



Employers Get Extra Line Of Defense Against Class Certification

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Employment litigation is costly and disruptive, and when a single complaint turns into a class or collective action, the stakes go up exponentially. With its recent ruling in *Comcast v. Behrend*, the U.S. Supreme Court provided another line of defense against class certification.

Behrend places an affirmative burden on plaintiffs to establish, prior to certification, a plausible methodology for determining damages on a classwide basis through evidentiary proof. And while *Behrend* involved consumer antitrust claims, the court's holding is applicable to employment and wage-hour litigation as well.

In *Behrend*, the plaintiffs alleged that Comcast's practice of clustering — swapping cable systems with other cable providers or buying cable providers outright in order to be the only provider in the area — had an illegal anticompetitive impact on Philadelphia's cable market under four different theories. The plaintiffs sought class certification for the more than 2 million Comcast subscribers in the area. The district court certified a class only as to subscribers who had allegedly been injured because Comcast's clustering deterred competition from over-builders — companies that offer a competitive alternative where a telecommunication company already operates.

The U.S. Court of Appeals for the 3rd Circuit affirmed the court's ruling, but the Supreme Court reversed, holding that in order to obtain class certification, the plaintiffs had to at least plausibly show through evidentiary proof that damages could be determined on a classwide basis. In its decision, the Supreme Court emphasized that courts are required to engage in a "rigorous analysis" in determining whether all of the prerequisites of Rule 23 have been met, which will often overlap with the merits of the plaintiffs' underlying claims.

With wage and hour class and collective actions at an all time high, *Behrend* breathes new life into the argument that questions of individual damage calculations can defeat class certification. For employers, it is a welcome follow up to *Wal-Mart Stores, Inc. v. Dukes*, where the Court also demanded a "rigorous analysis" and applied a more demanding view of the commonality requirement prior to class certification.

One issue left open by *Behrend* is the quality of the "evidentiary proof" required for class certification, including whether the trial standard for the admissibility of expert evidence applies at the class certification stage. But considering the Supreme Court's recent trend of imposing more

stringent standards for class certification and its rejection of the expert testimony in Comcast, employers have reason to be optimistic.

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