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Strategies to Defending Class Certification Among the Federal Circuits

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The requirements for class certification are found in Federal Rule of Civil Procedure 23. Although Rule 23 addresses issues like timing, class definition, and appointment of class counsel, it is silent on whether evidence introduced in support of the substantive requirements for class certification must be admissible under the Federal Rules of Evidence. That includes the narrower—though recurring—question of whether a district court must exercise its gatekeeping role at the class certification stage with respect to expert testimony.

Circuit courts take different approaches to the evidentiary standards applicable at the class certification stage. Most circuits require that evidence in support of class certification be admissible, most with respect to expert testimony and one with respect to fact evidence. Other circuits have followed that general rule in unpublished decisions or followed it *sub silentio* without explicitly adopting it. However, a minority of circuits have rejected this approach, applying a much more lenient, functional, and "tailored" standard to admissibility. One circuit has not addressed these issues at all.

This article will first examine the source of confusion and the various approaches to the issue taken by the appellate courts. It will then discuss effective strategies for defendants to oppose class certification in light of these approaches.

Background

The confusion among the circuits arises primarily because Rule 23 is silent as to any evidentiary standards applicable to a class certification motion. Rule 23 also does not address several other important questions, such as whether a court should resolve disputed issues of fact, what procedures are required, whether an evidentiary hearing is required, and the burden of proof for the movant. In the 1980s, the Supreme Court held that to certify a class, a court must engage in "rigorous analysis" to determine whether "the prerequisites of Rule 23(a) have been satisfied"—but with little more guidance than that. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161, (1982).

Since *Falcon*, district courts have exercised "broad discretion" over the procedures and standards for whether to certify a class. But, with the proliferation of the class mechanism, appellate courts have increasingly imposed new rules, and developed a substantial body of case law on these issues, particularly after the 1998 amendments provided a vehicle for potential immediate appeal. Fed. R. Civ. P. 23(f). At the same time, the circuits have also cautioned that the class certification hearing should not turn into a "mini-trial." See, e.g., *Sali v. Corona Reg'l Med. Ctr.*, 909 F.3d 996, 1004 (9th Cir. 2018).

Even with this growing body of case law—and a murky gap between sufficiently "rigorous" procedures and a "mini-trial"—the Supreme Court has not specifically addressed whether—or to what extent—the Federal Rules of Evidence are superimposed on top of Rule 23. In *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), the Supreme Court in *dicta* expressed "doubt" at the idea that "*Daubert* did not apply to expert testimony at the certification stage of class-action proceedings." The Supreme Court was poised to resolve this question in *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013), but decided the petitioner had not preserved the issue.

Later, in *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442 (2016), the Court held that expert evidence could be used to support a class judgment at trial, but strongly indicated that, if the petitioner had moved to exclude the testimony, the trial court would have been required to apply *Daubert*. The petitioner did not raise such a challenge, however, and so "there was no basis to conclude it was legal error to admit that evidence."

Different Approaches

Over the last decade, appellate courts have addressed issues regarding the evidentiary standards applicable at the class certification stage, for both expert testimony and fact evidence. None, though, has said broadly that the Federal Rules of Evidence are applicable *in toto* at the class certification stage, as that would seem to endorse a position that the certification hearing should look like a "mini-trial."

For courts that have taken up the issue, many have leaned toward a more rigorous standard for admissibility. A minority has applied a more relaxed and functional standard. To be sure, there are variations within those categories, and practioners and class defendants should be aware of the nuances of each circuit. Some circuits have not squarely addressed the issue, or done so in published opinions, which gives litigants the opportunity to preserve and raise the issue on appeal as a matter of first impression.

Admissibility Standard

The Third, Fifth, and Seventh Circuits require admissible evidence to support class certification, but have addressed the question only in the context of expert testimony. In one of the leading cases on the issue, *American Honda Motor Co., Inc. v. Allen*, 600 F.3d 813, 816-17 (7th Cir. 2010), the Seventh Circuit held that a "district court must perform a full *Daubert* analysis before certifying the class if the situation warrants"—but only when the expert testimony is "critical" to class certification. See also *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 813 (7th Cir. 2012)—regardless of how a court rules on a certification motion, it must first "conclusively" decide any *Daubert* issues on expert testimony that are "critical" to the certification decision.

The Third, Fifth, and Eleventh Circuits, following *American Honda*, have also applied the admissibility rule only to expert evidence. In *In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 188 (3d Cir. 2015), the court reversed for failure to fully resolve the defendants' *Daubert* motion, and rejected the rationale that the expert testimony "could evolve to become admissible evidence at trial." In addition to relying on *American Honda*, the court found that subjecting expert testimony to *Daubert* was a natural extension of the Supreme Court's statements in *Wal-Mart Stores* and *Comcast*. In *Prantil v. Arkema Inc.*, 986 F.3d 570, 575 (5th Cir. 2021), the Fifth Circuit likewise decertified a class where the district court failed to conduct a *Daubert* analysis of expert reports offered in support of class certification.

The Eleventh Circuit has explicitly followed and applied the rule from *American Honda*, albeit in an unpublished, non-precedential decision. *Sher v. Raytheon Co.*, 419 F. App'x 887, 890–91 (11th Cir. 2011) (citing *Am. Honda*, 600 F.3d at 817). Although a future Eleventh Circuit panel would likely follow that decision as persuasive, the holding is not binding for future panels.

The Second Circuit has not squarely addressed whether a district court should only consider admissible evidence as part of its rigorous analysis under Rule 23. In *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108 (2d Cir. 2013), it declined to reach the question specifically, as the district considered admissibility—tacitly—on the papers, noting that the *Daubert* inquiry is "flexible." In *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 299 F. Supp. 3d 430, 470 (S.D.N.Y. 2018), the court noted "[n]either the Supreme Court nor the Second Circuit has definitely decided whether the *Daubert* standard governs the admissibility of expert evidence submitted at the class certification stage."

That said, some Second Circuit decisions seem to support an admissibility standard. In *Lujan v. Cabana Mgmt., Inc.*, 284 F.R.D. 50, 64 (E.D.N.Y. 2012), the district court suggested that the Second Circuit had "implicitly accepted the admissibility requirement" in *In re Salomon Analyst Metromedia Litig.*, 544 F.3d 474 (2d Cir. 2008), insofar as the court "rejected the 'prima facie' standard." Thus, extending *In re Salomon*, the district court proceeded to analyze whether the declarations at issue in the case should be excluded for lack of personal knowledge or as inadmissible hearsay.

Unpublished decisions in the Second Circuit seem to support this approach. For example, in *In re IPO Sec. Litig.*, 471 F.3d 24, 42 (2d Cir. 2006), the court observed that "an expert's testimony may [not] establish a component of a Rule 23 requirement simply by being not fatally flawed" because a judge must first assess admitted evidence. However, in *Cuevas v. Citizens Fin. Grp.*, Inc., 526 F. App'x 19, 21–22 (2d Cir. 2013), the Second Circuit noted that a district court must "assess all of the relevant evidence admitted at the class certification stage and resolve all material disputed facts" as part of its "rigorous analysis" under Rule 23.

In *In re Asacol Antitrust Litig.*, 907 F.3d 42, 53 (1st Cir. 2018), the First Circuit addressed a different question—the admissibility of fact evidence rather than expert testimony. There, the court decertified a class, in part because the plaintiffs had relied on "affidavits [that] would be inadmissible hearsay at trial, leaving a fatal gap in the evidence for all but the few class members who testify in person." But its rationale seemed to extend more broadly than just hearsay. In its view, "[t]he fact that plaintiffs seek class certification provides no occasion for jettisoning the rules of evidence" because "evidence may not be used in a class action to give 'plaintiffs and defendants different rights . . . [from what] they could [] assert[] in an individual action."

In short, the trend among a plurality of circuits is to subject evidence in support of class certification to admissibility standards, especially with respect to expert evidence. But because the admissibility issue tends to arise more often at class certification with expert witnesses, some circuits have simply "never addressed whether fact evidence, rather than expert opinion, must likewise be admissible." *Allen v. Ollie's Bargain Outlet, Inc.*, 37 F.4th 890, 905 (3d Cir. 2022) (Porter, J., concurring). Query whether the application of *Daubert*—and Fed. R. Evid. 702—means that any and all rules of evidence are likewise applicable in those circuits. *Cf. In re Asacol Antitrust Litig.*, 907 F.3d at 53.

Relaxed Standards

The Sixth, Eighth, and Ninth Circuits do not require expert or non-expert evidence to be strictly admissible at the class certification stage. They have adopted a more functional approach that allows the district court to adapt the inquiry as necessary, in light of the timing and purpose of the class certification decision.

In *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604 (8th Cir. 2011), the Eighth Circuit held that the district court was permitted to conduct a "focused *Daubert* analysis which scrutinized the reliability of the expert testimony in light of the criteria for class certification and the current state of evidence." As the court explained, the certification analysis is limited by the requirements of Rule 23: "findings as to [] experts' disputes [should be] limited to whether, if [plaintiff's] basic allegations [are] true, common evidence could suffice, given the factual setting of the case, to show classwide injury." Accordingly, a "full and conclusive *Daubert* inquiry" at this phase is premature.

Rather, a district court ought to "examine[] the reliability of the expert opinions in light of the available evidence and the purpose for which they [are] offered . . . with Rule 23's requirements in mind." The court based its decision not only on the purpose of the Rule 23 inquiry, but also on the timing issues with respect to dual-track merits and class-specific discovery. In its view, the defendant's "desire for an exhaustive and conclusive *Daubert* inquiry before the completion of merits discovery cannot be reconciled with the inherently preliminary nature of pretrial evidentiary and class certification rulings."

The Sixth Circuit has not yet addressed this issue with respect to expert testimony specifically. As it held in *Lyngaas v. Ag*, 992 F.3d 412, 428–30 (6th Cir. 2021), evidentiary proof at the class certification phase "need not amount to admissible evidence, at least with respect to nonexpert evidence." It held that the district court did not abuse its discretion in granting certification when it relied on inadmissible summary-report logs and other corroborating evidence because "[a]ll that was left was authentication" which could be done at trial.

The Ninth Circuit has applied perhaps the most lenient approach to certification-stage evidence, though there appears to be some intra-circuit tension with respect to the appropriate standard. In *Sali v. Corona Reg'l Med. Ctr.*, 909 F.3d 996, 1003 (9th Cir. 2018), the Ninth Circuit held that the district court erred in "unnecessarily exclud[ing] proof that tended to support class certification" by "rel[ying] on formalistic evidentiary objections" because this evidence "likely could have been presented in an admissible form at trial."

Elsewhere it held that "strictly admissible evidence is not required" for class certification, and "plaintiffs can meet their evidentiary burden in part through allegations [that] are detailed and supported by additional materials." See *B.K. by next friend Tinsley v. Snyder*, 922 F.3d 957, 973–74 (9th Cir. 2019), finding "confidential medical and placement evidence in the record," though it was "thin," was "sufficient to corroborate [plaintiff's] allegations at [the class certification] stage."

More recently, in *Grodzitsky v. Am. Honda Motor Co., Inc.*, 957 F.3d 979, 984–85 (9th Cir. 2020), the Ninth Circuit held that a court did not abuse its discretion in excluding expert opinion at the class certification phase that it found to be unreliable under *Daubert*. By contrast, in *Sali*, the defendants had not attacked the overall reliability of plaintiff's report but instead focused their argument on plaintiffs' failure to authenticate underlying data. This, the Ninth Circuit found, was an abuse of discretion because it improperly "rel[ied] on formalistic evidentiary objections" to "unnecessarily exclude[] proof that tended to support class certification," which "likely could have been presented in an admissible form [later] at trial."

Together, *Grodizitsky* and *Sali* suggest that an expert report should be "reliable" under *Daubert* to support certification. But *Sali* suggests that there is some subset of "formalistic" evidentiary objections that would not be appropriate at the class certification stage. The spectrum of admissible evidence is thus not entirely clear from the court's precedent.

Other Circuits

The Fourth Circuit has not taken up the issue, but its district courts have and are split among the approaches. Some Fourth Circuit district courts have rejected the admissibility standard, instead adopting the relaxed standards employed Sixth, Eighth, and Ninth Circuits, whereas other Fourth Circuit district courts appear to follow the admissibility standard. Compare *In re Marriott Int'l, Inc. Customer Data Sec. Breach Litig.*, at *3 (D. Md. 2022), with *Soutter v. Equifax Info. Servs. LLC*, 299 F.R.D. 126, 131–32 (E.D. Va. 2014).

The Tenth Circuit has not taken up the issue.

Finally, the D.C. Circuit has not taken up the issue, but some district court decisions have and they too lean toward the admissibility standard with regards to expert evidence. See *Campbell v. Nat'l R.R. Passenger Corp.*, 311 F. Supp. 3d 281, 295–96 (D.D.C. 2018), concurring "with the heavy weight of authority that, when a party moves to exclude expert testimony proffered in support of a motion for class certification, the district court must perform a full *Daubert* analysis before certifying a class."

Admissibility & Strategy For Class Certification

- Whether a district court can consider only admissible evidence in support of class certification has a significant impact on defense strategy. Accordingly, a defendant should consider whether to transfer to a district court in the First, Second, Third, Fifth, Seventh, or Eleventh Circuits, and then, whether successful or not, tailor its briefing strategy to appeal to its circuit's approach to this issue.
- Prospective class action defendants should exhaust all procedural means to ensure they litigate in the First, Second, Third, Fifth, Seventh, or Eleventh Circuits. The First, Second, Seventh, and Eleventh Circuits are most preferable because they do not limit the admissibility requirement to expert evidence, whereas the Third and Fifth circuits do. Litigants should be advised, however, that the issue is not conclusively established in the Second or Eleventh Circuit.

- The admissibility standard is highly favorable to defendants in these jurisdictions because it will force class-action plaintiffs to produce admissible evidence at a fairly early stage in the litigation. Moreover, as the Second and Third Circuits observed in *IPO Sec. Litig.* and *Hydrogen Peroxide*, plaintiffs need not only offer admissible evidence in support of each Rule 23 requirement, but must then prove to the court qua factfinder that each Rule 23 requirement is met. Merely offering admissible evidence in support of each Rule 23 requirement is not enough because "[l]ike any evidence, admissible expert opinion may persuade its audience, or it may not." *Hydrogen Peroxide*, 552 F.3d at 323.
- The Seventh and Eleventh Circuits also require a prospective class action defendant to affirmatively challenge the admissibility of expert testimony or expert reports through motion practice before class certification. Thus, defendants should file motions to strike, *Daubert* motions, and/or motions *in limine* prior to class certification when possible to ensure there are pending challenges to the admissibility of prospective evidence plaintiffs intend to offer in support of class certification. This will help ensure that the court rules on these issues before considering class certification. Successful challenges at this stage afford defendants the prospect of an early decisive victory through exclusion of expert evidence necessary to plaintiffs' case.
- If defendants have to defend a class action in the Sixth, Eighth, or Ninth Circuits, though, all is not lost. These circuits will still consider excluding evidence offered in support of class certification so long as there is a substantive basis for doing so. Raising technical evidentiary challenges like authentication or hearsay, unconnected from any substantive issue with the proffered evidence, may not work, especially where discovery creates the possibility the evidence could be offered in admissible form at a later stage. But defendants can raise more substantive challenges that go to the reliability of the proffered evidence.
- For example, with regard to expert evidence, a defendant can attack the accuracy of the underlying data, reliability of the methodology, lack of supporting studies or testing, and use of an unworkable standard underlying the expert's theory. See *Grodzitsky*, 957 F.3d at 984–85. In *Sali*, defendants likely would have had much better results had they focused their attack on the substance of the paralegal's overtime payment calculation report by attacking the accuracy of the underlying data, the reliability of the calculations, or some other basis for questioning reliability, as the court explicitly observed. See *Sali*, 909 F.3d at 1006. Defendants can also show that subsequent discovery will not cure the shortcomings of plaintiffs' proffered evidence. For example, a defendant could use its substantive attack on the reliability of plaintiffs' expert evidence to argue that discovery will serve no purpose because it cannot change the fact the plaintiff expert's methodology is fatally flawed and unreliable.
- If litigating in the Fourth, Tenth, or D.C. Circuits, defendants can employ a comprehensive approach that combines all the strategies discussed above. This will help ensure that the prospective court in one of these jurisdictions will be persuaded that plaintiff's proffered evidence is both substantively unreliable and procedurally inadmissible under the Federal Rules of Evidence. To do this, defendants should file motions to strike, motions *in limine*, and/or *Daubert* motions well before class certification and front-load their briefing with reliability standard arguments. Arguments that go to technical bases for inadmissibility like authentication and hearsay, which would be dispositive in the admissibility standard jurisdictions, should certainly be included, but placed after the reliability standard arguments.

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Class Action Honors (cont.)

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