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Litigators of the Week: In Boeing Case, Fourth Circuit Says Class Cert Orders Should Not Be 'Like Participation Trophies'

By Ross Todd

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Our Litigators of the Week are **Jeffrey Wall** of **Gibson, Dunn & Crutcher** and **Richard Pepperman II** of **Sullivan & Cromwell**, who represent Boeing in a securities case where investors are targeting dozens of statements the company made in the years following deadly crashes involving two 737 Max airplanes.

The U.S. Court of Appeals for the Fourth Circuit this week vacated an order certifying a class of Boeing investors. In a decision that heavily cited the U.S. Supreme Court's 2013 decision in *Comcast Corp. v. Behrend*, a Fourth Circuit panel held that the plaintiffs hadn't shown how class-wide damages would be calculable in a manner consistent with their theory of liability.

"Rather than offering a methodology, the plaintiffs provided only a legal description of damages. For a securities fraud case, that's effectively saying that they are seeking compensatory damages," wrote Circuit Judge A. Marvin Quattlebaum Jr., on behalf of the panel.

Courtesy photos

Jeff Wall of Gibson, Dunn & Crutcher, left, and Rick Pepperman of Sullivan & Cromwell, right.

"Under *Comcast*, certification orders are not like participation trophies that are handed out to everyone on the tee ball team," he wrote.

Litigation Daily: What was at stake for Boeing in this appeal?

Rick Pepperman: Plaintiffs filed this class action alleging billions of dollars in damages. In *Comcast*, the Supreme Court held that plaintiffs need to have a class-wide method to calculate damages before they can certify a class. Class certification nevertheless has gotten too easy in many securities cases, and certification is often the ballgame because it generates such pressure to settle. Many plaintiffs haven't taken *Comcast*'s requirements seriously, but the Fourth Circuit correctly said it's not a box-checking exercise. It's a real burden that securities plaintiffs must satisfy before they can certify a class.

How did this matter come to you and your firms? Jeff, I'm guessing that your move to Gibson Dunn had something to do with there being multiple firms involved here.

Jeff Wall: Rick has been representing Boeing for years. When the case was filed, he took the lead in the trial court, including fact and expert discovery and then briefing and arguing plaintiffs' class-certification motion. I got more involved when we appealed the class-certification order, but still working very closely with Rick and Boeing's in-house lawyers, who were deeply involved in the briefing and strategy. We often talk about a team effort, but this truly was. Rick and I spent a lot of time talking about the briefs and trading edits. The S&C team prepared me for the argument, and Rick and I were talking about the case right up until the judges took the bench.

At a high level, what did you view as the single biggest legal error in the district court's certification ruling?

Pepperman: In securities cases like this, it has become common for plaintiffs simply to say that they want "out of pocket" damages. That's what plaintiffs did here. They wrongly persuaded the district court that merely saying out-of-pocket damages is enough. In *Comcast*, however, the Supreme Court held that plaintiffs need an actual methodology for measuring damages on a class-wide basis.

The Fourth Circuit repeatedly emphasized that plaintiffs must present a damages methodology that aligns with their liability theory. When did you realize that the alleged mismatch between those two concepts would become the centerpiece of your appeal?

Wall: The Supreme Court said three key things in *Comcast* and the Fourth Circuit followed all of them. First, plaintiffs need an actual damages methodology, backed up by evidentiary proof. Second, plaintiffs need that methodology before class certification. Otherwise, a district court can't know whether there is a way to measure damages class-wide and thus whether plaintiffs satisfy Rule 23's predominance requirement. Third, if plaintiffs offer a methodology, it must be consistent with their liability theory. Here, as the Fourth Circuit held, plaintiffs failed to do all three things.

This appeal appears to have turned on what could sound to non-specialists like an abstract dispute over damages modeling. How did you make those concepts accessible for a panel that had to understand both securities law and economic methodology?

Wall: This appeal wasn't about economic jargon; it was about common sense. To have a class action, common issues have to predominate over individual ones. We were clear in our briefs and at argument that the plaintiffs didn't need to put on a green eyeshade and do the actual math. They instead had to offer a workable formula that was consistent with their liability case. And they never did that.

During argument, Judge Richardson seemed particularly interested in whether a court can evaluate consistency under *Comcast* without first identifying the operative liability theory.

One theme running through your briefing and argument was that plaintiffs never actually committed to a damages methodology before certification. Why was that timing issue so important from a Rule 23 standpoint?

Pepperman: Plaintiffs often put the cart before the horse in these cases. They are vague at class certification about things like their damages methodology, so as not to hamstring them on the merits or limit potential damages. This case is a perfect example. Only after the class was certified did plaintiffs and their expert offer a constant-inflation methodology. But as *Comcast* held and the Fourth Circuit reiterated, plaintiffs have to offer their damages methodology before class certification.

Jeff, looking back at the oral argument, was there a particular question that signaled the court was focused on the issues you most wanted to highlight?

Wall: What stands out is how prepared the entire panel was from the jump. The judges had read the class certification papers, the district court transcripts and even the expert reports cover to cover, and they dove right in with both me and plaintiffs' counsel, **Deepak Gupta**, who is a leading appellate lawyer. As an advocate, that's the best feeling: when judges know the case as well as you do, and you can go straight to high gear.

Rick, Sullivan & Cromwell has handled many major securities matters. Where does this decision fit in terms of its potential significance for future class-certification battles?

Pepperman: This decision will require securities plaintiffs to take *Comcast* seriously. I also represented BP in the securities litigation filed after the Deepwater Horizon explosion. That case raised many of the same *Comcast* issues and resulted in an important opinion from the Fifth Circuit that the Fourth Circuit relied on here. Interestingly, Jeff mooted me for that Fifth Circuit argument back in 2015. We've been at this a long time!

What lessons should corporate defendants and their counsel take from the Fourth Circuit's insistence on a rigorous examination of damages methodology at the certification stage?

Pepperman: Defendants should be encouraged to vigorously oppose class certification in securities cases. The Fourth Circuit's decision provides a roadmap by articulating *Comcast*'s separate requirements, which plaintiffs need to take seriously.

What will you remember most about this matter?

Pepperman: I will most remember Jeff's oral argument in the Fourth Circuit. It was masterful. One of the best arguments I have seen.

Wall: For rebuttal, I needed a particular page from the massive record, and Rick handed it to me before I could even ask. That's how good this team was: not only Rick but **Jacob Cohen** and **Jason Barnes** at S&C and **Judd Littleton** at Gibson. Every one of them played a critical role.