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Supreme Court Raises the Bar for Certifying Class Actions

The United States Supreme Court's recent decision in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (Mar. 27, 2013), has made it more difficult for plaintiffs to bring class actions under Federal Rule of Civil Procedure 23(b)(3). Labor and employment practitioners should take note of *Behrend* because courts now will scrutinize rigorously whether plaintiff-specific damages predominate in determining whether to allow Rule 23(b)(3) class actions to proceed.

The *Behrend* Case

Behrend was an antitrust case, not an employment case. The named plaintiffs alleged that Comcast had taken four anticompetitive actions. The district court held that only one theory was capable of class-wide proof and certified a class as to that single theory.

The district court required the plaintiffs to demonstrate that damages could be determined on a class-wide basis. The plaintiffs came forward with a methodology based on all four anticompetitive theories, not just the one remaining in the case. Nevertheless, the judge was satisfied that damages could be determined on a class-wide basis. The Third Circuit affirmed.

The Supreme Court, however, disagreed. The Court held that the plaintiffs must produce *evidence* that issues common to the class predominate over plaintiff-specific issues. Because the plaintiffs' methodology did not isolate which damages flowed from the only remaining theory of liability, there was no evidence that damages could be determined on a class-wide basis. As a result, the trial court had erred in certifying the class.

The four dissenting justices argued that the majority's ruling was misleading. "In particular," they noted, "the decision should not be read to require, as a prerequisite to certification, that damages attributable to a class-wide injury be measurable 'on a class-wide basis.'" *Id.* at 1436. These justices suggested that the lower court erred in requiring the plaintiffs to show that their damages were measurable on a class-wide basis: "Recognition that individual damages calculations do not preclude class certification under Rule 23(b)(3) is well-nigh universal." *Id.* at 1437. Because no one objected to the lower court's requirement that damages be determinable on a class-wide basis, the majority assumed that proposition was true, leading to the misleading language. The dissent concluded:

> The Court's ruling is good for this day and case only. In the mine run of cases, it remains the "black letter rule" that a class may obtain certification under Rule 23(b)(3) when liability questions common to the class predominate over damages questions unique to class members. *Id.*

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Interpreting *Behrend*

Despite the dissent's attempted limitation, *Behrend*'s emphasis on requiring plaintiffs to produce a method for determining class-wide damages may apply beyond the facts of *Behrend*. For example, the Supreme Court sent *RBS Citizens, N.A. v. Ross*, an FLSA class action case for which it had granted *certiorari*, back to the Seventh Circuit for reconsideration in light of *Behrend*. *See* 133 S. Ct. 1722 (Apr. 1, 2013).

Numerous district courts already have applied *Behrend* to deny class certification in employment cases. *See, e.g.*, *Tracy v. NVR, Inc.*, 2013 U.S. Dist. LEXIS 62407, at *18 (W.D.N.Y. Apr. 29, 2013) (citing *Behrend* and denying a motion to certify an FLSA overtime class because damage determinations were too highly individualized to be brought as a class); *Semenko v. Wendy's Int'l, Inc.*, 2013 U.S. Dist. LEXIS 52582, at *32 (W.D. Pa. Apr. 12, 2013) (citing *Behrend* and denying class certification in an ADA case); *Roach v. T.L. Cannon Corp.*, 2013 U.S. Dist. LEXIS 45373, at *9-10 (N.D.N.Y. Mar. 29, 2013) (denying FLSA class certification and rejecting plaintiffs' contention that individualized damages were permissible, because that "position is in contravention of the holding of *Behrend*").

Other courts have taken a more nuanced approach to *Behrend*. After a thoughtful discussion, one judge wrote: "I interpret [*Behrend*] not to foreclose the possibility of class certification where some individual issues of the calculation of damages might remain, as in the current case, but those determinations will neither be particularly complicated nor overwhelmingly numerous." *Martins v. 3PD, Inc.*, 2013 U.S. Dist. LEXIS 45753, at *21 n.3 (D. Mass. Mar. 28, 2013). Another court limited *Behrend* further. *See Harris v. ComScore, Inc.*, 2013 U.S. Dist. LEXIS 47399, at *32 n.9 (N.D. Ill. Apr. 2, 2013) (calling *Behrend*'s assumption that damages must be assessed with a common methodology "merely dicta" and instead suggesting that *Behrend* stood for the simple, uncontested proposition that a class should not be certified if individual damage calculations will inevitably overwhelm common questions).

Conclusion

As is clear from the post-*Behrend* decisions, there is no consensus among the courts on *Behrend*'s application. Class certification may very well depend on whether there are many, or any, individualized damage issues. At the very least, however, *Behrend*'s emphasis on a rigorous analysis of whether the plaintiffs have shown that common issues predominate over plaintiff-specific damages will change the way employment law class actions are litigated. Both sides should prepare to argue predominance thoroughly.

~ By Justin C. Sorrell, Jackson Lewis LLP

Section Calendar

JUNE 27, 2013

The Florida Bar Annual Convention

Boca Raton Resort & Club, 501 East Camino Real, Boca Raton, FL 33432, www.bocaresort.com

- Executive Council Meeting (**Venetian room**)
  5:00 p.m. to 6:00 p.m.
- Reception (**Royal Palm Ballroom VII**)
  6:00 p.m. to 8:00 p.m.