DAUBERT SCRUTINY OF EXPERT EVIDENCE IN CLASS CERTIFICATION PROCEEDINGS

By Cynthia H. Cwik, Amanda Pushinsky, and Justin T. Smith

Expert testimony is increasingly being presented during class-certification proceedings. As courts have considered expert testimony in determining whether the requirements for certifying a class have been met, questions have arisen about the appropriate standard of review for that expert testimony. The United States Supreme Court has never explicitly addressed the appropriate level of review for expert testimony presented in connection with class-certification proceedings. Lower courts have focused on the U.S. Supreme Court decision that generally governs the admissibility of expert evidence, the seminal decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[1]

In connection with class-certification proceedings, the Supreme Court previously stated that the district court may not consider a "preliminary inquiry into the merits" in deciding whether to certify a class.[2] In *Daubert*, the Supreme Court emphasized that courts must look beneath the surface of expert opinions, closely examine the expert's methodologies, and exclude testimony that is irrelevant or unreliable.[3] The *Daubert* decision, however, did not address the appropriate level of scrutiny of expert testimony presented in connection with class-certification proceedings, and some have argued that *Daubert* applies only to the use of expert testimony at trial.

More courts have begun to apply *Daubert*—at least in some form—to expert testimony offered in support of class certification, and the most recent decisions generally lean toward a higher level of scrutiny of expert testimony. Under one approach, courts do not subject the expert testimony to a full *Daubert* inquiry at the class-certification stage but instead conduct a limited review. As the decisions emerging from circuit courts over the last few years demonstrate, however, the current tendency is to apply higher levels of scrutiny to expert testimony at the class-certification stage. Given that

the decision whether or not to certify a class can often be case-determinative, this trend toward increased scrutiny of expert testimony at the class-certification stage has important ramifications for practitioners.

CIRCUIT OVERVIEW

The First Circuit. In *In re New Motor Vehicles Canadian Export Antitrust Litig.*,[4] the First Circuit generally held that if plaintiffs rely on a novel or complex theory to meet Rule 23's requirements, courts must conduct a "searching inquiry" into the factual merits of the theory.[5] The First Circuit determined that the plaintiffs' two-part theory of price manipulation was "both novel and complex" and not entirely supported by the testimony of the plaintiffs' expert.[6] In other words, certification was dependent on the ability of the plaintiffs' expert "to establish—whether through mathematical models or further data or other means—the key logical steps behind their theory."[7] Specifically, the Circuit held that "a more searching inquiry" by the district court into whether the plaintiffs could actually prove the key elements of their claims through common proof at trial was required.[8]

The court in *New Motor Vehicles* declined to specify a precise standard of proof that plaintiffs would be required to satisfy at the class-certification stage. However, the court made clear that the district court's analysis of expert testimony should be sufficiently thorough to identify, at a preliminary stage in the litigation, cases where "there is no realistic means of proof."[9]

The Second Circuit. *In re Initial Public Offering Sec. Litig.*[10] was one of the key decisions ushering in a more rigorous standard for expert testimony at the class-certification stage. *In re IPO* heightened the plaintiffs' burden on a class-certification motion in that it was no longer sufficient for plaintiffs to obtain class certification merely on the basis of unsupported legal conclusions or plausible expert methodologies.[11] The Second Circuit specifically stated that the plaintiffs' burden of proving each of the Rule 23 requirements was not lessened by overlap between a Rule 23 requirement and a merits issue, and it acknowledged that a district court may have to resolve underlying expert disputes to make such a determination.[12] However, *In re IPO* did indicate that district courts continue to have discretion to shape discovery and the extent of the hearing to ensure that class certification does not become a partial trial on the merits.[13]

GIVEN THAT THE DECISION WHETHER OR NOT TO CERTIFY A CLASS CAN OFTEN BE CASE-DETERMINATIVE, THIS TREND TOWARD INCREASED SCRUTINY OF EXPERT TESTIMONY AT THE CLASS-CERTIFICATION STAGE HAS IMPORTANT RAMIFICATIONS FOR PRACTITIONERS.

The Third Circuit. In *In re Hydrogen Peroxide Antitrust Litig.*,[14] the Third Circuit issued a significant decision that further raised the standard for the evaluation of expert testimony at the class-certification stage. More specifically, the Third Circuit holding requires district courts to engage in "rigorous" analysis of evidence in determining whether Rule 23 requirements have been met.[15] After the district court granted the plaintiffs' motion for class certification, the defendants argued on appeal that the plaintiffs had failed to satisfy Rule 23(b)(3)'s requirement that common questions of law or fact predominate over any questions affecting individualized issues. Both parties had submitted expert testimony on the question of commonality, but the district court failed to resolve the dispute between the experts on this issue.

The Third Circuit discussed the intersection between *Daubert* and class certification, holding 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."[16] The Third Circuit held that a district court's ruling that expert testimony should not be excluded under *Daubert* does not automatically mean the testimony should be "uncritically accepted as establishing a Rule 23 requirement."[17] On the other hand, "a district court's conclusion that an expert's opinion is admissible does not necessarily dispose of the ultimate question—whether the district court is satisfied, by all the evidence and arguments including all relevant expert opinion, that the requirements of Rule 23 have been met."[18] Accordingly, under *In re Hydrogen Peroxide*, where expert testimony is necessary for the class-certification determination, a district court must resolve disputes between competing experts, and neither credibility issues nor concern for addressing the merits of the case can impede the rigorous analysis required to resolve such disputes.[19]

The Fourth Circuit. In *Gariety v. Grant Thornton, LLP*,[20] the Fourth Circuit reversed the district court's certification order on the ground that it had not conducted a sufficiently rigorous analysis of the underlying facts, holding that "while an evaluation of the merits to determine the strength of plaintiffs' case is not part of a Rule 23 analysis, the factors spelled out in Rule 23 must be addressed through findings, even if they overlap with issues on the merits."[21] Although the Fourth Circuit did not squarely address the issue of the appropriate level of inquiry into expert testimony at the certification stage, *Gariety* suggests that it may endorse a relatively rigorous approach. Accordingly, district courts in the Fourth Circuit have engaged in *Daubert* analyses during class certification.[22]

The Fifth Circuit. In *Regents of Univ. of Cal. v. Credit Suisse First Boston (USA), Inc.*,[23] the Fifth Circuit reversed the district court's certification of the class of the former Enron shareholders, moving toward an express authorization of the merits inquiry at the class-certification stage and requiring the resolution of conflicting expert testimony.[24]

The Sixth Circuit. In *Rodney v. Northwest Airlines, Inc.*,[25] the district court did not simply accept the plaintiffs' allegations and expert methodologies on class impact and injury; it also considered the testimony of the defendants' expert that injury and damages could not be proved on a classwide basis, ultimately denying the certification motion. The Sixth Circuit affirmed the denial of class certification, holding that "a court performing a 'predominance' inquiry under Rule 23(b)(3) may consider not only the evidence presented in the plaintiff's case-in-chief but the defendant's likely rebuttal evidence."[26] Although the Sixth Circuit has not clearly addressed the role of experts in class-certification proceedings, it held that "courts [should] take care to inquire into the substance of the underlying claims" to determine the type of evidence that will be needed at trial, which suggests that district courts must go beyond a cursory analysis and actually resolve conflicting expert testimony prior to certification.[27]

The Seventh Circuit. In *West v. Prudential Sec. Inc.*,[28] each side presented testimony by an established financial economist at the class-certification stage, and the district court held that the fact that both sides presented expert testimony was by itself enough to support class certification. Without specifically mentioning *Daubert*, the Seventh Circuit held that the district court's approach was an impermissible "delegation of judicial power to the plaintiffs," who could obtain certification simply by hiring an established expert.[29] The court held:

> A district judge may not duck hard questions by observing that each side has some support, or that considerations relevant to class certification also may affect the decision on the merits. Tough questions must be faced and squarely decided, if necessary by holding evidentiary hearings and choosing between competing perspectives.[30]

In *American Honda Motor Co. v. Allen*,[31] the Seventh Circuit held that when an expert's opinion is an essential element of class certification, the district court must definitively rule on any challenge to the expert's qualification or submissions, possibly entailing a full *Daubert* analysis.[32] Further, the district court must also resolve any challenge to the reliability of information provided by the expert if that information is relevant to establishing any of the Rule 23 requirements for class certification.[33]

The Eighth Circuit. *Blades v. Monsanto Co*.[34] was a putative class action in which the plaintiffs claimed an alleged price-fixing conspiracy in violation of the Clayton Act and the Sherman Act. The plaintiffs sought to use expert testimony to meet their burden for class certification. The Eighth Circuit affirmed the district court's findings and held that district courts may be required to resolve expert disputes at the class-certification stage.[35] The court also noted that "assumptions," "presumptions," and "conclusions" offered by the plaintiffs' expert were insufficient to establish Rule 23 requirements.[36]

The Ninth Circuit. A few district courts in the Ninth Circuit have recently addressed the issue of the admissibility of expert testimony at the class-certification stage. In *Campion v. Old Republic Home Protection Co., Inc.*,[37] the court noted that the "Ninth Circuit has not yet determined whether a full *Daubert* analysis is required at the class certification stage."[38] In that case, the court decided not to conduct a full *Daubert* analysis because the expert's opinions were not critical to the court's determination of the motion for class certification. In *Hovenkotter v. Safeco Ins. Co. of Ill.*,[39] although the court noted that it "need not conduct a full *Daubert* analysis as to the admissibility for trial of the expert's opinions" at the class-certification stage, it did hold that a court should conduct "a full and rigorous analysis of the admissibility of the expert's opinions *as they relate to class certification issues* and leave for trial the admissibility of their opinions as they relate to the merits of the underlying claims."[40] Similarly, in *Kennedy v. Jackson Nat. Life Ins. Co.*,[41] the court conducted a limited *Daubert* analysis of the expert's testimony.

The Tenth Circuit. In *Vallario v. Vandehey*,[42] the Tenth Circuit vacated a decision granting class certification and held that the district court abused its discretion by basing its class-certification ruling on an "unduly constrained view of the inquiry authorized by Rule 23."[43] The Tenth Circuit held that although "the merits of a movant's claims may not serve as the focal point of its class certification analysis[,] . . . this does not mean that a district court is categorically prohibited from considering any factor, in conjunction with its Rule 23 analysis, that touches upon the merits of a movant's claims."[44] Under *Vallario*, a district court must ensure that "the requirements of Rule 23 are met . . . through findings," even if such findings "overlap with issues on the merits."[45] Indeed, the Tenth Circuit wrote that the phrase "no merits inquiry" should not be "talismanically" invoked to limit a district court's inquiry into whether Rule 23's requirements have been met.[46] Overall, *Vallario* appears to stand for the proposition that the court may examine expert testimony to determine whether plaintiffs have satisfied Rule 23's requirements for class certification.

The Eleventh Circuit. In *Cooper v. Southern Co.*,[47] the plaintiffs alleged race discrimination based on Title VII and Section 1981 of the Civil Rights Act of 1866. The district court denied class certification due to the methodological deficiencies of the plaintiffs' expert, as the expert evidence could not demonstrate commonality. The Eleventh Circuit upheld the denial of class certification, stating:

> [t]he district court did not exclude [plaintiffs' expert's] reports because she was unqualified or because the reports were based on a wholly unreliable methodology; rather, the court accepted the reports' conclusions but determined that they still failed to establish that the named plaintiffs had claims in common with other class members . . . .[48]

The Eleventh Circuit did not specifically address the plaintiffs' argument that the district court applied an overly rigorous standard in evaluating their statistical expert at the class-certification stage.

CONCLUSION

The appropriate level of scrutiny for expert testimony presented at the class-certification stage is likely to remain an important issue for practitioners and the courts. A majority of federal appellate courts have already established heightened standards for district courts to apply to expert testimony used in class-certification proceedings, emphasizing that district courts must conduct a rigorous analysis when determining whether all the requirements of Rule 23 have been met.

In light of this recent Circuit trend, it is likely that it will become increasingly common for the parties to consider filing *Daubert* motions at the class-certification stage. In addition, there will likely be more requests for related evidentiary presentations. These developments can help ensure that class-certification decisions, which are often case-dispositive, are based on a sound, reliable foundation.

This article is a condensed and updated version of the article that appeared in Class Action Litigation Report*, 11 CLASS 863 (Sept. 24, 2010).* ■

CYNTHIA H. CWIK
San Diego
+1.858.314.1165
chcwik@jonesday.com

AMANDA PUSHINSKY
San Diego
+1.858.314.1123
apushinsky@jonesday.com

JUSTIN T. SMITH
Irvine
+1.949.553.7594
jtsmith@jonesday.com

[1] 509 U.S. 579 (1993).

[2] *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974).

[3] 509 U.S. 579 (1993).

[4] 522 F.3d 6 (1st Cir. 2008).

[5] 522 F.3d at 24.

[6] *Id*. at 27.

[7] *Id*. at 26.

[8] *Id*. at 31.

[9] *Id*. at 29.

[10] 471 F.3d 24 (2d Cir. 2006).

[11] 471 F.2d at 40–41.

[12] *Id*. at 42.

[13] *Id*. at 40–41; *see also Weiner v. Snapple Beverage Corp*., 2010 WL 3119452, at *5 (S.D.N.Y. Aug. 5, 2010) (ruling that plaintiffs had failed to meet Rule 23(b)(3)'s predominance requirement because their expert's testimony was unreliable).

[14] 552 F.3d 305 (3d Cir. 2008).

[15] 552 F.3d at 323.

[16] *Id*.

[17] *Id*.

[18] *Id*. at 315 n.13.

[19] *See also Nafar v. Hollywood Tanning Systems, Inc*., 339 Fed. Appx. 216, 223 (3d Cir. 2009) (remanding case to district court to consider defendant's expert evidence as to predominance claim as required by *In re Hydrogen Peroxide*).

[20] 368 F.3d 356, 358–59 (4th Cir. 2004).

[21] 368 F.3d at 366.

[22] *See*, *e.g.*, *Rhodes v. E.I. du Pont de Nemours & Co.*, 2008 WL 2400944, at *10–12 (S.D. W. Va. June 11, 2008).

[23] 482 F.3d 372 (5th Cir. 2007).

[24] 482 F.3d at 381 (imposing prohibition against consideration of merits only insofar as they pertain to matters unrelated to class-certification requirements).

[25] 146 Fed. Appx. 783 (6th Cir. 2005).

[26] 146 Fed. Appx. at 787.

[27] *Id*. at 786.

[28] 282 F.3d 935 (7th Cir. 2002).

[29] 282 F.3d at 938.

[30] *Id*.

[31] 600 F.3d 813 (7th Cir. 2010) (per curiam).

[32] 600 F.3d at 815–16.

[33] *Id*. at 816.

[34] 400 F.3d 562, 569–70 (8th Cir. 2005).

[35] 400 F.3d at 575 (stating that "in ruling on class certification, a court may be required to resolve disputes concerning the factual setting of the case" including "the resolution of expert disputes concerning the import of evidence").

[36] *Id*. at 571.

[37] No. 09-748, 2011 WL 42759 (S.D. Cal. Jan. 6, 2011).

[38] *Id*. at *20.

[39] No. 09-0218, 2010 WL 3984828, at *4 (W.D. Wash. Oct. 11, 2010).

[40] *Id*.

[41] No. 07-0371, 2010 WL 2524360, at *12 (N.D. Cal. June 23, 2010).

[42] 554 F.3d 1259 (10th Cir. 2009).

[43] 554 F.3d at 1267.

[44] *Id*. at 1266.

[45] *Id*.

[46] *Id*. at 1267.

[47] 390 F.3d 695 (11th Cir. 2004), *overruled on other grounds by Ash v. Tyson Foods, Inc*., 546 U.S. 454, 456–57 (2006).

[48] 390 F.3d at 717.