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CLASS CERTIFICATION

EXPERT EVIDENCE

Comcast v. Behrend: Footnote 5 and the Ghost of *Carolene Products*



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Seventy-five years ago in a seemingly inconsequential case interpreting the Filled Milk Act, Justice Harlan Fiske Stone dropped a footnote in the majority opinion with profound consequences for future constitutional adjudication.

The famed *Carolene Products* footnote called for “more searching judicial inquiry” of legislative enactments directed at particular religious, national or racial minorities. 304 U.S. 144, 152 n. 4.

Recognizing that “political processes ordinarily to be relied upon to protect minorities” may be curtailed by “prejudice against discrete and insular minorities,” Justice Stone’s footnote started the Court on a journey toward the aggressive use of “strict scrutiny” analysis to protect minority rights against legislative incursion.

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In his recent majority opinion in *Comcast Corp. v. Behrend* (No. 11-864), Justice Antonin Scalia dropped a footnote which, while virtually ignored in the immediate aftermath of the case, may have a comparably profound effect on cases turning on a “battle of the experts.” Justice Scalia, in fact, may have pointed the way to resolving the conundrum, trenchantly observed by Judge Learned Hand, that the rubric for admitting expert testimony—that the expert is qualified in matters exceeding the competence of a lay juror—is inconsistent with the usual practice of permitting lay jurors to resolve expert conflicts.

Justice Scalia’s conclusion that “while the data contained within an econometric model may well be ‘questions of fact’ in the relevant sense, what those data prove is no more a question of fact than what our opinions hold,” could rationally shift responsibility for resolving expert conflicts from juries to courts, and trigger important complementary process adjustments in cases where expert testimony may be case dispositive.

We first examine the context of Justice Scalia’s pregnant footnote and then turn more specifically to its meaning and potential consequences.

Context for *Comcast v. Behrend*

Comcast v. Behrend arose from an antitrust class action complaint alleging that Comcast had monopolized the Philadelphia cable market and harmed consumers by raising prices above competitive levels. In seeking to certify a class of some 2 million Comcast customers in the Philadelphia area, plaintiffs relied on the expert testimony of an economist who proposed to model “benchmark” prices using markets in which Comcast held less than a monopoly share. According to plaintiffs, this would permit a common determination of damages for all class members by a straightforward comparison of actual price and projected competitive price. On this basis plaintiffs argued, and the courts below agreed, that the common issues to be litigated predominated any in-

dividual damages issues permitting the proposed class to be certified.

Defendant Comcast contended that the economist's testimony was insufficient to certify the class. In particular, Comcast pointed out that the expert had based his benchmark on four alleged theories of antitrust impact while the District Court had determined that only one of those theories was capable of classwide proof.

Criticizing the courts below for failing to examine the expert's methodology, the Court reversed the class certification. Justice Scalia's opinion held that: "By refusing to entertain arguments against respondents' damages model that bore on the propriety of class certification, simply because those arguments would also be pertinent to the merits determination, the Court of Appeals ran afoul of our precedents." (6-7). Because plaintiff expert's "model failed to measure damages resulting from the particular injury on which [Comcast's] liability in this action is premised," the model could not support a finding of Rule 23(b) predominance and sustain a class action.

A vigorous four-member dissent was co-written by Justices Ginsburg and Breyer. The dissent, pointing out that the expert's testimony was conceded to be admissible, argued that the majority had considered "fact-based matters, namely what this econometric multiple-regression model is about, what it proves, and how it does so," and had overturned the "factual findings" of two lower courts. (D. 9) Footnote 5 in Justice Scalia's majority opinion responded directly to the dissent's "factual findings" point: "[w]hile the data contained within an econometric model may well be 'questions of fact' in the relevant sense, what these data prove is no more a question of fact than what our opinions hold." (FN 5, 8-9).

Plain Meaning

The breadth of Justice Scalia's pronouncement is significant. He did not limit his endorsement of the judicial role in evaluating competing expert testimony to Rule 23 determinations which are the exclusive province of the court. His distinction of the facts incorporated in an expert opinion from the expert's analytical methods and conclusions is stated far more broadly.

With the possible exception of experts providing only general background information—for example, descriptions of prior art or accused devices in patent proceedings—experts inevitably go beyond facts and data and provide an analysis of how legal issues are affected by the data. For example, economic experts, as in *Behrend*, construct models purporting to explain how certain actions affect price or output; epidemiologists analyze possible causal nexi between substance exposure and injury; and valuation experts analyze the relationship between financial data and asset value. One need only look at bar publications advertising varying expert skill sets to recognize how important experts have become in both civil and criminal practice and how easy it is to engage an expert that will reach the "right conclusion."

The *Daubert* decision and the ensuing reform of Federal Rule of Evidence 702 were intended to inject additional discipline into expert practice by permitting courts to exclude expert testimony that was not relevant or reliable. Some courts have exercised this authority vigorously and used it to effect "back door"

summary judgments. Others have used it sparingly, allowing expert contests to be determined by juries so long as each expert could testify plausibly. Justice Scalia's footnote 5 could resolve this discrepancy and provide an improved means of dealing with expert conflicts.

Consequences for Case Resolution

The *Behrend* footnote will have immediate consequences in Rule 23 certification disputes where expert collisions over the ability to adjudicate key elements of plaintiffs' claims with common proof are widespread. 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. 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.

Behrend also may impact non-class antitrust cases that are expert-dependent. For example, in a merger case or price-fixing case where experts divide on how a proposed combination has affected marketplace outcomes, and the amount of overcharge at issue, *Behrend* should permit the courts, rather than the jury, to resolve that expert conflict. From a defense perspective, separating economic impact and alleged misconduct—a separation more readily achieved by a court required to record its reasoning—should prove highly advantageous.

Antitrust cases are not the only area of litigation to which *Behrend* may apply. In toxic tort and pharmaceutical liability cases, there are frequent expert disputes about whether exposure to or ingestion of the product at issue is capable of causing the harm for which damages are claimed. In the face of uncertainty, competing experts may well pass a *Daubert* screen and face a jury with highly sophisticated epidemiological analyses including differing evaluations of the reliability and significance of prior reported studies. *Behrend* would give courts responsibility for examining the experts analytical approaches and determining whether plaintiffs have carried their burden on causation issues. Again, an unemotional, reasoned resolution by a court having the time necessary to analyze competing opinions and the available resource of its own expert consultants is likely to favor those otherwise vulnerable to injury-driven verdicts.

Even what might be considered garden variety expert disputes such as asset valuation may be within *Behrend's* teaching. Valuation disputes often turn on applying differing methodologies to undisputed accounting data such as sales and profits. Data selection may depend, in part, on facts such as whether a particular method is ordinarily used when similar assets are transferred commercially, but are also likely to involve disputes over what transactions are properly analogous and how individual predictive variables such as discount rates should apply. *Behrend* strongly favors judicial resolution of these differences despite their factual underpinning just as courts resolving conventional issues of law examine the facts involved to determine which legal precedents best apply.

Judicial Process Implications

Application of *Behrend* in the lower courts would give added importance to summary judgment when expert disputes involve case-dispositive issues as in the examples above. Parties would no longer be able to avoid summary judgment by labeling expert disagreements issues of material fact. Thus, *Behrend* could significantly reduce the cost and uncertainty of expert-dependent cases.

Case management innovations attuned to *Behrend* could further streamline resolution of such cases. Just as courts adjudicating patent disputes have accommodated to the Supreme Court's *Markman* determination that patent claim construction is an issue for the court,

by expediting, and severing and holding hearings regarding claim construction issues, courts applying *Behrend* could adopt expedited procedures, including limiting discovery to facts relevant to expert opinions, to resolve case determinative expert disputes. Substantial cost savings and avoidance of discovery expense driven settlement would then be important benefits.

At the appellate level, *Behrend* would call for *de novo* review except for lower court resolutions of underlying fact issues embedded within conflicting expert analyses. Appellate scrutiny of the type the Supreme Court applied in *Behrend* would further discipline the decisional process by encouraging lower courts to articulate with some precision the basis for their resolution of expert disputes.