

D.C. Circuit Ruling Reflects Impact, as Predicted by Wiley Rein, of Footnote in Supreme Court's *Comcast v. Behrend* Decision

August 14, 2013

A decision last week by the U.S. Court of Appeals for the District of Columbia Circuit, in *Rail Freight Fuel Surcharge Antitrust Litigation – MDL No. 1869*, reflects the profound impact of a footnote in the U.S. Supreme Court's March 27 ruling in *Comcast Corp. v. Behrend*. The footnote's impact was predicted earlier this year by Wiley Rein founding partner Bert W. Rein and partner John B. Wyss.

In their April 26 article, "*Comcast v. Behrend: Footnote 5 and the Ghost of Carolene Products*," Mr. Rein and Mr. Wyss anticipated far-reaching consequences for Justice Scalia's pregnant footnote 5 in the majority opinion. The footnote pertains to cases turning on a "battle of the experts," according to the article, which ran in several *Bloomberg BNA* publications including *Class Action Litigation Report* and *Antitrust & Trade Regulation Report*.

"Under *Behrend*, a District Court now must determine whether experts' conflicts arise from contested facts or, as more typical, differing models and analyses of undisputed and not infrequently identical data," Mr. Rein and Mr. Wyss explained in the article. "If the conflict is in 'what those data prove,' *Behrend* instructs the District Court to resolve it rather than to decide only whether plaintiffs have a claim triable under Rule 23."

The D.C. Circuit has now acknowledged the revolutionary significance of *Behrend* footnote 5. In its August 9 *Rail Freight Fuel Surcharge* opinion, the appeals court held that plaintiffs can no longer obtain class certification in antitrust cases by presenting a "plausible" economic model suggesting classwide injury. Quoting *Behrend*

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footnote 5, the opinion states that “it is now clear” that “Rule 23 not only authorizes a hard look at the soundness of statistical models that purport to show [injury] predominance—the rule commands it.”

The D.C. Circuit’s August 9 opinion can be read [here](#).