

**U.S. SUPREME COURT TO DECIDE WHETHER CLASS CERTIFICATION REQUIRES
PLAINTIFF CLASS TO ESTABLISH BY ADMISSIBLE EVIDENCE THAT DAMAGES
CAN BE AWARDED ON A CLASS-WIDE BASIS**

On June 25, 2012, the U.S. Supreme Court granted certiorari in *Comcast v. Behrend*, Dkt. No. 11-864, and, assuming it reaches the merits, the Court's decision could have a far-reaching impact on how securities class actions are litigated. Significantly, the Court itself framed the issue to be decided in the case as whether class actions may be certified "without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class wide basis." In framing the issue as it did, the Court signaled that its decision may expand upon *Wal-mart Stores, Inc. v. Dukes, et al.*, __ U.S. __, 131 S. Ct. 2541 (2011), in which Justice Antonin Scalia, writing for the majority, held that merits issues can be assessed at the class certification stage to determine whether common issues of law and/or fact predominate over individual issues and suggested that *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 579 (1993), applied to the admissibility of expert testimony even at the class certification stage. *Id.* at 2552, 2554.

Although *Comcast* is an antitrust case, the Court's decision could have a broad impact on class certification in many pending and future securities class actions. Typically, securities plaintiffs at the class certification stage use experts to support the claim that common damages issues predominate over individual ones. In such cases, awarding damages on a class-wide basis can be difficult, especially when purchases and sales have occurred over a lengthy class period, the alleged misrepresentations were made at different times, and alleged actionable price drops occurred at different times, resulting in disparities in damages among members of the plaintiff class. The Court's decision may impose significant limitations on class plaintiffs' ability to establish that common damages issues predominate among class members and on the use of expert testimony to support class-wide damages at the class certification stage.

* * * * *

If you have any questions regarding this memorandum, please contact Richard D. Bernstein (202-303-1108, rbernstein@willkie.com), James C. Dugan (212-728-8654, jdugan@willkie.com), or the Willkie attorney with whom you regularly work.

Willkie Farr & Gallagher LLP is headquartered at 787 Seventh Avenue, New York, NY 10019-6099. Our telephone number is (212) 728-8000 and our facsimile number is (212) 728-8111. Our website is located at www.willkie.com.

June 28, 2012

Copyright © 2012 by Willkie Farr & Gallagher LLP.

All Rights Reserved. This memorandum may not be reproduced or disseminated in any form without the express permission of Willkie Farr & Gallagher LLP. This memorandum is provided for news and information purposes only and does not constitute legal advice or an invitation to an attorney-client relationship. While every effort has been made to ensure the accuracy of the information contained herein, Willkie Farr & Gallagher LLP does not guarantee such accuracy and cannot be held liable for any errors in or any reliance upon this information. Under New York's Code of Professional Responsibility, this material may constitute attorney advertising. Prior results do not guarantee a similar outcome.