



A Sea Change in Class Action Certification

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In *Comcast v. Behrend*, a class action case involving how much Comcast charged cable TV subscribers, the United States Supreme Court held 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. Justice Antonin Scalia wrote for the majority that Comcast's subscribers fell far short of establishing that damages are capable of measurement on a class wide basis, he continued. There is no question that the model failed to measure damages resulting from the particular antitrust injury on which (Comcast's) liability in this action is premised.

Comcast requires that plaintiffs not only show they could prove their claims through common evidence, but also 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. Thus, in holding that a plaintiff seeking certification of a damages class under Rule 23(b)(3) must establish, through evidentiary proof, that damages can be measured on a class wide (and not individual) basis, *Comcast* raises the bar for class-action plaintiffs to obtain class action certification. *Comcast* also makes it clear that the trial court must probe the merits of the claim at the certification stage to ensure that the method for measuring damages fits the underlying substantive legal theories remaining in the case and is not arbitrary.

Although this decision related to consumers, it can be applied to and will significantly impact the future of employment-related class action lawsuits.