

## Client Alert

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# Comcast Corp. v. Behrend: Courts Must Assess Merits of Plaintiffs' Damages Evidence at Class Certification

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Yesterday, in *Comcast Corp. v. Behrend*, 569 U.S. \_\_\_ (2013), the Supreme Court answered a looming class certification question left open by *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. \_\_\_ (2011): whether a putative class action plaintiff must offer credible evidence of damages applicable on a class-wide basis before the district court can certify a class under Federal Rule of Civil Procedure 23(b)(3). In a 5-4 opinion, the Court answered yes. The decision promises to have particularly significant implications in putative antitrust, employment, and consumer protection class actions, where plaintiffs traditionally rely on simplified assumptions and modeling at the class certification stage to persuade courts that proof of class-wide damages would be possible. The *Behrend* decision confirms that defendants in such cases should not overlook potential flaws in putative class plaintiffs' damages theories at the outset of the case.

**Background.** *Dukes* made clear that preliminary issues of class certification will likely require district courts to resolve "overlapping" merits questions. *Dukes* did not, however, answer *how* courts should resolve overlapping merits questions, and lower courts have differed significantly in the level of scrutiny they apply to those questions and to the evidence that is submitted at the class certification stage. *Behrend*—the first Supreme Court decision to apply *Dukes*—directly addresses that issue by requiring a district court to scrutinize a class plaintiff's damages evidence at the class certification stage to ensure that evidence could actually prove damages on a class-wide basis for the particular liability theory asserted.

**Facts.** In *Behrend*, cable customers alleged that Comcast "clustered" its cable television operations within a particular region by acquiring competitor cable providers in the region, and swapping its own systems outside the region for competitor systems located in the region. The cable customers alleged Comcast's practice harmed competition and artificially raised customer prices, in violation of antitrust laws. The cable customers sought class certification under Rule 23(b)(3), which allows damages-based class relief where "questions of law or fact common to class members predominate over any questions affecting only individual members." The customers alleged four distinct theories of harm to competition, and offered an expert's statistical model to prove that the damages resulting from that harm were measurable on a class-wide basis. In opposition to class certification, Comcast challenged all four theories, as well as the customers' damages evidence—an expert report—because the expert's model lumped together all the customers' purportedly improper theories of harm and did not isolate damages attributable to any one theory. Although the district court rejected three of the four theories as inapplicable to the class as a whole, it accepted the expert's model and certified the class. The Third Circuit affirmed, holding that Comcast's challenge to the model would improperly require the district court to assess the merits of the expert's methodology at the class certification stage.

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**Opinion.** Reversing, the Supreme Court held that the district court was required to assess whether the expert's damages methodology could apply class-wide. Quoting extensively from *Dukes*, Justice Scalia's majority opinion noted that "[b]y refusing to entertain arguments against respondents' 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." By accepting the expert's damages model, the lower courts failed to address the fact that plaintiffs' damages model incorporated three theories of harm that the court held inapplicable on a class-wide basis. Thus, "[t]here is no question that the model failed to measure damages resulting from the particular antitrust injury on which petitioners' liability in this action is premised." As such, the damages model could not credibly show the predominance of a common damages question unless the model showed damages attributable to the only remaining legally valid theory of harm. Because the analysis failed to do so, certification of the class was improper:

The Court of Appeals simply concluded that respondents "provided a method to measure and quantify damages on a classwide basis," finding it unnecessary to decide "whether the methodology [was] a just and reasonable inference or speculative." Under that logic, at the class-certification stage *any* method of measurement is acceptable so long as it can be applied classwide, no matter how arbitrary the measurements may be. Such a proposition would reduce Rule 23(b)(3)'s predominance requirement to a nullity.

**Dissent.** For its part, Justice Ginsburg's and Justice Breyer's dissent (in which Justices Sotomayor and Kagan joined) attacked the majority for, among other things, potentially "requiring, as a prerequisite to certification, that damages attributable to a class-wide injury be measurable on a class-wide basis." The dissent further stated that the predominance requirement "scarcely demands commonality as to all questions" and that when adjudication of questions of liability common to the class will achieve economies of time and expense, the predominance standard is generally satisfied "even if damages are not provable in the aggregate." The dissent also attacked the majority for improperly "consider[ing] fact-based matters" at the class certification stage. The dissent also attempts to confine the majority's decision "for this day and case only."

**Impact.** *Behrend* promises to pose extensive challenges to plaintiffs at the class certification stage from here on out. Clarifying *Dukes* and offering much-needed guidance to district courts currently grappling with certification questions, *Behrend* presents defendants with new ammunition at the class certification stage to challenge a plaintiff's ability to prove class-wide damages. Clients facing Rule 23(b)(3) class actions should renew their focus on attacking plaintiffs' damages evidence at the class certification stage, particularly where viable questions exist as to the applicability of a damages model to the class as a whole, or when the model is not carefully tied to plaintiffs' theory of liability. Even if the damages theory could apply on a class-wide basis, the opinion leaves open another potential avenue for attacking plaintiffs' damages claims: whether the expert survives scrutiny under *Daubert*—a question the Court declined to address in this case. In any event, the opinion makes clear that plaintiffs must tie their damages claims to liability, and they must show their damages claims are viable at the class certification stage. Despite a recent trend to the contrary, the *Behrend* decision breathes new life into the notion that individualized issues as to damages can defeat a class—a point defendants should consider when assessing how to oppose class certification.

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