# NEWS & INSIGHTS

### IS THE PLAINTIFF'S DAMAGES THEORY CONSISTENT WITH ITS LIABILITY THEORY?

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It is common for plaintiffs to include several liability theories in a shotgun style class action complaint.  It is also common that different liability theories can support different and mutually exclusive damages awards.  Rule 23(b)(3) requires that a class plaintiff prove at the certification stage that common questions, including questions of how damages should be calculated, predominate over individual ones.  Plaintiffs often gloss over this requirement by having an expert witness at the class certification stage say something general about using a model to calculate damages and then citing the oft-repeated platitude that the need to do individual damages calculations does not in itself preclude certification under Rule 23(b)(3).  The United States Supreme Court's opinion in *Comcast Corporation v. Behrend* , 133 S. Ct. 1426 (2013), makes it clear, however, that such a cavalier approach to damages proof may allow a defendant to beat certification.

In *Comcast*, the plaintiff brought a class action antitrust suit claiming that Comcast had attempted to monopolize cable television services in a market area.  In support of its claim, Plaintiff advanced four theories of antitrust impact.  To meet its burden of proof at the class certification stage that individual damages issues would not predominate, Plaintiff offered an expert's regression model comparing actual cable prices in the market area with hypothetical prices that would have prevailed but for Comcast's anti-competitive conduct.  The district court agreed with the defendant that three of the four advanced theories of antitrust impact were not suitable for class treatment, but certified a class based on only one theory of liability.  The problem for the plaintiff, however, was that the proffered regression model assumed liability on all four theories, and not just the theory that was deemed suitable for class treatment.

Rejecting the argument that specific assaults on the plaintiff's damages analysis are merits issues that should not be considered at certification, the Supreme Court held that once the district court limited the impact theories under which the case could proceed as a class action, there was no admissible evidence in the record that showed how damages under that particular theory could be assessed.  In light of the requirement that the plaintiff bears the burden of proving predominance, this failure of damages proof by the plaintiff required the certification order to be reversed.

The takeaway from *Behrend* is that a defendant needs to fight certification on a theory by theory basis and assess well before the class certification stage whether there is an opportunity to argue that a plaintiff's damages approach is overly broad or not consistent with whichever claims are ultimately certified.  If there is such an opportunity, a robust pre-hearing deposition of the plaintiff's damages expert, as was conducted in *Behrend*, will be critical.