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Behrend and *Amgen*: The Supreme Court Sends Mixed Signals About Reaching the Merits at the Class Certification Stage

By Stephen A. Fogdall and Christian D. Sheehan

The U.S. Supreme Court has sent mixed signals this term regarding when courts can address merits issues at the class certification stage. On March 27, 2013, in *Comcast Corp. v. Behrend*, the Court reaffirmed that lower courts may not "refus[e] to entertain arguments … that b[ear] on the propriety of class certification, simply because those arguments would also be pertinent to the merits determination." Op. at 6-7. However, a month earlier, in *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, the Court arguably did exactly that.

The *Behrend* Decision

In *Behrend*, subscribers of Comcast television services in the Philadelphia market brought suit against Comcast for violations of federal antitrust laws and sought certification of a class of current and former Comcast subscribers in the market. The plaintiffs proposed four theories of antitrust impact, *i.e.*, four ways in which Comcast allegedly distorted the market and increased cable subscription rates. *Behrend* Op. at 3. The District Court found that one of these theories — that Comcast's activities reduced the level of competition from "overbuilders" — was capable of class-wide proof, and certified a class based on that theory alone. *Id.*

To show that damages were measurable on a class-wide basis, the plaintiffs offered expert testimony comparing actual cable prices in the Philadelphia market with hypothetical prices that would have existed in the absence of all of Comcast's alleged anticompetitive conduct. *Id.* at 4. The expert's model did not isolate the portion of damages resulting from the "overbuilder" theory — the only theory of antitrust injury accepted for class-wide treatment. *Id.*

Despite this flaw in the expert's methodology, the Third Circuit affirmed the District Court's class certification ruling. Rejecting Comcast's argument that certification was inappropriate because the expert's model failed to isolate damages attributable to exclusion of "overbuilders," the Third Circuit held that examination of the expert's methodology would require an inquiry into the merits that was inappropriate at the class certification stage. *Id.* at 4 (citing 655 F.3d 182 (3d Cir. 2011)). The Third Circuit further explained that the plaintiffs were not required to "tie each theory of antitrust impact to an exact calculation of damages" to obtain class certification. *Id.*

The Supreme Court granted *certiorari* and reversed, emphasizing that a court must make a "determination that Rule 23 is satisfied, even when that requires inquiry into the merits of the claim." *Id.* at 8. The Court held that because the expert's model did not isolate the damages resulting from the only theory of antitrust impact capable of class-wide proof, the model could not demonstrate that common damages questions would predominate over individual damages calculations. *Id.* at 7. For instance, the Court explained, some members of the putative class might have seen their cable rates increase due to one of the theories of antitrust impact that the District Court had found unsuitable for class action treatment, while others might have paid increased rates due to another of the four theories. *Id.* The Court rejected the Court of Appeals' reasoning that it was "unnecessary to decide" at the class certification stage whether the model was "a just and reasonable inference or speculative" because the model successfully "provided a method to measure and quantify damages on a classwide basis." *Id.* at 8. The Court explained that on "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." *Id.*

Tension with *Amgen*

The *Behrend* decision reaffirms that district courts considering motions for class certification often must look beyond the pleadings to issues that overlap with the merits.

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The opinion also makes clear that a court can reject an expert's opinion, and deny class certification, because the expert's opinion is "arbitrary" or "speculative," even though the expert's opinion can be applied on a class-wide basis. However, the extent to which a district court may scrutinize an expert's methodology at the class certification stage remains unclear. In particular, the Court did not directly address whether the expert's opinion must be admissible at the class certification stage, or whether the opinion must pass muster under a full blown *Daubert* analysis, issues on which lower courts remain split.

In addition, the *Behrend* decision arguably is in tension with another class certification ruling issued by the Court in *Amgen* last month. There the Court held that a named plaintiff in a securities fraud case need not establish the materiality of the alleged misrepresentation in order to obtain class certification on the basis of the "fraud-on-the-market" theory, despite that proof of materiality is a necessary element of that theory, and despite that the plaintiff could only establish predominance if the fraud-on-the-market theory were applicable. The Court reasoned, first, that "materiality can be proved through evidence common to the class," and second, that materiality was an essential element of the plaintiff's claim on the merits. *Amgen* Op. at 11. Thus, "[a]bsent proof of materiality, the claim of the Rule 10b-5 class will fail in its entirety." *Id.* at 12. Materiality was therefore a dispositive merits issue that was "properly addressed at trial or in a ruling on a summary judgment motion," not at the class certification stage. *Id.* at 14. Hence, the Supreme Court arguably did in *Amgen* what it said was improper in *Behrend*, namely, "refusing to entertain arguments … that bore on the propriety of class certification, simply because those arguments would also be pertinent to the merits determination." *Behrend* Op. at 6-7.

Lower courts will be left to grapple with these issues in the wake of the potentially conflicting signals given by the Court in *Behrend* and *Amgen.* ◆

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