount of damages."[7] In a monopolization case like Comcast, this means that the plaintiffs must prove that the specific (allegedly) illegal conduct of the defendants resulted in artificially inflated prices to proposed class members. Moreover, the overcharge should be causally related to the particular allegation of defendants' anti-competitive conduct and separated from the effects of any other market factors that influenced prices paid by customers, including conduct determined not to be illegal.

Given that the importance of establishing a causal link between damages and the alleged conduct has long been recognized in the antitrust arena, what are possible implications of the Supreme Court decision from an economics perspective? It is very likely that plaintiffs' proposed damages models will come under more scrutiny in the class certification phase. This is particularly relevant in cases where plaintiffs may argue that class should be certified on the abstract basis that regression analysis exists as a general methodology for the calculation of damages.

Indeed, as the recent Supreme Court decision highlights, such an argument is not scientifically sound because a regression model may or may not be valid in a given case depending on the facts at hand. As stated in Daubert, the methodology must fit the facts of the case to be reliable.[8] Thus, even when the plaintiffs do put forward a specific regression model at the class certification stage, following Comcast that model could be subject to more rigorous scrutiny than previously had been the case. Moreover, in cases where plaintiffs allege multiple types of anti-competitive conduct, it is likely that there will be an effort to present damages calculations that are tied separately to each type of conduct. Thus, the Supreme Court decision has made it likely that courts will be weighing the adequacy of proposed damages models at the class certification phase, even if those issues "overlap" with the merits of the case.

These implications suggest a stronger emphasis going forward on the role of rigorous empirical testing in the class certification phase related to both impact and damages analyses. When extensive data and information become available through discovery in the class certification phase, it may be straightforward to conduct the requisite economic testing to demonstrate the reliability of plaintiffs' proposed approaches. Indeed, such testing is consistent with sound scientific practice and provides an objective and scientific basis for arriving at conclusions. The use of a scientific approach also would increase the likelihood that economic testimony would survive Daubert challenges, which may become more common in class certification cases after this Supreme Court decision.

--By Laila Haider and John Johnson, Edgeworth Economics LLC

Laila Haider, Ph.D., is a partner and John Johnson, Ph.D., is the president and CEO of Edgeworth Economics. They work in the firm's Washington, D.C., office.

[1] Comcast Corp. v. Behrend, 569 U.S. (2013).

[2] FED.R.CIV.P. 23(b) (3).

[3] Comcast Corp. v. Behrend, 569 U.S. (2013).

[4] Ibid.

[5] Ibid.

[6] "[T]he plaintiff's damages case must be consistent with its liability case, particularly with respect to the alleged anticompetitive effect of the violation." ABA Section of Antitrust Law, Proving Antitrust Damages: Legal and Economics Issues 57, 62 (2d Ed. 2010); "The first step in a damages study is the translation of the legal theory of the harmful event into an analysis of the economic impact of that event." Federal Judicial Center, Reference Manual on Scientific Evidence 432 (3d ed. 2011); "The failure to properly consider causation jeopardizes the admissibility of expert testimony on damages." Lawrence Ranallo & Diana Weiss, Causation Issues in Expert Testimony, in Litigation Services Handbook 2-11 (Roman L. Weil, et al. eds., 4th ed.); "Factors other than anticompetitive conduct can affect the prices paid, or the profits earned, by an antitrust plaintiff. Potential coincident factors include general market forces (e.g., supply and demand factors), legitimate competition by the defendant in the actual world, compensating benefits from the antitrust violation, legal competitive responses by the defendant in the but-for world, and mitigation opportunities or opportunity cost. Antitrust models should account for these factors whenever possible and exclude their effects from the damages calculation. If a model fails to account for such other factors when it can make such accommodations, the trier of fact will give the model little weight or disregard it altogether." Stephen H. Kalos, Antitrust, in Litigation Services Handbook 24-8 (Roman L. Weil, et al. eds., 4th ed.).

[7] Amerinet, Inc. v. Xerox Corp., 972 F.2d 1483, 1490 (8th Cir. 1992) cert. denied 506 U.S. 1080 (1993). (Internal quotation marks omitted.)

[8] General Electric Co. v. Joiner, 522 U.S. 136 (1997).