

# Supreme Court Ups the Bar for Class Action Lawsuits

by Christine M. Vanek on May 7, 2013

The U.S. Supreme Court's decision in *Comcast Corp. v. Behrend* will likely help businesses defend employment, anti-trust, consumer protection class action lawsuits. The Court raised the bar for plaintiffs at the class certification stage by holding that they must provide credible evidence of damages applicable on a classwide basis.

## *The Facts of the Case*

Federal Rule of Civil Procedure 23(b)(3) requires that "questions of law or fact common to class members predominate over any questions affecting only individual members." In *Comcast*, the plaintiffs alleged that the cable provider "clustered" its cable television operations within a particular region by swapping the systems outside the region for competitor systems inside the region. The antitrust suit further claimed that the plaintiffs and other Comcast subscribers in the Philadelphia "cluster" are harmed because Comcast's strategy lessens competition and leads to supra-competitive prices.

At the class action certification stage, the district court accepted only one of the plaintiffs' four proposed theories of antitrust impact: that Comcast's actions lessened competition from "overbuilders," i.e., companies that build competing networks in areas where an incumbent cable company already operates. It then certified the class, finding that the damages from overbuilder deterrence could be calculated on a classwide basis, even though respondents' expert acknowledged that his regression model did not isolate damages resulting from any one of respondents' theories. The Third Circuit Court of Appeals upheld the ruling, finding that Comcast's challenge to the model would require reaching the merits of the plaintiffs' claims at the class certification stage.

## *The Supreme Court's Decision*

In a 5-4 decision, the majority of the Supreme Court disagreed. Relying heavily on the Court's reasoning in *Wal-Mart Stores, Inc. v. Dukes*, the majority reiterated that certification analysis will 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."

Under this framework, the majority concluded 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."

As further explained in the majority opinion, “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.”

As the Supreme Court’s decision highlights, class-action plaintiffs must not only prove that their claims involve “common questions” but also “common answers” when seeking to certify a class action. Accordingly, businesses can now challenge the ability to prove classwide damages as another avenue for defending a class-action lawsuit at the certification stage.

*If you have any questions about this case or would like to discuss the legal issues involved, please contact me, Christine Vanek, or the Scarinci Hollenbeck attorney with whom you work.*