

U.S. Supreme Court Hears Oral Argument in Case that May Further Tighten Class Certification Standards

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The U.S. Supreme Court has heard oral argument in an antitrust case that may have significant implications for employment-based class actions. In *Comcast Corp. v. Behrend*, No. 11-864, the Court is considering whether a district court may certify a class action without resolving whether a plaintiff class has introduced admissible evidence, including expert testimony, to demonstrate that damages may be awarded on a class-wide basis. More specifically, the Court may answer a question left open in its 2011 opinion in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541: whether a judge must apply the well-known *Daubert* factors to evaluate the admissibility of proposed expert testimony at the class certification phase. Significantly, during the November 5th oral argument, the attorney for the class did not appear to disagree with that proposition. Indeed, the Court commented that the parties disagreed on the expert report at issue, but apparently not on the applicable legal standard.

It appears that the Court may be prepared to continue its march from *Dukes* toward tightening other prerequisites to class certification. (For more on *Dukes*, see our article, [Supreme Court Reverses Certification of Nationwide Class of 1.5 Million Female Workers](#).) Employers would benefit if the Court ruled expert reports offered in support of class certification are required to survive a *Daubert* challenge and constitute admissible evidence. Class actions that are not susceptible to awarding damages on a class-wide basis could be stopped earlier. Employers could avoid the additional attorneys' fees and the pressure to settle that accompany class certification.

We will report the Court's decision when it is available.

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