COURTS DECIDING CLASS CERTIFICATION MUST RESOLVE "DUELING" EXPERT TESTIMONY

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Blurb – Recent appeals court decisions prompt courts to scrutinize expert testimony more closely at class-certification stage:

Trial courts have long struggled with how to address conflicting expert testimony that goes to the requirements of class certification. In the past, many courts refused to make credibility determinations about competing experts' opinions at the class certification stage. Recently, however, this practice has been turned on its head as appellate courts are increasingly requiring trial courts to scrutinize expert testimony as part of their class-certification analysis, even if that scrutiny inevitably leads the court to make threshold determinations about the credibility of competing experts' opinions.

***Using Experts to Support or Oppose Class Motions*.**

Courts have always wrestled with how to treat expert testimony offered to support—or oppose—motions for certification. Plaintiffs often submit expert opinion to show that the contested issues in the case can be decided on the basis of common proofs that would apply to all class members. Defendants offer their own expert testimony to show that trial of the claims would instead depend on individual proofs specific to each plaintiff's case. Such expert testimony bears directly on the commonality and predominance requirements of the class-action rule. But it also, inevitably, concerns the merits of the case to one degree or another.

The issue of damages is a common battlefield: the expert for the named plaintiff submits a model showing that a damages formula applies across the board. The expert for the defense criticizes this model for failing to take into account individual differences that are, in that expert's view, essential to the damages calculation.

Expert battle lines are also drawn over key liability issues like causation and the fact of injury, and whether these issues can be decided based on common proofs, or instead will require individualized evidence. In a proposed employment class action, plaintiffs use expert statistical models to show discrimination in the aggregate. Defendants use an opposing expert's different statistical methodology to show flaws in the aggregate approach.

In a product liability case, the plaintiffs' technical expert opines that an entire product line suffers from the same defect. Defendants' expert points to changes in the design specifications or manufacturing methods over time to show that some products could never have the alleged defect. If the plaintiff is right, a very broad class may be certified; if the defendant is right, then a much narrower class, or no class at all, is the result.

Emerging Standards for Battling Experts at the Class-Certification Stage.

Faced with conflicting expert testimony that goes to the requirements of class certification, what is a trial court to do? When the technical and economic experts disagree, how does the court determine whether an issue can be tried on the basis of common proof as opposed to requiring individualized evidence? How far can the trial court delve into these issues, without trampling on the role of the jury as the finder of fact?

For courts reluctant to go into the merits at all at the class certification stage, one approach was to accept the plaintiffs' expert testimony, so long as it was not "fatally flawed." Other courts subjected expert testimony to *Daubert* scrutiny, or to a modified, "*Daubert*-lite" standard.

But appellate courts have begun instructing the trial courts that they may—and indeed must—fully scrutinize expert testimony as part of the rigorous analysis required at the class-certification stage. And trial courts must do so even if that scrutiny means making a threshold determination about the credibility of competing experts' opinions.

The Second and Third Circuit Lead the Way, Requiring Rigorous Analysis of Expert Testimony. The Third Circuit's decision in *In re Hydrogen Peroxide Antitrust Litig*., 552 F.3d 305 (3d Cir. 2009), adds momentum to a trend that began in 2006, when the Second Circuit rejected the "not fatally flawed" standard for expert testimony on a class motion. *In re Initial Pub. Offering Sec. Litig*., 471 F.3d 24, 42 (2d Cir. 2006). In *Hydrogen Peroxide*, the Third Circuit held "that court[s] must resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits." 552 F.3d at 307. That obligation to consider all relevant evidence "extends to expert testimony, whether offered by a party seeking class certification or by a party opposing it." *Id.*

The *Hydrogen Peroxide* plaintiffs and defendants had submitted competing expert testimony on the critical question of antitrust impact. Specifically, they disputed whether "the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members." *Id.* at 311, 312. The plaintiffs' expert said that the alleged antitrust conspiracy would have impacted all purchasers of hydrogen peroxide. The defendants' expert said that individual issues like which grade of the chemical was purchased, or individualized pricing factors, meant that common proof could not be used to decide antitrust impact. *Id.* at 312, 315.

The district court admitted the plaintiffs' economist's evidence under the *Daubert* reliability standard and then certified the class, without ever addressing the defendants' competing expert analysis. *Id.* at 308, 309, 322. Vacating class certification, the Third Circuit instructed that expert opinion with respect to class certification calls for "rigorous analysis." *Id.* at 317.

Indeed, the Third Circuit specifically endorsed credibility decisions, instructing that "[w]eighing conflicting expert testimony at the certification stage is not only permissible, it may be integral to the rigorous analysis Rule 23 demands." *Id.* at 323. To keep from invading the

province of the jury, the Third Circuit explained that the trial court's class-certification findings would not later bind the ultimate fact-finder on the merits. *Id.*

Following on the heels of *Hydrogen Peroxide*, one Pennsylvania federal court certified an antitrust conspiracy case against Toys "R" Us, after first considering competing expert damages models and concluding that damages were capable of common proof. *McDonough v. Toys "R" Us, Inc*., No. 06 0242, 2009 WL 2055168 (E.D. Pa. July 15, 2009). In another Pennsylvania case alleging product defects in certain Ford trucks, a trial court refused to disregard a defense expert report, noting that the court was required to "consider all relevant evidence and arguments," including expert testimony offered by either party, in its class-certification analysis. *Lewis v. Ford Motor Co.*, No. 09 164, 2009 WL 2355744, at *1 (W.D. Pa. July 30, 2009). The court found the expert's report was relevant to determining numerosity, commonality, and the proper class definition, since the expert had opined that the proposed class included owners of at least twenty-four distinct vehicles, some of which had axles that precluded the type of suspension-shimmy defect alleged by plaintiff. *Id.* at *3-*4.

A State Court Follows Suit. The impact of *Hydrogen Peroxide* and the new expert class decisions has been felt in the state courts as well. In July, a Colorado state appeals court reversed certification of a nuisance case alleging asbestos contamination because the district court had refused to resolve conflicting expert models of how the asbestos was released. The trial court was directed to weigh the expert testimony and make specific findings, but only to the extent necessary to decide whether a class of property owners was identifiable. *Jackson v. Unocal Corp*., No. 09CA0610, 2009 WL 2182603 (Colo. App. July 23, 2009).

Ninth Circuit to Speak En Banc? In the Ninth Circuit, court-watchers are awaiting the *en banc* decision in the *Dukes v. Wal-Mart* sex discrimination case, where the panel opinion affirmed class-certification. Holding that the district court had properly considered expert opinion from plaintiffs' sociologist and statistician that was offered to show commonality, the panel rejected Wal-Mart's arguments that the district court should have taken into account as more probative Wal-Mart's contrary statistical expert testimony. *Dukes v. Wal-Mart, Inc*., 509 F. 3d 1168, 1178-1182 (9th Cir. 2007). Whether an *en banc* decision will clarify standards for expert testimony bearing on class certification in the Ninth Circuit remains to be seen.

What's Next? The recent cases permitting trial courts to resolve conflicts in expert testimony raise new issues for class-action practitioners. Will the new expert standards make it harder for plaintiffs to certify classes? Will we see more evidentiary hearings on class motions? Will class discovery inevitably have a larger expert component? Will expert models be more fully developed at the class certification stage? How will trial courts manage the schedule leading up to the class-certification decision? How will courts distinguish an expert's permissible technical opinions from his impermissible legal conclusions on class certification? And how will these new cases impact the scope of class-certification appeals under Rule 23(f)? When the trial court's class decision depends upon the acceptance or rejection of expert testimony, should an interlocutory appeal encompass the *Daubert* decision, as well as the trial court's credibility determination under *Hydrogen Peroxide*? Future decisions will provide the answers.