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A Broader Perspective

Alert

Class and Derivative Actions

To: Our Clients and Friends

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Comcast Corp. v. Behrend, --- S. Ct. ---, 2013 WL 1222646 (U.S. Mar. 27, 2013): A Shift in the Requirements for Class Plaintiffs to Prove a Basis for Class Certification, Or Merely Status Quo?

The Supreme Court's *Comcast* decision could have a far-reaching impact on class action jurisprudence. The Court held that plaintiffs could not properly certify a class where they had failed to submit competent evidence that antitrust injury and damages could be established on a classwide basis. While many in the plaintiffs' bar have tried to portray the opinion as essentially routine, following longstanding precedents, class action practitioners familiar with how Rule 23 certifications typically are addressed will find significant new threshold requirements — in requiring as a prerequisite to certification that there is a basis for to address classwide injury and damages, with competent proof — not merely allegations. That is why the tone of the dissent, which so strenuously argues that the majority opinion didn't really decide anything, rings hollow. The importance of the decision may depend on how the Court ultimately addresses whether *Daubert* or other standards govern the admissibility of expert testimony on classwide issues (damages, causation, etc.) at the class certification stage. The die is cast, however, that these are serious questions that cannot be sloughed off by aphorisms about how the merits cannot be considered or that classwide damages are essentially irrelevant. The meaning of *Comcast* will be contested in the lower courts, with the plaintiffs' bar pointing to the dissent's claim that the case is limited to its facts and changes nothing, and the defense bar pointing to the holding of the majority that class certification was improper because the plaintiffs failed to demonstrate that the amount of damages can be shown on a class-wide basis.

The decision surprised some observers who expected an answer to whether *Daubert* or some other standard applied to the admissibility of expert testimony in class certification proceedings. In the case below, the Third Circuit had approved a lesser standard for admissibility than *Daubert* — whether it was plausible that the evidence would evolve into admissible evidence for admission of expert testimony in class certification proceedings, refusing to consider the quality of plaintiffs' proof because

that allegedly would be an impermissible merits inquiry. *Comcast Corp. v. Behrend*, 655 F.3d 182, 204 n.13 (3rd Cir. 2011), *rev'd*, 2013 WL 1222646 (U.S. Mar. 27, 2013). The issue posed by the Court in granting *certiorari* (substantially tailoring the question originally proposed by Comcast) was: "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." It ultimately became clear that the procedural posture of the case (where no *Daubert* motion had been made prior to certification) made the case a poor candidate for an authoritative decision on the standard of review of expert evidence on certification. Instead of answering that question, Justice Scalia's majority opinion reformulated the issue to avoid a waiver argument:

> Such a forfeit would make it impossible for petitioners to argue that Dr. McClave's testimony was not "admissible evidence" under the Rules; but it does not make it impossible for them to argue that the evidence failed "to show that the case is susceptible to awarding damages on a class-wide basis." Petitioners argued below, and continue to argue here, that certification was improper because respondents had failed to establish that damages could be measured on a classwide basis. That is the question we address here.

Id. at *4 n.4. This reformulation met with withering criticism from the dissent, who argued that "[t]his case comes to the Court infected by our misguided reformulation of the question presented. For that reason alone, we would dismiss the writ of certiorari as improvidently granted." *Id.* at *7 (Justices Ginsburg and Breyer, joined by Justices Sotomayor and Kagan). The dissent further argued that "[t]he Court's newly revised question, focused on predominance, phrased only after briefing was done, left respondents without an unclouded opportunity to air the issue the Court today decides against them." *Id.* at *9.

Having reformulated the question, the majority held that Rule 23(b)(3)'s predominance requirement is not satisfied where the plaintiff fails to establish with admissible evidence that damages can be measured classwide. *Id.* at *5 ("And it is clear that, under the proper standard for evaluating certification, respondents' model falls far short of establishing that damages are capable of measurement on a classwide basis. Without presenting another methodology, respondents cannot show Rule 23(b)(3) predominance: Questions of individual damage calculations will inevitably overwhelm questions common to the class."). In *Comcast*, the plaintiffs presented expert testimony that purported to show classwide damages. The Court rejected the evidence, however, because it purported to measure damages resulting from "the alleged anticompetitive conduct as a whole" and did not attribute damages to the only theory upheld by the district court. *Id.* at *6. The Court ruled that a damage model that does not attempt to measure only those damages attributable to the theory of wrongdoing certified "cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3)." *Id.* at *5.

The long-term import of the decision is not in its particulars regarding the expert's evidence (contrary to the spin of the plaintiff's bar), but in a potential interpretation of the case to require plaintiffs to present competent evidence that damages may be established by class-wide proof as a prerequisite to class certification. This interpretation certainly finds support in the text of the Court's opinion, but it would be contrary to the long-held position of many courts that differences in the amount of damages

to class members will rarely defeat class certification. *See* 7AA Wright, Miller, & Kane, *Federal Practice and Procedure* § 1781 (3d ed. 2005) ("it uniformly has been held that differences among the members as to the amount of damages incurred does not mean that a class action would be inappropriate") (citing cases); *see also Behrend*, 655 F.3d at 204 ("Some variation of damages among class members does not defeat certification").

The dissent sought to cabin the majority opinion to the facts in the case, and vehemently asserted that the majority made no change in the law. *See* 2013 WL 1222646, at *9-*10 ("The Court's ruling is good for this day and case only. In the mine run of cases, it remains the 'black letter rule' that a class may obtain certification under Rule 23(b)(3) when liability questions common to the class predominate over damages questions unique to class members."). The dissent's position may reflect discomfort with the potentially far-reaching nature of the majority opinion, and a desire to provide future litigants bases to distinguish the majority's opinion from their case.

Comcast presents the defense bar with potentially significant arguments against class certification. It also reflects a trend of the Supreme Court begun in *Wal-Mart v. Dukes* (decided by the same majority in 2011) to require that classes satisfy objective standards. Meanwhile, the wait continues for those looking for guidance about whether *Daubert* governs the admissibility of expert testimony in class certification proceedings. This remains an open question even though the Court's question to be addressed referred to "admissible evidence" and the Court's focus on the flaws of plaintiffs' model might strongly suggest that this Court would apply *Daubert*, and do so strictly.

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