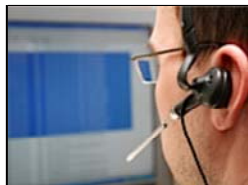


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### **Certification**

#### **Panelists Consider Impact From Behrend On Experts at Certification Stage, Settlements**



By Bruce Kaufman

A thorough evidentiary hearing appears necessary at the class action certification stage in light of the U.S. Supreme Court ruling in *Comcast v. Behrend*, but the extent of the inquiry into issues like expert credibility and the impact of *Behrend* on new filings and settlements remain uncertain, panelists said at a June 7 webcast sponsored by the American Law Institute.

In light of *Behrend*, 133 S. Ct. 1426 (2013) (14 CLASS 411, 4/12/13), litigators should assume that plaintiffs will have to prove impact and damages on a classwide basis, said plaintiffs' attorney Stephen D. Susman, of Susman Godfrey LLP in New York. Susman, who has tried five class actions, said plaintiffs' attorneys must now be prepared to try the entire case at the certification stage. This means finding the right experts, and spending the money necessary to retain those experts.

Michael D. Donovan, a plaintiffs' attorney at Donovan Axler LLC in Philadelphia, agreed and predicted that federal judges will soon face a quandary at the certification stage: dueling experts, all qualified and with acceptable methodologies. "What is a judge to do at this stage, accept Yale over Harvard?"

According to Donovan, the Supreme Court has asked judges to "pretend they are juries, and to make credibility findings" for experts. In the wake of *Behrend*, he said plaintiffs' attorneys, in order to make their cases "bullet proof on appeal," should not merely try to encourage judges to make credibility findings on their qualified experts at the certification stage, they should "insist on it," even if defendants waive their rights to *Daubert* challenges.

"That's what [*Behrend*] means," Donovan said. "Judges will do this because they have to protect themselves from reversal," he explained. And the most troubling aspect of this development is, "How does any of this help a court to decide on class certification," he said.

Defense attorney Robert C. Heim, of Dechert LLP in Philadelphia, noted there is still tension in the circuits as to whether a full-blown *Daubert* analysis is required at the certification stage, or something less. He also disagreed that judges will have to make credibility findings at the certification stage.

The comments came as the panel discussed the proper role of *Daubert*, and other gatekeeping mandates, in class and mass actions.

#### **Behrend's Impact on Settlements, Filings**

The panelists also offered their perspectives on whether *Behrend* will foster settlements and if it may deter cases.

Donovan said the ruling will encourage "fast cheap settlements." For defendants, it's all about costs and benefits, he said. *Behrend* will prompt defendants to offer less. For consumers, this will reduce their ultimate benefits, he added.

Susman said the ruling will definitely deter cases and "that is what the Supreme Court wants." He further warned that anything the Supreme Court "can do to make it more difficult for class action plaintiffs, they will do over the next decade."

Heim contended the ruling will only deter "bad cases, but not good ones." Its impact will be felt most on the "marginal cases," he said.

Thomas R. Nathan, senior vice president and general counsel at Comcast Cable Communications LLC

in Philadelphia, said the ruling will not live up to its hype as yet another “death knell” for class action filings. He predicted no dire consequences for filings.

Addressing *Behrend's* possible impact on settlements, Susman wondered how under *Behrend* a case can be settled before discovery is over, and before a class determination on certification. In such instances, there will be uninformed or under-informed class members

“Won't other attorneys say, ‘You can't bind these plaintiffs, you are selling them out' when I settle. I don't want to be sued for [allegedly] selling out the class,” he said.

Heim, for his part, saw no direct impact from *Behrend* on settlements.

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