

Client Alert

March 28, 2013

***Comcast Corp. v. Behrend*: Supreme Court Reinforces *Dukes* -- Holds that Class Certification Requires Merits Assessment of Damages Claims**

By James Boddy and Jacob Harper

Yesterday, in *Comcast Corp. v. Behrend*, 569 U.S. ___ (2013), the Supreme Court strongly reinforced its earlier decision in *Wal Mart Stores, Inc. v. Dukes*, 564 U.S. ___ (2011) that courts must undertake a “rigorous analysis” to satisfy themselves that the requirements for class certification have been met and must address the underlying merits of the case where necessary to carry out that analysis. Applying this standard to damages claims, the Court in a 5-4 decision reversed class certification where plaintiffs failed to demonstrate that damages could be proved on a classwide basis.

BACKGROUND.

The *Dukes* opinion acknowledged that preliminary issues of class certification frequently require district courts to resolve questions that overlap with the merits. *Dukes* did not, however, answer *how* courts should resolve that question or in what context, and lower courts have been issuing inconsistent results regarding the extent to which merits questions should be addressed at the class certification stage. *Behrend*—the first Supreme Court decision to apply *Dukes*—addresses that issue by requiring a district court to scrutinize the merits of a class plaintiffs’ damages evidence at the class certification stage as necessary to ensure that damages can be determined on a classwide basis.

FACTS.

In *Behrend*, cable customers alleged that Comcast “clustered” its cable television operations within a particular region by swapping stations it owned in other regions with its competitors in return for the competitors’ stations within the clustered region, thereby harming competition and artificially raising 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 theories of harm to competition for class-based damages claims, and offered an expert’s statistical model to show that plaintiffs could prove damages on a classwide basis. In opposition to class certification, Comcast challenged all plaintiff theories, as well as the customers’ damages evidence in an expert report. Although the district court rejected three of the plaintiffs’ four injury theories as not capable of classwide proof, it found that the expert’s model, based on the cumulative effect of all four theories combined, was sufficient to demonstrate that the one viable theory could be proved on a classwide basis, 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 customers’ claim at the class certification stage.

Client Alert

OPINION.

Reversing, the Supreme Court held that the lower courts had improperly avoided the merits and that plaintiffs' evidence failed to demonstrate that damages could be proved on a classwide basis. Quoting extensively from *Dukes*, Justice Scalia's majority opinion noted that district courts must "probe behind the pleadings before coming to rest on the certification question, and a certification is proper only if the trial court is satisfied, after a rigorous analysis, that Rule 23's prerequisites . . . have been satisfied." In addition, class certification questions "frequently overlap with the merits of the plaintiff's underlying claim" because a "class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." By accepting the expert's damages report, the district court and Third Circuit failed to address the fact that the plaintiffs' damages model could not distinguish between damages caused by the one viable liability theory and the damages caused by the three rejected theories. 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 incorporating the rejected theories could not credibly show the predominance of a common damages question in regard to the one potentially viable theory, because the model failed to show damages attributable to that theory alone. The Third Circuit's decision not to require review of the expert's model "simply because those arguments would also be pertinent to the merits determination" was erroneous because it "ran afoul of our precedents requiring precisely that inquiry." The majority thus held that the customers' damages evidence could not support class certification, and reversed.

DISSENT.

Justice Ginsburg's dissent attacked the majority for, among other things, potentially "requiring, as a prerequisite to certification, that damages attributable to a classwide injury be measurable on a classwide basis." Existing precedent generally finds, she asserted, that the commonality and predominance questions are satisfied where they achieve economies of time and expense, "even if damages are not provable in the aggregate." The dissent also attempted to confine the majority's decision "for this day and case only."

IMPACT.

The dissent's attempts to confine the majority opinion to the facts of the case may be wishful thinking. *Behrend* promises to pose further challenges to plaintiffs at the class certification stage. Clarifying *Dukes* and offering much-needed guidance to district courts currently grappling with certification questions, *Behrend* presents defendants with new ammunition to challenge plaintiffs' damages evidence. Clients facing Rule 23(b)(3) class actions should renew their focus on attacking plaintiffs' damages evidence at the class certification stage, particularly where plaintiffs offer broadly aggregated damages models, and viable questions exist as to the applicability of their damages models to the class as a whole.

Even if damages might be provable on a classwide basis, the opinion leaves open another potential avenue for attacking class certification: whether the expert's damages or other theories survive scrutiny under *Daubert*; that is, whether they are scientifically sound, a question the Court declined to address in this case. In any event, the opinion makes clear that damages are not exempt from the "rigorous analysis" required to certify a class, including, if necessary, an assessment of the merits. Despite a recent trend to the contrary, the *Behrend* decision

Client Alert

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 in employment, wage-hour, and other class actions.

* * *

The hallmark of our employment and labor practice is high-stakes litigation involving wage and hour and employment discrimination class actions, theft of trade secrets, employee and customer raiding, workplace privacy, and union-management relations. We try cases and provide counseling, auditing, and litigation avoidance strategies concerning all aspects of the employment relationship. To learn more about our practice, [click here](#).

To read our other employment and labor alerts, [click here](#).

Contact:

James Boddy

(415) 268-7081

jboddy@mofo.com

About Morrison & Foerster:

We are Morrison & Foerster—a global firm of exceptional credentials. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life science companies. We've been included on *The American Lawyer's* A-List for nine straight years, and *Fortune* named us one of the "100 Best Companies to Work For." Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at www.mofo.com.

Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations. Prior results do not guarantee a similar outcome.