

Tightening the Noose on Class Certification Requirements (II): Is Admissible Evidence Required at Class Certification?

CASE AT A GLANCE

Philadelphia Comcast cable television subscribers sued Comcast Corp. in an antitrust class action alleging that Comcast's anticompetitive actions artificially inflated the cost of cable subscriptions. The Court will first determine whether it should hear Comcast's appeal in light of a settlement or whether Comcast properly preserved a class certification issue for appeal. If the Court gets to the merits, it will determine if a trial court during class certification must resolve whether a plaintiff has introduced admissible expert witness testimony to show that damages may be awarded on a classwide basis.

Comcast Corp. et al. v. Behrend et al.
Docket No. 11-864

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From: The Third Circuit

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ISSUES

Should the Supreme Court resolve a contested issue where the parties settled their underlying dispute two weeks before the Court granted certiorari review?

During class certification proceedings and on appeal, did Comcast properly preserve the issue of the court's role in resolving the admissibility of expert witness testimony?

If the Court agrees to hear the appeal, did the trial court appropriately resolve the admissibility of expert witness testimony on classwide damages during the class certification proceedings?

FACTS

In 2003, Caroline Behrend brought an antitrust class action lawsuit in federal court for the Eastern District of Pennsylvania on behalf of herself and other Comcast cable subscribers. The class members claimed that as a consequence of Comcast's anticompetitive actions, they paid too much for their cable services. The complaint alleged that Comcast violated § 1 of the Sherman Act by agreeing with Time Warner Cable and other cable operators to allocate video customers in the Philadelphia area to Comcast. The plaintiffs further alleged that Comcast violated § 2 of the Sherman Act by monopolizing and attempting to monopolize the Philadelphia market, which resulted in artificially inflated prices to Comcast consumers. See Sherman Act, 15 U.S.C. §§ 1-2.

The nub of the plaintiffs' complaint centered on their contention that Comcast engaged in anticompetitive "clustering" in the Philadelphia area. "Clustering" refers to a practice when a cable company concentrates its operations in a regional geographic

area by acquiring cable systems where the company already has a significant presence. The plaintiffs alleged that Comcast engaged in acquisitions and swaps so that it eventually controlled 69.5 percent of Philadelphia-area cable subscriptions. The complaint alleged that these actions were designed to eliminate competition, raise barriers to entry for potential competition, and increase prices for services to supracompetitive levels.

To prevail on claims, the plaintiffs needed to show (1) a violation of the antitrust laws, (2) individual injury resulting from that violation (the so-called "antitrust impact"), and (3) measurable damages. The plaintiffs asserted four theories of antitrust impact under prevailing antitrust jurisprudence.

In May 2007, the district court certified a class of cable subscribers from the Philadelphia area to assert antitrust claims against Comcast. Comcast appealed this certification order under Fed. R. Civ. P. 23(f), but the Third Circuit declined to hear this appeal on June 29, 2007. Shortly thereafter, the Third Circuit issued an opinion delineating comprehensive standards to govern a court's rigorous analysis of class certification proceedings, including the role of the court in resolving disputed expert witness testimony. See *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008).

In light of the Third Circuit's decision in *Hydrogen Peroxide*, Comcast sought to decertify the class action. The district court treated Comcast's motion as a "Motion for Reconsideration" and ordered briefing and argument to address the new *Hydrogen Peroxide* standards. The court conducted an evidentiary hearing over four days in October 2009, during which the parties presented 32 expert reports relating to class certification and merits issues, multiple documents, and deposition testimony from more than a dozen witnesses. The

judge heard direct and cross-examination testimony—and personally examined—fact and expert witnesses.

The court received testimony from two economic experts relating to a model for classwide damages. Dr. Michael Williams presented testimony that four nonexclusive mechanisms had caused the high cable prices in the Philadelphia area, and that the case was susceptible of awarding damages on a classwide basis. The judge admitted this expert testimony without objection from Comcast. Dr. James McClave, a statistician and econometrician, presented a statistical model and common methodology to measure and quantify damages on a classwide basis. During the certification hearing, Comcast challenged Dr. McClave's use of other "benchmark" markets to determine an appropriate and reliable estimate of damages, and presented a number of other challenges to the plaintiffs' damage model.

At the hearing, Comcast did not object to the admissibility of the experts or reports that the plaintiffs presented in support of class certification under the federal rules of evidence or under the *Daubert* standards for challenging expert witness testimony. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 469 (1993). Instead, Comcast argued that the plaintiffs had not proved by a preponderance of the evidence that the Rule 23(b)(3) class certification for predominance of common questions was satisfied with regard to antitrust impact or the methodology for classwide damages.

After the four-day class certification hearing, the judge addressed an additional series of questions to the parties relating to the questions of antitrust impact and the damage model. On November 16, 2009, the judge heard further argument addressing these questions. On January 7, 2010, the court issued an order recertifying the class under Fed. R. Civ. P. 23(b)(3) pursuant to the rigorous analysis standards in *Hydrogen Peroxide*. See 264 F.R.D. 150 (E.D. Pa. 2010). In an unreported decision, the court issued an amended class certification order on January 13, 2012, which limited the scope of antitrust impact solely to the theory that Comcast had engaged in anticompetitive clustering conduct, which deterred entry into the Philadelphia market.

On appeal to the Third Circuit, Comcast argued that the judge abused his discretion or clearly erred in certifying the class. Comcast did not contend that the judge had erred in admitting the expert opinions of Dr. McClave under *Daubert* standards. The Third Circuit affirmed the court's recertification order on August 23, 2011. See 655 F.3d 182 (3d Cir. 2011).

A divided panel of the Third Circuit held that the trial court conducted a proper class certification analysis applying *Hydrogen Peroxide* standards and that Comcast did not contest that the court failed to perform the rigorous analysis. The court further held that the trial judge properly found that the plaintiffs could prove antitrust impact using common evidence to the class and affirmed the trial court's endorsement of Dr. McClave's damage model.

The panel disagreed whether the plaintiffs had carried their burden of proof to show that their alleged damages were capable of measurement on a classwide basis, using common proof. However, the majority suggested that Comcast's attacks on the merits of Dr. McClave's methodology had no place in the class certification inquiry. The court suggested that: "[w]e have not reached the stage of

determining on the merits whether the methodology [offered by the Plaintiffs] is a just and reasonable inference or speculative."

Instead, the court examined only whether the proposed model "could evolve to become admissible evidence," and accepted the plaintiffs' assurances that it could. Moreover, the court noted that the Supreme Court in *Dukes*, "require[d] a court to evaluate whether an expert is presenting a model which could evolve to become admissible evidence, and not requiring a district court to determine if a model is perfect at the certification stage." See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

Comcast filed a petition for a writ of certiorari in the Supreme Court. While the certiorari petition was pending, the district court judge set the case for trial on September 5, 2012. On June 8, 2012, Comcast moved to exclude Dr. McClave's opinions under *Daubert* standards. On June 11, 2012, after a day-long mediation, the parties agreed to settle the case and signed a settlement sheet of proposed terms. On June 13, 2012, the parties asked the judge to remove the case from the September trial docket.

On June 25, 2012, two weeks after the agreed settlement, the Supreme Court granted certiorari. Two days later Comcast informed the plaintiffs that they would not proceed to finalize the settlement. On June 29, 2012, the plaintiffs filed a motion to enforce the settlement, which remains pending in the district court.

CASE ANALYSIS

If the Supreme Court decides to address Comcast's stated issue, the Court will be tackling important issues of evidentiary proof at class certification left open by the Supreme Court in its 2011 *Wal-Mart* decision, as well as the Third Circuit in *Hydrogen Peroxide* (and other appellate courts endorsing a more rigorous analysis standard for class certification). The issue whether a district court may certify a class without resolving whether the plaintiff has introduced admissible expert witness testimony to show that the case is susceptible to classwide damages has tremendous importance for the role of the court in receiving and evaluating evidence during class certification proceedings.

However, Behrend has raised a set of substantial threshold issues that may deflect the Court from deciding the issue upon which it granted certiorari. Behrend argues that, in light of the parties' settlement two weeks before the Court granted certiorari, the Court should now not hear the case at all and instead determine that the writ of certiorari was "improvidently granted." In support of this contention, Behrend argues that the law favors settlement, that the settlement moots the case, and that the parties' settlement counsels restraint on the part of the Court. In addition, there is ample precedent for the Supreme Court, under these circumstances, to decline to hear an appeal and to instead decide that the writ was improvidently granted.

In addition, Behrend argues that the settlement itself materially alters the question before the Court. In a 1997 landmark settlement class decision, the Court held that in reviewing a Rule 23(b)(3) settlement "a district court need not inquire whether the case, if tried, would present intractable management problems." *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591 (1997). Hence, according to Behrend, the parties' settlement in this antitrust class action renders

irrelevant the possible management problem posed by classwide damages.

Behrend further contends that Comcast is estopped from pursuing its appeal challenging whether the trial court appropriately considered the admissibility of the expert witness testimony because Comcast never raised or preserved this issue during multiple opportunities at the trial or appellate levels. In reviewing proceedings over several years, Behrend argues that Comcast chose not to object to the admissibility of Dr. McClave's expert reports and testimony, including for lack of relevance under the federal evidence rules or for threshold admissibility under *Daubert* standards. Therefore, this appeal does not present an appropriate legal posture or factual setting for the Court to analyze and answer the question presented to the Court.

Behrend contends that it is a fundamental principle of appellate jurisprudence that a party that does not perfect and preserve errors of law thereby forfeits the ability to raise those issues in the first instance, on appeal. In short, Behrend contends that Comcast has waived its right—several times—to assert any claims of error based on the trial court's failure to apply evidentiary standards to Dr. McClave's expert testimony.

Furthermore, Behrend contends that even if the Court permits the appeal before it, then Comcast's failure to object to the admission of evidence during the class certification proceedings changes the standard of review. Normally, a trial judge's class certification decisions are reviewed for an abuse of discretion. In this instance, however, Behrend contends that Comcast must instead show that the trial judge committed "plain error" in certifying the class. Various courts have articulated the plain error standard, but generally a party asserting that a judge committed plain error must show that the error is plain, affected substantial rights, and seriously affected the fairness, integrity, or public reputation of the proceedings. A party must show that disregarding the judge's plain error would result in a miscarriage of justice. In addition, the error must be plain "under current law."

Behrend contends that the trial judge did not commit plain error under current law, because neither Rule 23, *Wal-Mart*, nor class action jurisprudence set standards for whether a district court may certify a class in absence of expert evidence admissible under *Daubert*. In addition, Behrend argues, the trial judge faithfully adhered to the current legal standards for class certification in *Hydrogen Peroxide*, including that decision's standards for evaluating competing expert witness testimony.

If the Court agrees with Behrend's threshold arguments, then the Court could decline to rule on the question presented and dismiss the writ of certiorari as improvidently granted. On the other hand, if the Court agrees to hear the issue of admissibility of expert witness testimony, then the Court will have to determine whether to evaluate the judge's actions under an abuse of discretion or plain error standard.

Turning to the merits of the appeal, an unresolved question in federal class action jurisprudence concerns whether a court must hold an evidentiary hearing on the class certification issue, and if so, what rules of evidence, if any, apply to the certification inquiry.

While Rule 23 is silent on these questions, many federal courts now require such evidentiary hearings, and do apply Fed. R. Evid. 702 and *Daubert* to evidence adduced in certification proceedings. Most federal courts have now moved well beyond the days when they would certify a class action on the pleadings and allegations alone.

In its 2011 *Wal-Mart* employment discrimination decision, the Court did not resolve the question concerning what *kind* of hearing, if any, a trial court must conduct in order to certify a class. However, although the Court did not directly hold that *Daubert* standards apply to class certification, the majority signaled that the district court incorrectly refused to apply *Daubert* to assess a sociologist's expert testimony during class certification proceedings, instead admitting this testimony into the record and considering it in the certification decision.

Thus, the Court stated: "The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. We doubt this is so . . ." Consequently, if the question whether courts must apply *Daubert* standards to expert witness testimony at class certification ever directly is presented to the Court, it seems likely that at least the five justices who joined the *Wal-Mart* majority opinion might agree that this is a proper evidentiary rule for class certification proceedings. But, whether this case has perfected this *Daubert* evidentiary issue on its facts or law may prove problematic for this Court.

In its *Wal-Mart* decision, in addition to suggesting that the expert sociological testimony should have been subjected to *Daubert* scrutiny, the Court chose to discount the sociologist's opinions and conclusions that Wal-Mart has a strong corporate culture making it vulnerable to gender bias. Instead, the Court expressed doubt that the expert's testimony was useful in assessing whether the proposed class was united by a common question of fact or law. The Court similarly discounted the expert testimony of the plaintiffs' statistician and labor economist, offered to demonstrate that Wal-Mart store supervisors engaged in a common mode of exercising local discretion that discriminated against female employees.

The Court's repudiation of the statistical testimony cuts at the heart of such offers of proof based on regression analyses often used by plaintiffs in class certification proceedings to satisfy the commonality requirement of Rule 23(a)(2) and the predominance requirement of Rule 23(b)(3). In dissent, Justice Ginsburg defended the experts' regression analyses. She opined that the majority's contrary contention "reflects only an arcane disagreement about statistical method—which the District Court resolved in the plaintiffs' favor." Justice Ginsburg further noted that appellate review was not an occasion to disturb a trial court's handling of factual disputes of this nature.

The Court's unresolved conversation in *Wal-Mart* concerning the appropriate use of expert witness testimony at the class certification stage manifests the Court's interest in this issue. Whether the Court will utilize *Comcast* to set the standards for the role of trial courts in evaluating such testimony is an open question.

Comcast contends that the Third Circuit's decision not to address the admissibility of Dr. McClave's expert testimony because this was a merits issue—accepting the plaintiffs' assurances that classwide

proof of damages would be forthcoming—violates bedrock principles of class certification. Comcast contends that the Court in *Wal-Mart* recognized that the rigorous analysis standard entails some overlap with the merits of the plaintiffs’ underlying claims, and that even prior to *Wal-Mart* most federal courts recognized that district courts must resolve any factual issues bearing on class certification, whether they overlap with the merits or not.

Comcast contends that where plaintiffs attempt to satisfy their burden in a Rule 23(b)(3) class that common issues predominate through expert witness testimony, the court must examine that testimony to determine whether it is sufficiently reliable and helpful for that purpose. The court must examine the expert evidence in light of other evidence before it, including competing testimony. Under *Hydrogen Peroxide*, a judge must decide all factual disputes and competing expert testimony. And, according to Comcast, simple logic dictates that if the testimony would not ultimately be admissible at trial, the court should not credit it at class certification. Moreover, the federal evidence rules do not contain an exception that would limit their applicability to the admission of evidence at trial. If expert evidence does not meet the threshold requirements for reliability and helpfulness, then a plaintiff cannot satisfy its burden.

Comcast argues that the Third Circuit’s decision violates a basic rule of class action jurisprudence; namely, that the parties seeking class certification must demonstrate actual and not presumed conformance with the Rule 23 requirements for class certification. Comcast contends that the plaintiffs failed to carry their burden of demonstrating the predominance element of a Rule 23(b)(3) class, because of the court’s failure to exclude Dr. McClave’s expert testimony as inadmissible to support a model of classwide damages. In absence of a well-founded damage theory, class certification was and is inappropriate. Thus, because the plaintiffs had no classwide evidence of damages, they would be required to prove that issue on an individualized basis across nearly two million class members.

Moreover, characterizing the Third Circuit’s decision as a “watered-down” approach to class certification, Comcast maintains that the Third Circuit’s decision would relieve class members of the burden of proving damages at trial, depriving Comcast of its right to defend against class members’ claims—in direct violation of the Rules Enabling Act. Under the Rules Enabling Act, federal courts may only enact procedural rules that do not modify, change, or amend substantive rights; therefore courts also may not interpret procedural rules such as Rule 23 to affect substantive rights. Comcast points to the majority decision in *Wal-Mart*, which repudiated a “trial by formula” variant of a gross damages theory.

In response, Behrend first suggests that the *Comcast* appeal does not provide an appropriate legal or factual setting to provide an answer to the evidentiary standards required at class certification. The plaintiffs argue that the trial judge faithfully adhered to the rigorous analysis standards in *Hydrogen Peroxide*, and the unreserved *Daubert* error and the pending settlement make this an inapt vehicle for deciding these issues.

If the Court decides to consider the appeal on its merits, the plaintiffs agree that a trial court at class certification should resolve evidentiary objections, including under *Daubert*, whether or not

the issue overlaps with the merits of the underlying claims. But the plaintiffs argue that context matters, and the *Daubert* question before a court at class certification differs from the *Daubert* question a court must answer at trial. The *Daubert* gatekeeping function, the plaintiffs point out, is to safeguard reliability in a jury trial; this concern is lessened in a nonjury setting, such as a class certification hearing before a judge only.

The plaintiffs suggest that it is conceivable that a court might properly admit expert witness testimony that complies with *Daubert* but that does not directly prove damages on a classwide basis. In addition, on the facts, the plaintiffs argue that Comcast has failed to carry its burden in demonstrating a clear error by the trial judge in accepting Dr. McClave’s expert testimony as a plausible way to show damages on a classwide basis.

Finally, the plaintiffs assert Comcast’s argument that Rule 23(b)(3) and the Rules Enabling Act require the plaintiffs to prove individual class members’ damages as another point that Comcast never raised before in the underlying proceedings. Behrend argues that well-established class action jurisprudence authorizes proof of damages on a classwide basis, and that the presence of individualized damages does not prevent certification under Rule 23(b)(3).

SIGNIFICANCE

Over the past decade, some appellate courts have tightened the requirements for class certification by clarifying the rigorous analysis standard that courts must apply to determine whether litigation can be maintained as a class action. But an unresolved issue among federal courts centers on the evidentiary rules that apply during class certification proceedings. Because many class certification decisions involve expert witness testimony, the evidentiary rules governing the admissibility and use of such testimony is a highly important, yet unresolved, issue in federal class action jurisprudence.

Trial and appellate courts disagree concerning the nature, scope, and applicability of evidentiary rules to class certification proceedings. At one extreme, an older view that is still endorsed by some courts maintains that evidentiary rules do not apply to class certification hearings at all. At the other extreme, some courts require full-blown *Daubert* hearings for challenged expert testimony. In the middle, most judges merely allow all testimony into the certification record, deferring evidentiary challenges until some later point in the proceedings.

The Supreme Court, in *Wal-Mart*, endorsed the rigorous analysis standard and articulated further criteria for evaluating the Rule 23(a) threshold commonality requirement. Although the Court in its decision commented extensively on the quality and the nature of the expert witness testimony that had been offered in support and opposition to class certification, the Court stopped short of issuing any pronouncements concerning the use of *Daubert* hearings at class certification. The Court left that issue open for another day, but signaled its interest in resolving this issue in a case properly presenting the *Daubert* evidentiary problem.

At first blush, *Comcast* seems to focus on this gap in class action jurisprudence and to press the Court to now decide the issue concerning what evidentiary standards apply when expert witness

testimony is offered during class certification proceedings. *Comcast* would have the Court fashion a rule that would impose trial *Daubert* standards at class certification, and not defer such umpiring until later in the trial.

The plaintiffs, however, urge the Court not to use *Comcast* as the vehicle to make broad pronouncements about evidentiary *Daubert* rules at class certification. Chiefly, the plaintiffs suggest that in light of the pending settlement, the Court should honor that settlement and dismiss the certiorari petition as improvidently granted. In addition, the plaintiffs argue that *Comcast* did not properly raise or preserve the important *Daubert* evidentiary issues in the lower courts. Thus, *Comcast* as a matter of law and fact is an inapt vehicle for the Court to now make broad pronouncements on important class certification issues.

If the Court agrees with the plaintiffs' threshold arguments, then the Court may very well dismiss the writ of certiorari as improvidently granted and save the problems of evidentiary standards at class certification for resolution in some other case where the issues are more clearly drawn.

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PREVIEW of United States Supreme Court Cases, pages 77–81.
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