

One Minute Memo[®]



Supreme Court Hears Oral Argument in Comcast v. Behrend

This morning the Supreme Court of the United States heard oral argument in *Comcast Corp. v. Behrend* – addressing whether a district court may certify a class action without first determining whether the plaintiffs have introduced admissible evidence that damages can be determined on a class-wide basis. A copy of the [hearing transcript](#) is attached.

The case centers on plaintiffs' allegation that Comcast engaged in "anticompetitive clustering" by making deals with competitors in Philadelphia to swap cable assets and allocate regional cable markets among themselves. Plaintiffs submitted an expert report by Dr. James McClave as support for the proposition that damages can be determined on a class-wide basis. Comcast, in turn submitted its own expert reports which, in part, challenged the methodology employed by plaintiffs' expert. The district court granted the motion for class certification. The U.S. Court of Appeals for the Third Circuit affirmed, stating that attacks on expert methodology are inappropriate at the class certification phase.

Behrend is the latest in a string of relatively recent Supreme Court cases addressing class certification issues. Notably, in *Wal-Mart Stores, Inc. v. Dukes* five Justices hinted – but did not hold – that the standards for admissibility of expert testimony established in *Daubert v. Merrill Dow Pharmaceuticals, Inc.* should be applied at the class certification stage. That issue presumptively was to be the focus of the *Behrend* case.

During this morning's argument, however, three Justices appeared to challenge whether the issue properly is before the Court. Specifically, the Justices explored plaintiffs' argument that Comcast had waived the question of whether admissibility must be decided at class certification, having never requested a *Daubert* hearing as part of class certification.

The Justices then turned to the substantive question presented for review – whether a *Daubert* analysis of expert testimony should be required at class certification. Based on responses to questions posed by the Justices, surprisingly, it appears as if the parties are in agreement with respect to the legal question before the Court. For example, in response to several different questions, plaintiffs' counsel agreed that the district court should decide reliability, as long as the admissibility had been presented to the district court.

Other justices focused on the pragmatic realities facing district courts when addressing class certification issues. For example, Justice Kennedy asked whether it really is necessary for a court to speak "magic words" such as "admissibility" instead of just making a finding as to whether it is possible to measure damages on a class-wide basis. Similarly, Justice Ginsburg raised the analogy of a Title VII employment discrimination class action, where courts can and do bifurcate the issues of liability and damages, allowing individual calculation of damages after a class-wide liability determination has been made. The frequency of such questions suggest the Justices are searching for a pragmatic solution that will allow a district court to consider expert testimony as part of the class certification process, but yet not require stringent compliance with the well-established *Daubert* standard.

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The Supreme Court's decision regarding this issue will be of critical importance to any case in which the issue of certification may turn on the reliability of expert testimony. If plaintiffs are held to a higher standard at the certification stage, it is less likely that weak or arguably meritless cases will proceed.

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