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Practice Group(s):  
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## Comcast v. Behrend: New Opportunities for Class Action Defendants?

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The Supreme Court's recent opinion in *Comcast Corp. v. Behrend* all but invites defendants to make a number of arguments when attempting to defeat class certification. The *Behrend* case is therefore the latest move by the U.S. Supreme Court to limit class actions by giving defendants expanded tools to prevent class certification under Rule 23 of the Federal Rule of Civil Procedure.

### Background

Behrend was a Comcast subscriber in the Philadelphia region. He filed an antitrust suit under the Sherman Act alleging that Comcast engaged in anti-competitive practices by "swapping" its cable systems outside of the region for competitor systems within the region. Behrend sought certification of a class of subscribers under Federal Rule of Civil Procedure 23(b)(3).

In analyzing the Rule 23(b)(3) requirements for class certification, the District Court formulated the predominance requirement as requiring Behrend to show "(1) that the existence of individual injury resulting from the alleged antitrust [impact] . . . was capable of proof at trial through evidence that was common to the class . . . ; and (2) that the damages . . . were measurable on a class-wide basis through use of a common methodology."<sup>1</sup>

The District Court rejected three of Behrend's four theories of antitrust impact, leaving only the theory that Comcast's activities lessened competition from "overbuilders"—companies that build competing networks in areas where an incumbent cable company already operates. Behrend's damages theory, however, was calculated based on all *four* of his initial theories of liability. Critically, he did not calculate damages caused exclusively by lessened competition from overbuilders.

Notwithstanding this fact, the District Court found that damages resulting from Behrend's overbuilder theory could be calculated on a classwide basis and granted the motion for class certification.<sup>2</sup> A divided panel of the Third Circuit Court of Appeals affirmed.

### The *Behrend* Decision

#### *The Majority Opinion*

The Supreme Court reversed, holding that the class was improperly certified. The Court explained that any economic model supporting a damages theory must be consistent with the plaintiff's liability theory.<sup>3</sup> Behrend's damages model failed to calculate damages based solely on his theory of reduced overbuilder competition. Behrend's model therefore could not "bridge the differences between supra-competitive prices in general and supra-competitive prices attributable to the deterrence of

<sup>1</sup> Slip op. at 2-3.

<sup>2</sup> Slip op. at 4.

<sup>3</sup> *Id.* at 7.

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overbuilding, [and] Rule 23(b)(3) cannot authorize treating subscribers within the Philadelphia cluster as members of a single class.”<sup>4</sup>

With respect to the District Court’s analysis of the predominance requirement, the Court explained, “it is clear that, under the proper standard for evaluating certification, [Behrend’s] 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.”<sup>5</sup>

### *The Dissent*

The dissent expressed concern that the “decision should not be read to require, as a prerequisite to certification, that damages attributable to a classwide injury be measurable on a classwide basis.”<sup>6</sup> The dissent argued that the Court’s opinion “broke no new ground” and that it is “well nigh” universally recognized that individual damages calculations do not preclude class certification.<sup>7</sup> The dissent concluded that the damages model was an issue of fact and the Court should have deferred to the District Court’s finding that the model was capable of measuring damages on a classwide basis.<sup>8</sup>

## **What *Behrend* May Mean for Class Action Defendants**

The *Behrend* opinion appears to represent the next step in the Supreme Court’s efforts to rein in class action suits. More immediately, the opinion invites a number of arguments that defendants may try to use to defeat class certification.

First, defendants facing a class action can argue that the predominance analysis requires a putative class to affirmatively show damages measurable on a classwide basis as a prerequisite to certification. There is ample language in support of this proposition, particularly the Court’s apparent endorsement of the proposition that damages measurable on a classwide basis is the “proper standard for evaluating certification[.]”<sup>9</sup>

Second, regardless of whether plaintiff bears an affirmative burden at the certification stage to show that damages can be measured on a classwide basis, defendants may argue that a court should deny class certification where it is impossible for a plaintiff to establish damages measurable on a classwide basis at the certification stage.

Third, and despite the dissent’s view of the supposed black letter class certification law, defendants can argue that a court should deny certification where individual damage calculations overwhelm common issues.

Finally, the Court’s focus on the connection between the theory of liability and the theory of damages suggests that defendants should argue, where appropriate, that a court should deny class certification because plaintiff’s damages model does not tie to the theory of liability.

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<sup>4</sup> *Id.* at 10.

<sup>5</sup> *Id.* at 7.

<sup>6</sup> Dissent, at 3.

<sup>7</sup> *Id.* at 3-4.

<sup>8</sup> *Id.* at 9-10.

<sup>9</sup> Slip op. at 7.

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