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Class Action Litigation/Antitrust ADVISORY ■

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Applying *Comcast Corp. v. Behrend*, D.C. Circuit Derails Freight Surcharge Class

Last term, in ***Comcast Corp. v. Behrend***, 133 S. Ct. 1426 (2013), the Supreme Court made clear that class certification is inappropriate if the plaintiffs' injury model does not fit their liability theory.

Two weeks ago, in ***In re Rail Freight Fuel Surcharge Antitrust Litigation***, No. 12-7085 (D.C. Cir. Aug. 9, 2013), the D.C. Circuit applied ***Behrend*** to vacate class certification because the plaintiffs' injury model was not tailored to their alleged harm. The ruling could be a sign of things to come.

In *Fuel Surcharge*, the district court certified the class despite a potentially fatal flaw in the plaintiffs' statistical models.

In ***Fuel Surcharge***, shippers who use railroads to ship items allege that a number of railroads conspired to fix fuel surcharge rates. The shippers moved for class certification based on expert regression models that purportedly measured antitrust impact across the putative class, but as the railroads' expert pointed out, the plaintiffs' models produced a number of "false positives" because it "detect[ed] injury where none could exist."[1] The plaintiffs' expert conceded the flaw, but the district court nevertheless certified the class because, in its view, the plaintiffs' regression models were "plausible."[2] The court didn't address the flaw in the plaintiffs' statistical models.

Applying *Behrend*, the D.C. Circuit vacated class certification because the district court ignored the flaw in the plaintiffs' statistical models, and that flaw went to whether there was common proof of classwide injury.

The D.C. Circuit vacated the district court's class-certification order, emphasizing that, after ***Behrend***, "[i]t is now clear . . . that Rule 23 not only authorizes a hard look at the soundness of statistical models that

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1 *In re Rail Freight Fuel Surcharge Antitrust Litig.* at slip op. 13.

2 *Id.* at slip op. 7–8.

purport to show predominance—the rule *commands* it."[3] Because the district court ignored the admitted flaw in the plaintiffs' regression models, the appellate court reasoned, class certification could not stand:

> As we see it, ***Behrend*** sharpens the defendants' critique of the damages model as prone to false positives. It is now indisputably the role of the district court to scrutinize the evidence before granting certification, even when doing so "requires inquiry into the merits of the claim." If the damages model cannot withstand this scrutiny then, that is not just a merits issue. [The regression] models are essential to the plaintiffs' claim they can offer common evidence of classwide injury. *No damages model, no predominance, no class certification*.[4]

Fuel Surcharge proves that ***Behrend*** has bite—some takeaways.

Fuel Surcharge is significant because it is the first circuit decision strongly applying ***Behrend***. Here are some takeaways from the decision:

- After ***Behrend***, we predicted that many speculative or unreasonable damages models that would have passed muster before ***Behrend*** will fall by the wayside after the decision. ***Fuel Surcharge*** evidences that trend.
- ***Fuel Surcharge*** will further encourage defendants to make ***Behrend***-type arguments in ***Daubert*** motions. In some respects, ***Behrend*** is ***Daubert*** by another name, so it's only natural that class defendants will start to use ***Behrend*** alongside ***Daubert*** in Rule 702 attacks on admissibility.
- ***Fuel Surcharge***, like ***Behrend***, is an antitrust case, but neither case's reasoning is confined to the antitrust context. On the contrary, both ***Behrend*** and ***Fuel Surcharge*** speak generally of the need for rigorous analysis of statistical models at the class-certification stage. Every class plaintiff must demonstrate that common evidence is available to prove that each putative class member suffered injury.
- In rejecting the district court's analysis, the D.C. Circuit noted that "the district court looked to cases from other circuits suggesting that false positives do not indict the viability of a class, since '[c]lass certification is not precluded simply because a class may include persons who have not been injured by the defendant's conduct.'" (Citing cases from the Fifth and Seventh Circuits.) ***Fuel Surcharge*** makes it hard for class plaintiffs in the D.C. Circuit to argue for certification of classes full of uninjured people.

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[3] *Id*. at slip op. 18 (emphasis added).

[4] *Id*. at slip op. 15 (emphasis added).

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