HOW RIGOROUS IS "RIGOROUS:" A GROWING TREND IN FAVOR OF APPLYING *DAUBERT* AT THE CLASS CERTIFICATION STAGE

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In re Hydrogen Peroxide Antitrust Litigation[2] brought about a revolution in class certification proceedings. Courts within the Third Circuit – and elsewhere – no longer permit a mere "threshold showing" that class certification is appropriate. Instead, they now engage in a "rigorous analysis" of the evidence, even if this requires inquiry into the merits.[3] An important question, though, is how far will that revolution go insofar as evaluation of expert testimony is concerned. In *Hydrogen Peroxide*, the Court held that "[w]eighing conflicting expert testimony at the [class] certification stage is not only permissible[,] it may be integral to the rigorous analysis Rule 23 demands."[4] Accordingly, district courts can no longer avoid "battles of the experts;" resolving such disputes "to determine whether a class certification requirement has been met is *always* a task for the court."[5]

The law has been mixed regarding the appropriate level of scrutiny that courts should give to expert testimony at the class certification stage in the wake of *Hydrogen Peroxide*. And there has been only limited appellate guidance. Some district courts have held that applying *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[6] is inappropriate or unnecessary at class certification. An increasing number of district courts, however, are conducting a *Daubert*-like analysis to evaluate expert testimony as part of their class certification decisions, and many perform a full-fledged *Daubert* review.

The practical implications of applying *Daubert* at class certification are significant, especially in horizontal price-fixing cases. Class certification in such cases usually turns on plaintiffs' ability to demonstrate individual impact (*i.e.*, fact of some injury) using common evidence. Both plaintiffs and defendants almost invariably present expert testimony on this issue. Prior to *Hydrogen Peroxide* little was required of the class expert—identification of a "possible methodology" and a statement that "I know I can make it work" sufficed. Although the decision whether to apply a full *Daubert* analysis is not dispositive (*i.e.*, courts applying *Daubert* may certify the class and those applying a lesser standard may not), one thing is clear: expert testimony in support of Rule 23 certification is now subject to much greater scrutiny.

I. Courts Requiring a Full *Daubert* Review

On April 7, 2010, in *American Honda Motor Co. v. Allen*, the Seventh Circuit became the first court of appeals to address directly whether a district court must resolve a *Daubert* challenge before ruling on class certification.[7] Plaintiffs, purchasers of Honda's Gold Wing GL1800 motorcycle, alleged that the motorcycle had a "design defect that prevent[ed] the adequate dampening of 'wobble,' that is, side-to-side oscillation of the front steering assembly about the steering axis."[8] Plaintiffs moved for class certification. In demonstrating the predominance of common issues, plaintiffs relied heavily on expert testimony—specifically, the "wobble decay standard" developed by their expert.[9] Honda moved to strike this expert report under *Daubert*, arguing that the "wobble decay standard was unreliable because it was not supported by empirical testing, was not developed through a recognized standard-setting procedure, was not generally accepted in the relevant scientific, technical, or professional community, and was not the product of independent research."[10] The district court purported to undertake a *Daubert* analysis to address Honda's reliability concerns.[11] Moreover, the court appeared to agree with many of these concerns, stating, "[v]iewing all of the arguments together, the court has *definite reservations* about the reliability of [the expert's] wobble decay standard."[12] Ultimately, however, without an explanation, the district court "decline[d] to exclude the [expert] report in its entirety at this early stage of the proceedings."[13]

On appeal, the Seventh Circuit held that "when an expert's report or testimony is critical to class certification . . . a district court must conclusively rule on any challenge to the expert's qualifications or submissions prior to ruling on a class certification motion. That is, the district court must perform a full *Daubert* analysis before certifying the class if the situation warrants."[14] The Seventh Circuit concluded that the district court's analysis was deficient because it "le[ft] open the

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questions of what portions of [the expert's] testimony it may have decided (or will decide) to exclude, whether [the expert] reliably applied the standard to the facts of the case, and, ultimately, whether [p]laintiffs have satisfied Rule 23(b)(3)'s predominance requirement."[15] Thus, the district court "never actually reached a conclusion about whether [the expert's] report was reliable enough to support [p]laintiffs' class certification request."[16] Because the unreliable expert testimony was inadmissible (even at the class certification stage), and because without such testimony, the *American Honda* plaintiffs were "left with too little to satisfy Rule 23(b)(3)'s predominance prong," the Seventh Circuit vacated both the district court's denial of Honda's motion to strike and the court's order certifying the class.[17]

Another recent case, *Reed v. Advocate Health Care*, found that a *Daubert* analysis was necessary to determine whether plaintiffs had properly supported their motion for class certification.[18] There, a putative class of registered nurses sued several Chicago-area hospitals, alleging a conspiracy to depress pay in violation of federal antitrust laws.[19] The court conducted lengthy hearings on class certification and analyzed extensively the reliability of the plaintiffs' expert's method of proving antitrust impact and damages on a class-wide basis.[20] The court held that the "critical issue is not whether [the expert's] techniques are generally accepted," but "whether they are appropriate when applied to the facts and data *in this case*."[21] Concluding that the expert "ha[d] not applied econometric principles and methods reliably to the facts of this case," the court regarded his testimony as "essentially inadmissible" under *Daubert*.[22] And because the plaintiffs could not demonstrate a method of proving individual impact using proof common to the class, the court refused to certify the proposed class.[23]

American Honda and *Reed* are not isolated decisions. Several other district courts across multiple jurisdictions have applied *Daubert* at the class certification stage, both on initial and renewed motions for class certification.[24] Highlighting just how high the stakes are in this context, the District Court for the Southern District of West Virginia has noted that "[g]iven the high percentage of class actions which settle as a result of class certification, failure to conduct a *Daubert* analysis might invite plaintiffs to seek class status for settlement purposes, and essentially amounts to a delegation of judicial power to the plaintiffs, who can obtain class certification just by hiring a competent expert."[25] While some plaintiffs have succeeded in meeting the *Daubert* standard, the growing acceptance of *Daubert* review at class certification tangibly raises the burden for plaintiffs attempting to certify a class.

II. Courts Rejecting a Full *Daubert* Analysis

In contrast, some courts have held that a *Daubert* review is inappropriate or unnecessary at class certification. For example, the District Court for the Middle District of Florida, in *Sher v. Raytheon Co.*, and the District Court for the Northern District of Georgia, in *In re NetBank, Inc., Securities Litigation*, both recently held that a *Daubert* analysis is inappropriate at the class certification stage.[26] The courts thus refused to subject the plaintiffs' experts' testimony in those cases to any significant level of review before granting class certification. In *Sher*, the court noted that it was "cognizant" of the defendants' objections to plaintiffs' expert evidence, but held that the plaintiffs' experts were well-credentialed and had presented useful models for proving the predominance of common issues.[27] Similarly in *NetBank*, the court emphasized repeatedly its refusal to engage in the parties' battle of the experts at class certification, determining that the plaintiffs offered sufficient evidence to show predominance.[28] Notably, however, both *Sher* and *NetBank* relied on pre-*Hydrogen Peroxide* case law. Because courts are increasingly favoring the *Hydrogen Peroxide* line of cases, *Sher* and *NetBank* are likely to become obsolete as the law in the Eleventh Circuit evolves.

The District Court for the Eastern District of Michigan, in *Serrano v. Cintas Corp.* also rejected the applicability of *Daubert* at class certification, holding that this level of analysis is "unnecessary."[29] But interestingly, the *Serrano* court nevertheless subjected the plaintiffs' expert evidence to a rigorous review and ultimately refused to give that evidence much weight. *Serrano* was a gender discrimination case, and the court, citing *Hydrogen Peroxide*, explained that it will review the plaintiffs' expert evidence "carefully" and "will give it as much weight as is appropriate under the circumstances."[30] Discounting the plaintiffs' expert evidence, the court denied plaintiffs' motion for class certification. Even though *Serrano* expressly rejected the application of *Daubert* at class certification, the reliability of plaintiffs' expert evidence – a central tenet of *Daubert* – played a meaningful role in the court's class certification decision.

III. Courts Applying a Limited *Daubert* Analysis

In this post-*Hydrogen Peroxide* period where courts are working out, case-by-case, how to apply a "rigorous analysis" to class certification, it is not surprising that some courts have sought a middle ground on the question of how *Daubert* fits into this rubric. Such courts have adopted what appears to be an intermediate position, performing a limited *Daubert* review as part of their class certification analysis. For example, in *Dukes v. Wal-Mart*, the Ninth Circuit recently had an opportunity to determine the applicability

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of *Daubert* at class certification on the heels of the Seventh Circuit's decision in *American Honda*.[31] The 6-5 majority in *Dukes* reaffirmed that a district court must engage in a rigorous analysis at the class certification stage,[32] but did not answer the question of whether a full-fledged *Daubert* analysis is required.[33] In *Dukes*, another gender discrimination case, the plaintiffs offered testimony from fact and expert witnesses to demonstrate a common policy of discrimination.[34] Wal-Mart argued that the plaintiffs' expert testimony should be stricken under *Daubert* because the expert's conclusion was "vague and imprecise."[35] The district court refused to engage in a *Daubert* inquiry, concluding that the expert's opinion had sufficient foundation and raised questions that were common to all class members, which is all the court believed was required at class certification.[36]

On appeal, the Ninth Circuit stated that it was "not convinced . . . that *Daubert* has exactly the same application at the class certification stage as it does to expert testimony relevant at trial," but held that "even assuming it did," "we need not resolve this issue here" because "the district court [] was not in error."[37] Specifically, the Ninth Circuit emphasized that although "district courts . . . must[] perform a rigorous analysis to ensure that the prerequisites of Rule 23 have been satisfied, and this analysis will often . . . require looking behind the pleadings to issues overlapping with the merits," district courts "may not analyze any portion of the merits of a claim that do not overlap with the Rule 23 requirements."[38] Because Wal-Mart did not challenge the *methodology* of the plaintiffs' expert's testimony, but only disputed "whether certain inferences can be persuasively drawn from his data," testing the expert's "testimony for '*Daubert* reliability' would not have addressed Wal-Mart's objections," and was therefore not necessary to the class certification analysis.[39] The *Dukes* dissent disagreed with the majority's approach; quoting *American Honda*, the dissent concluded that a *Daubert* analysis should be part of the class certification analysis and thus the lower court abused its discretion by "forego[ing] a reliability inquiry" at the class certification stage.[40]

Several district courts have adopted a standard of review similar to that enunciated by the *Dukes* majority to determine the sufficiency of expert testimony at class certification. These courts perform a limited *Daubert* analysis, examining the expert reports only insofar as they relate to the Rule 23 inquiry. In *In re Zurn Pex Plumbing Products Liability Litigation*, for instance, the court held that "the *Daubert* inquiry is tailored to the purpose for which the expert opinions are offered, *e.g.*, [p]laintiffs' claim that the action is capable of resolution on a class-wide basis and that [common questions] predominate[] over the class members' individual issues."[41] Moreover, in centering the *Daubert* inquiry on Rule 23, the court in *Zurn Pex Plumbing* gave weight to the limited discovery that had been performed at the class certification stage of the litigation, concluding that "[b]ased on the available information for class certification purposes, [the] expert report . . . will not be stricken."[42] Other courts have echoed the propriety of a narrowed *Daubert* review.[43]

To analyze the reliability of an expert's methodology under the "lower *Daubert* standard" courts often concentrate on whether that methodology is widely accepted rather than whether it is appropriate when applied to the facts and data in the particular case. In *In re: Ready-Mixed Concrete Antitrust Litigation*, for example, the court performed "a substantially relaxed" *Daubert* analysis, ultimately concluding that the plaintiff's expert was qualified and that his testimony was reliable.[44] The expert proposed a model for proving class-wide impact through the use of a multiple regression analysis.[45] The defendants challenged the admission of the expert report arguing, *inter alia*, that the expert's promise "'to develop a model at some future time using unknown and as yet undesignated variables and measures . . . is inadmissible under' Rule 702."[46] The court disagreed; noting that the expert's methodology was widely accepted in the relevant scientific community, it determined that the expert testimony "satisfied the requirements under *Daubert* for class certification purposes."[47] Another court, in *Schafer v. State Farm & Fire Casualty Co.*, adopted a similar standard, holding that the expert's "methodology must show some hallmarks of reliability whether through peer review or use of generally-accepted standards or methods."[48]

IV. Conclusion

A review of post-*Hydrogen Peroxide* case law shows that, although the application of *Daubert* among various jurisdictions is not consistent, the recent trend is in favor of an increasingly rigorous analysis of expert testimony at class certification. The practical implications of this trend are significant. Defendants are more likely to file *Daubert* motions in conjunction with their oppositions to class certification. This affords defendants two opportunities to highlight deficiencies in the plaintiffs' expert reports. In addition, courts are increasingly conducting much lengthier class certification hearings. Given the considerable stakes surrounding a court's decision at the class certification stage and the courts' increasing willingness to resolve battles of the experts early in the litigation, plaintiffs and defendants must now, more than ever, invest considerable time and expense in obtaining high-quality experts. A denial of class certification can effectively end an antitrust litigation.

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[2] 552 F.3d 305 (3d Cir. 2008).

[3] *Hydrogen Peroxide* contributed to a recent trend among courts of appeals to impose stricter standards of proof on plaintiffs requesting class certification. *See, e.g.*, *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010); *In re New Motor Vehicles Canadian Expert Antitrust Litig.*, 555 F.3d 6 (1st Cir. 2008); *In re Initial Public Offerings Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006); *Blades v. Monsanto Co.*, 400 F.3d 562 (8th Cir. 2005); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672 (7th Cir. 2001).

[4] *Id.*

[5] *Id.* at 324 (emphasis added).

[6] 509 U.S. 579 (1993).

[7] *See Am. Honda Motor Co. v. Allen*, 600 F.3d 813 (7th Cir. 2010) (per curiam).

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Am. Honda*, 264 F.R.D. 412, 425 (N.D. Ill. 2009).

[12] *See id.* at 426-28 (emphasis added).

[13] *Id.* at 428.

[14] *Am. Honda*, 600 F.3d at 815-16.

[15] *Id.* at 816.

[16] *Id.*

[17] *Id.* at 819.

[18] 2009 WL 3146999, at *21 n.20 (N.D. Ill. Sept. 28, 2009).

[19] *Id.* at *1.

[20] *See id.* at *6.

[21] *Id.* at *20 (emphasis in original).

[22] *Id.* at *21.

[23] Notwithstanding the court's finding that the plaintiff's expert testimony was unreliable, the court denied the defendants' *Daubert* motion. The court's rationale for this curious result was that its "rigorous analysis" of the expert evidence required it "to examine the weight of [the expert's] analysis to the same extent we would have had we ruled it to be admissible." *Id.* Thus, the court held "against plaintiffs on the substance of [the expert's] analysis" and in effect did not reach "the question of whether it passes muster under *Daubert*." *Id.*

[24] *See, e.g.*, *Duling v. Gristede's Op. Corp.*, 2010 WL 768869, at *94-95 (S.D.N.Y. Mar. 8, 2010) (reviewing the admissibility of plaintiffs' expert report under *Daubert* prior to determining whether a class should be certified); *Columbus Drywall & Insulation, Inc. v. Masco Corp.*, No. 1:04-CV-3066-JEC, 2009 WL 856306, at *2-6 (N.D. Ga. 2009) (conducting a *Daubert* analysis prior to considering plaintiffs' renewed motion for class certification); *Srail v. Village of Lisle*, 249 F.R.D. 544, 557-64 (N.D. Ill. 2008) (resolving the defendants' *Daubert* challenge prior to analyzing the propriety of class certification).

[25] *Rhodes v. E.I. du Pont de Nemours & Co.*, No. 6:06-cv-00530, 2008 WL 2400944, at *11 (S.D.W.V. June 11, 2008) (quotations and citations omitted).

[26] *Sher v. Raytheon Co.*, 261 F.R.D. 651, 670 (M.D. Fl. 2009) (holding that a "Daubert style critique of the proffered expert's qualifications, [] would be inappropriate" at the class certification stage); *In re NetBank, Inc., Sec. Litig.*, 259 F.R.D. 656, 670 n.8 (N.D. Ga. 2009) ("[P]erforming *Daubert* analyses at this stage of the litigation, in the context of class certification, would be inappropriate.").

[27] *Sher*, 261 F.R.D. at 670.

[28] *NetBank*, 259 F.R.D. at 670-76, 683.

[29] Nos. 04-40132, 06-12311, 2009 WL 91702, at *2 (E.D. Mich. Mar. 31, 2009).

[30] *Serrano*, 2009 WL 91702, at *2.

[31] *See* 603 F.3d 571 (9th Cir. 2010) (en banc).

[32] *Id.* at 594.

[33] *See id.* at 602-03 n.22.

[34] *Id.* at 600.

[35] *Id.* at 601.

[36] *Id.* at 602 ("[W]hether the jury was ultimately persuaded by those opinions was a question on the merits.").

[37] *Id.* at 603 n.22.

[38] *Id.* at 594.

[39] *Id.*

[40] *Id.* at 639-40 (Ikuta, J., dissenting).

[41] No. 08-1958, 2010 WL 1839278, at *3 (D. Minn. May 6, 2010).

[42] 2010 WL 1839278, at *3.

[43] *See, e.g.*, *In re NYSE Specialists Sec. Litig.*, 260 F.R.D. 55, 66 (S.D.N.Y. 2009) ("[T]he proper role for a *Daubert* inquiry at the class certification stage remains limited by Rule 23 itself."); *Schafer v. State Farm & Fire Cas. Co.*, No. 06-8262, 2009 WL 799978, at *3 (E.D. La. Mar. 25, 2009) (holding that "the review of an expert's proffered evidence at class certification should be vigorous but limited to the opinion's reliability and relevance to the requirements of class certification under Rule 23" (quotations and citations omitted)); *In re First Am. Corp. ERISA Litig.*, Nos. SACV07-01357-JVS, CV 07-07602, CV 07-07585, SACV 08-00110, 2009 WL 928294, at *4 (C.D. Cal. Apr. 2, 2009) (striking the defendants' expert declaration because it was "neither relevant nor useful" to the Rule 23 analysis).

[44] 261 F.R.D. 154, 162-65 (S.D. Ind. 2009). Notably, following the Seventh Circuit's decision in *American Honda*, the District Court for the Southern District of Indiana must now perform a full-fledged *Daubert* review where the expert report is critical to class certification.

[45] *Id.* at 164-165.

[46] *Id.* at 164 (citation omitted).

[47] *Id.* at 165.

[48] 2009 WL 799978, at *11-12 (noting, also, that "the expert must be qualified; and the opinion must have probative value for the issues of class certification" (quotations and citations omitted)).