

The Broad Reach of Antitrust: An Overview

The Metropolitan Corporate Counsel

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The Editor interviews **Richard Hernandez**, Partner, McCarter & English, LLP.

Related People:
Richard Hernandez

Editor: Please tell us about your practice.

Hernandez: My antitrust counseling and litigation practice covers a broad spectrum of substantive areas: price-fixing, group boycotts, refusals to deal, tying, exclusive dealing, monopolization, reverse payments, licensing of intellectual property, dealer terminations and franchising. I also counsel clients on a variety of production distribution matters, including distributor agreements, resale price maintenance, customer and territorial restraints, and other vertical restraints. I assist clients in formulating and implementing antitrust-compliant joint ventures and competitor collaborations. My practice includes antitrust compliance programs, trade association conduct, representation in government investigations of anticompetitive conduct, including those initiated by the Federal Trade Commission, the Department of Justice and various state attorneys general. I also represent clients in all aspects of the Hart-Scott-Rodino pre-merger notification process, including complying with government-issued Second Requests and securing antitrust regulatory approvals for a variety of transactions.

Editor: Please describe the facts in the case of *Comcast v. Behrend*. What overall effects will the Supreme Court's decision in this case have?

Hernandez: Comcast cable television subscribers in the Philadelphia area sued Comcast, alleging that the company violated federal antitrust laws by engaging in "clustering" – a strategy of concentrating operations within a particular region. The plaintiffs asserted four theories of liability, but the district court certified the class as to only one of them – that Comcast acquired a significant share of the Philadelphia area, which deterred competitors (known as "overbuilders") from entering the greater Philadelphia cable market, thereby resulting in less competition and supra-competitive prices. But the plaintiff's damages model was based on all four theories. So, Comcast appealed the district court's class certification decision, arguing that the plaintiffs could not prove damages. The Third Circuit Court of Appeals affirmed, but the Supreme Court reversed, ruling that since three out of four theories of liability upon which the damages calculation was based didn't survive, damages could not be calculated across the entire class and the class could therefore not be certified.

The *Comcast* ruling heightens the requirements for plaintiffs seeking class certification and will have significant implications for antitrust class actions in particular, and for class actions in general. The decision creates a new weapon for defendants to collaterally attack class certification. The Court's new standard for evaluating class certification appears to require plaintiffs to plead their damages claims such that they are able to establish the damages on a class-wide basis.

The decision invites the argument by defendants that, "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class." *Comcast* also appears to require plaintiffs to plead

a damages theory that is consistent with their liability theory, particularly with respect to the alleged anticompetitive effects of the violation.

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