

How Rigorous Is The 'Rigorous Analysis' Requirement?

Law360, New York (November 27, 2012, 3:56 PM ET) -- On Nov. 5, 2012, the [Supreme Court of the United States](#) heard oral argument in [Comcast Corp. v. Behrend](#), No. 11-864 (U.S.) — 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 classwide basis.

The case centers on the plaintiffs' allegation that Comcast engaged in "anti-competitive clustering" by making deals with competitors in Philadelphia to swap cable assets and allocate regional cable markets among themselves in violation of antitrust law. Plaintiffs claimed that Comcast's actions constituted an exercise of monopoly power that artificially increased the prices for cable services.

The plaintiffs initially advanced four theories of how this caused an "injury" under antitrust law. In granting class certification, the district court relied on only one: a damages model offered by plaintiffs' expert, Dr. James McClave, who compared actual cable prices to hypothetical prices that would have been in place absent Comcast's alleged wrongdoing. Dr. McClave's testimony was used as support for the proposition that damages can be determined on a classwide basis. Comcast, in turn submitted its own expert reports which, in part, challenged the methodology employed by the plaintiffs' expert. The district court, however, concluded that the plaintiffs had adequately established "there is a common methodology available to measure and quantify damages on a classwide basis."

Accordingly, the court granted plaintiffs' motion for class certification. In a split decision, the Third Circuit affirmed the order granting class certification. In its decision, however, the Third Circuit did not address Comcast's challenges to the viability of plaintiffs' proffered methodology. Instead, the court stated that "attacks on the merits of the methodology" have "no place in the class certification inquiry." *Behrend v. Comcast Corp.*, 655 F.3d 182, 207 (3d Cir. 2011). Comcast filed a petition for a writ of certiorari which the Supreme Court granted. In doing so, however, the Supreme Court reframed the question presented for review to focus specifically on the admissibility of the class-wide damages evidence.

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](#), 131 S. Ct. 2541 (2011), 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. See *Wal-Mart*, 131 S. Ct. at 2553-54 ("The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that is so. ..."). At bottom, the question is whether the "rigorous analysis" required of a court deciding class certification also requires it to apply *Daubert* to the parties' competing expert analyses. That issue presumptively was to be the focus of the *Behrend* case.

During the argument, however, three justices appeared to challenge whether the issue properly is before the court. Specifically, the justices explored the plaintiffs' argument that the writ had been improvidently granted because Comcast had waived the question of whether admissibility must be decided at class certification, having never requested a Daubert hearing.

The justices did, however, address 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, the plaintiffs' attorney agreed that the district court should decide reliability, as long as the admissibility had been presented to the district court and not waived.

Other justices focused on the pragmatic realities facing district courts when addressing class certification issues. For example, Justice Anthony 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 classwide basis. Similarly, Justice Ruth Bader 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 classwide 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.

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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