

## News Release

**For Immediate Release**

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### **Supreme Court Decision in *Comcast v. Behrend* Aligns With DRI Amicus Brief**

*Class Action Deemed to Be Improperly Certified by Lower Courts*

**CHICAGO – (March 27, 2013)** The Supreme Court this morning reversed the judgment of the Third Circuit Court of Appeals in the case of *Comcast v. Behrend*, an [opinion](#) in alignment with the position of DRI – Voice of the Defense Bar in its amicus brief filed in August of last year. The majority held that the class action in *Comcast v. Behrend* was improperly certified under Rule 23(b)(3).

In this case, subscribers sued Comcast Corp. and various Comcast subsidiaries, alleging that Comcast monopolized Philadelphia’s cable market and excluded competition in violation of federal antitrust laws. To constitute a class, plaintiffs proffered an expert damages model that purported to prove each class member’s damages by evidence common to all. Comcast responded that the plaintiffs’ model was incapable of calculating damages for the class because it was based on several erroneous assumptions about the asserted claims, and indeed that common proof of damages is impossible given significant differences among the class members. The district court nonetheless certified the class.

Comcast sought review in the Third Circuit Court of Appeals, which affirmed the certification order after expressly declining to consider Comcast’s contentions. While the Third Circuit acknowledged that, “[t]o satisfy . . . the predominance requirement, Plaintiffs must establish that the alleged damages are capable of measurement on a class-wide basis using common proof,” it nonetheless insisted that “[w]e have not reached the stage of determining on the merits whether the methodology [offered by Plaintiffs] is a just and reasonable inference or speculative.” The court concluded that Comcast’s “attacks on the merits of the methodology” have “no place in the class certification inquiry.”

In his dissent, Judge Jordan stated in part, “not only have Plaintiffs failed to show that damages can be proven using evidence common to the class, they have failed to show . . . that damages can be proven using any evidence whatsoever—common or otherwise.”

The Supreme Court held that the Third Circuit erred in refusing to decide whether the plaintiff class’s proposed damages model could show damages on a class-wide basis. Under proper standards, the model was inadequate and the class should not have been certified. The vote was 5–4 with Justices Breyer, Ginsburg, Sotomayor and Kagan dissenting.

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Citing the Federal Judicial Center’s Reference Manual on Scientific Evidence, the majority held that “‘The first step in a damages study is the translation of the *legal theory of the harmful event* into an analysis of the economic impact of *that event*.’ The District Court and the Court of Appeals ignored that first step entirely.”

The Third Circuit’s approach to class certification would have allowed plaintiffs to obtain certification without showing a reasonable likelihood that they will be able to prove their class-wide claims (predominately) by common evidence. This would have significantly lowered class plaintiffs’ burden under Rule 23 and resulted in the certification of many more non-meritorious class actions.

Brief author Jonathan F. Cohn of Sidley Austin LLP, Washington DC, is available for interview or for expert comment through DRI’s Communications Office.

For the full text of the brief, click [here](#).

### **About DRI – The Voice of the Defense Bar**

*For more than fifty years, DRI has been the voice of the defense bar, advocating for 22,000 defense attorneys, commercial trial attorneys, and corporate counsel and defending the integrity of the civil judiciary. A thought leader, DRI provides world-class legal education, deep expertise for policy-makers, legal resources, and networking opportunities to facilitate career and law firm growth. For more information, log on to [www.dri.org](http://www.dri.org)*

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