$1.2B in Damages - Expert Challenges Fail to Decertify Class

by Maggie Tamburro

Expert challenges asserted as part of a post-trial motion to decertify a class came too little, too late after a jury awarded plaintiffs over $400 million in damages in a high profile antitrust case.

In what seemed like a series of unfortunate events for defendant, chemical giant The Dow Chemical Company, U.S. District Judge John W. Lungstrum on May 15 denied two post-trial motions, including a request by Dow to decertify the class based on arguments that one expert's report was insufficient in the wake of the Supreme Court's March 27, 2013 decision in *Comcast Corp. v. Behrend*.

The judge also found that, under established U.S. laws of conspiracy – which allows one member of a conspiracy to be held responsible for certain acts of co-conspirators – all of the damages the jury awarded were attributable to Dow. (In doing so, the district court made sure to note that joint and several liability in civil antitrust cases is alive and well, citing a 1981 Supreme Court ruling in *Texas Indus., Inc. v. Radcliff Materials, Inc.*)

What was perhaps a streak of bad luck for the defendant didn't end there. In addition to denying Dow's post-trial requests, the judge then ordered that the jury's $400 million damage award be tripled pursuant to U.S. antitrust law. The result: An award of more than $1.2 billion in damages was ultimately awarded against Dow.

The class action case, known as *In Re: Urethane Antitrust Litigation*, out of the U.S. District Court, District of Kansas, resulted from a consolidation in 2004 of numerous actions out of 7 districts against a number of defendants amid allegations of conspiracy and price-fixing involving certain urethane chemicals. In 2008 the class was certified, and a four week jury trial ensued against lone defendant Dow in January of this year. The jury's verdict for the plaintiff class was entered on February 20.

Following the jury's verdict, Dow filed post-trial motions which sought to decertify the class and generally overturn the judgment based in large part on challenges to two of plaintiffs' experts.

News of the tripled verdict in the case received a maelstrom of media attention; however, the specific expert issues – which were a critical piece of Dow's post-trial arguments –

went largely undiscussed. That being said, we can't let the expert lessons in the judge's freshly issued memorandum go unnoticed.

Expert Piece in a Post-Trial Motion to Decertify a Class

Often expert reliability challenges are made at the pretrial stage, as gatekeeper challenges under FRE 702 and *Daubert*. However, in this instance a number of expert challenges came at the post-trial stage, as a basis for Dow's request to decertify the class and effectively overturn the jury's verdict.

In its post-trial motion to decertify the class, Dow alleged certain defects in the damages model created by plaintiffs' damages expert. But the court rejected those challenges, giving a clear answer: Dow's arguments directed at the plaintiffs' expert came at the wrong time.

Noting that Dow had been in possession of the plaintiffs' expert report since 2011, the court stated, "Dow has not offered any reason why it could not have filed its motion much earlier and why it instead filed its motion literally on the eve of trial. Reconsideration of the Court's certification order at that time or even post-trial would cause severe prejudice to plaintiffs, who prepared for a long and complex trial at great expense and who might find it much more difficult to assert individual claims at this time."

Despite a finding that the motion was untimely, the court still took time to address the merits, perhaps due to the importance of the issues involved and recent legal attention antitrust class actions have garnered. While doing so, the court addressed a few relevant, hot-button expert witness questions, particularly in light of the Supreme Court's intervening (and much-debated) decision on March 27 in *Comcast Corp. v. Behrend*. Two of the expert questions, and how the court ruled, are below.

• In order for class certification to stand in this case, must each and every member of the class under the expert's model suffer damages? No.

Dow asserted that under the expert's damages model, a small number of class members hadn't actually suffered any damages under the alleged conspiracy, and therefore class certification should fail, as certification – claimed Dow – requires that *every* class member suffer harm.

The court disagreed, finding authority in a 7th Circuit opinion which notes that "a class will almost inevitably include persons who have not been injured by the defendant's conduct, and that fact (or even inevitability) does not preclude certification." Thus the court rejected Dow's argument that a few "zero-damages" class members could cause certification to fail.

• Should the class in this instance be decertified in light of the Supreme Court's decision in *Comcast Corp. v. Behrend*? No.

Dow presented a new argument based upon the Supreme Court's March 27 ruling in the *Comcast* case. The argument asserted that here, as in *Comcast*, plaintiffs' expert's model and opinions failed to provide a "proper causal link between plaintiff's theory of liability and the impact on the class members," and as such – consistent with the decision made in *Comcast* – "impact is therefore incapable of class-wide proof as required for certification of a class action." As result, again similar to the ruling in *Comcast*, "questions of individual damage calculations would overwhelm common questions," defeating the predominance requirement under FRCP 23.

But despite the recent *Comcast* ruling, the court found that the argument, as it was based on the expert's report, could have been raised well in advance of trial and rejected it.

The court examined the substantive merits of Dow's argument in light of the Supreme Court's recent *Comcast* opinion anyway – which decided a similar issue in an antitrust class action case – but with a very different result. In *Comcast*, the Supreme Court reversed the district court's decision to certify the class based upon a damages model – coincidentally created by the very same expert at issue in this case.

The judge in this case, however, rejected Dow's expert challenge in light of *Comcast* on its merits. Why? It noted that "[t]he key distinction between this case and *Comcast* is the stage of litigation involved."

Comcast concerned expert testimony at the pretrial class certification stage, but such was not the case here. The court concluded, "In the present case, Dow did not raise this issue at the pretrial class certification stage. Nor did Dow raise this issue in attacking the reliability of [plaintiffs' expert] methodology in its pretrial *Daubert* motion, and the Court concluded that the [expert's] methodology was sufficiently reliable to allow his expert testimony. Nor did Dow object to [the expert's] testimony at trial on this basis. Thus, on the present state of the record, [the expert's] methodology is defined by his trial testimony."

Turning to examine the expert's trial testimony, the court found that there was not a basis to exclude the expert's methodology or to find that it failed to provide a proper causal link between the theory of liability and impact to the class. Once again, post-trial was too little, too late for the attack on the expert to be persuasive to the court as to decertification.

Ripe for Appeal?

Given the intervening timing of the *Comcast* decision in light of the chain of litigation events in this case, could Dow have reasonably been expected to make such arguments at the certification stage prior to the Supreme Court's decision in *Comcast*?

It's a question worth considering. In any event, Dow didn't walk away entirely empty-handed. Although unrelated to the expert issue, Dow did score a small victory win when

it convinced the court, post-trial, to modify the definition of the class post-trial to exclude purchases made during 2004.

But as to the post-trial expert challenges, the court's message was loud and clear – the post-trial stage, at least under the facts and evolution of this case, was neither the time nor the place for requesting decertification.

The *Memorandum and Order*, which has treasure trove of other expert-related antitrust, class action information, is *In Re: Urethane Antitrust Litigation*, U.S. District Court, District of Kansas, 04-md-01616 (May 15, 2013).

Should the judge have found a legal distinction between this case and *Comcast*, based largely upon the stage of the litigation?

This article was originally published in BullsEye, an expert witness and litigation news blog published by IMS ExpertServices. IMS ExpertServices is a full service expert witness and litigation consultant search firm, focused exclusively on providing best-of-class experts to attorneys. We are proud to be the choice of nearly all of the AmLaw Top 100.