

SUPREME COURT RAISES THE BAR FOR CLASS ACTIONS

Insights

Mar 27, 2013

Today the U.S. Supreme Court rendered a pivotal decision, holding that as a prerequisite for certification of a class action, a plaintiff must introduce *admissible* evidence to show that the case is susceptible to awarding damages on a class-wide basis. This ruling has been much anticipated and will significantly impact the future of employment-related class action lawsuits nationwide. *Comcast v. Behrend*

Background

The plaintiffs purport to represent a class of more than two million present and former Comcast cable subscribers in the Philadelphia area. They allege that Comcast monopolized Philadelphia's cable market and excluded competition by engaging in anticompetitive "clustering" – a strategy of swapping cable systems with other cable providers or buying cable providers outright in order to be the only provider in the area.

Comcast's "clustering" activities were designed to eliminate competition, raise entry barriers to potential competition, maintain increased prices for cable services at levels above what can be sustained in a competitive market, and deprive the market of effective competition, according to the complaint.

In ruling on the motion for class certification, the district court rejected most of the subscribers' theories, but certified the class on the theory that Comcast's clustering deterred competition from "over-builders" – companies that offer a competitive alternative where a telecommunication company already operates.

More specifically, the district court certified the class under Federal Rule of Civil Procedure 23(b)(3) after concluding that common issues predominate where "the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members, and that there is common

methodology available to measure and quantify damages on a class-wide basis.”

Comcast appealed, asserting that the expert testimony offered by the subscribers failed to demonstrate damages on a class-wide basis and was insufficient to satisfy minimum requirements for admissibility. Comcast further urged the court to adopt a rule requiring the subscribers to present *admissible* evidence of common injury to satisfy their burden for class certification.

Ultimately, the issue this case presented was whether the court was required to hold a hearing to determine the admissibility of expert testimony prior to class certification (referred to as a *Daubert* hearing), or if doing so would prematurely address the merits of the underlying class action. There is disagreement among jurisdictions regarding the role of the *Daubert* hearing under Rule 23. The U.S. Courts of Appeals for the 7th, 11th, and 9th Circuits require a full *Daubert* analysis in at least some circumstances. The 8th Circuit requires only a “focused *Daubert* analysis.” In *Behrend*, the 3rd Circuit introduced a different standard – whether the expert’s “theory of proof is plausible.”

The Decision And Its Impact

In a 5 – 4 decision, the Supreme Court held that “Respondents’ class action was improperly certified under Rule 23(b)(3). By 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 Appeal ran afoul of our precedents requiring precisely that inquiry. And it is clear that, under the proper standard for evaluating certification, respondents’ model falls short of establishing that damages are capable of measurement on a classwide basis.” The Supreme Court further noted that “at the class-certification stage (as at trial), any model supporting a “plaintiff’s damages case must be consistent with its liability case, particularly with respect to the alleged anticompetitive effect of the violation.””

Under the Federal Rules of Civil Procedure, to certify a case as a class action, the named plaintiff must satisfy the following criteria:

1. Commonality – there must be one or more legal or factual claims common to the entire class. Specifically, it must be shown that the common issues will predominate over individual issues;
2. Adequacy – the named plaintiff must fairly and adequately protect the interests of the class;
3. Numerosity – the class must be so large as to make individual lawsuits impractical; and

4. Typicality – the claims or defenses must be typical of the plaintiffs or defendants.

Usually, the most hotly litigated issue at the class certification phase is that of commonality. In 2011, the Supreme Court, in the case of *Walmart v. Dukes*, overturned a class-certification decision and applied a more stringent view of the commonality prong. The Court noted that it was not the mere raising of common questions that justified a finding of commonality; rather, the plaintiff must demonstrate “the capacity of a class wide proceeding to generate common answers apt to drive the resolution of the litigation.” *Dukes* was a significant win for employers, and made it more difficult for plaintiffs to obtain class certification, especially in employment cases where, typically, no single employment policy or practice impacts the entire class in the same way.

The *Behrend* decision raises the class action bar one more notch in favor of employers. Specifically, *Behrend* requires that plaintiffs not only show that they *could* prove their claims through common evidence at trial, but puts an affirmative burden on plaintiffs to establish, prior to certification, that there is reliable and admissible evidence of common injury and damages on a class-wide basis.

This decision is one that merits attention as it highlights the importance that admissibility determinations be sufficiently made on the record before expert testimony can be presented in any stage of litigation.

What this Means for Employers

The certification ruling is often the most important decision in a class action because certification creates significant pressure for defendants to settle, regardless of the merits of the case. This decision will not only limit those cases filed as a class action, but also impact the manner in which class actions are litigated.

For more information contact your regular Fisher Phillips attorney.

This Legal Alert provides an overview of a specific Supreme Court decision. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.