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Co-Chair's Corner:

by Gregg A. Farley

The country managed to weather yet another presidential election in 2004 – this time with much less controversy regarding “hanging chads” or trips to the Supreme Court. Nevertheless, the outcome of the general election promises to stir up more controversy when the U.S. Congress takes up again, as it is expected to do, the issue of class action “reform.”

As discussed in the last issue of this newsletter (Vol. 14, No. 3), the “Class Action Fairness Act,” which would “federalize” many current state court class actions, only narrowly missed passage during the summer of 2004 by both houses of the 108th Congress. In light of the composition of the new Senate, backers of the bill are expected to introduce it again in the new Congress. Should this legislation be enacted, it will dramatically change the way class actions are filed and litigated.

We promise to keep you advised of further legislative developments as they unfold. Among other things, in the coming year the Committee will be sponsoring multiple events where this issue will be a key subject of discussion.

RECENT COMMITTEE SUCCESSES

The Committee recently held its Eighth Annual National Institute on Class Actions, co-sponsored by the Mass Torts Committee and the Products Liability Committee of the ABA Litigation Section. Over the last eight years, this program has grown to become one of the most prestigious class action events in the country, drawing large crowds and featuring some of the highest profile speakers in the field.

This most recent 2004 program consisted of two separate, full-day events held October 15 and 29, 2004, in New York City and New Orleans, respectively. The program attracted over 340 attendees and featured a diverse range of discussion topics, including a presentation regarding new developments in class action law

conventional cases. The time constraints that impinge upon jurors, judges, and lawyers ensure that trial time cannot be increased without limit—a class of one million plaintiffs cannot be permitted to present one thousand times the anecdotal testimony presented by a class of 1,000. Thus, a trial court must determine either that the incremental testimony that is lost by increasing the scale of the class action either is immaterial or else it can be compressed to manageable size without compromising the rights of the parties to confront statistical evidence. A court that fails to consider these questions risks depriving a litigant of its right to due process.

Although class actions are an expedient that greatly can economize on judicial resources, the risk is that in large class actions, such as *Dukes*, the form of the action will dictate the substance of the evidence that can be presented. Under conventional trial plans, anecdotal testimony may be a casualty of even the most generous time constraints.

This article has suggested that randomization may provide a strategy that can protect a litigant's ability to confront statistical evidence, while economizing on the quantum of individual testimony necessary to meet the challenge. Although this requires a strong hand by the court, and care in framing issues for the jury, this procedure if implemented properly, may protect the parties' rights to due process.

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² An insightful discussion of due process and sampled testimony is provided in R.G. Bone, "Statistical Adjudication: Rights, Justice, and Utility in a World of Scarcity," 46 *VAND.L.REV.* 561 (1993).

Court's Use of *Daubert*-Lite Standard During Class Certification Proceedings is Analytically "Less Filling"

By James P. Muehlberger
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A federal district court recently certified the largest employment-discrimination class action in American history, *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2004). Based upon *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974), which the court interpreted as precluding it from considering arguments on the merits in connection with its class certification analysis, the court believed that it was compelled to utilize a lower *Daubert* standard to evaluate expert testimony. After finding that the testimony of plaintiffs' experts satisfied this lower *Daubert* standard, the court relied heavily upon that testimony in certifying a class of approximately 1.5 million women.

A review of *Eisen* and later Supreme Court decisions, however, reveals that *Eisen* does not construct a wall between merits and class certification analyses. Moreover, it is impractical for a district court to conduct the requisite rigorous analysis of the Rule 23 prerequisites as required by *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 161 (1982), without a full analysis of the expert testimony offered in connection therewith pursuant to *Daubert v. Merrell Dow Pharms. Inc.*, 509 U.S. 579 (1993). Use of a vaguely defined lower *Daubert* standard also leads to potentially inconsistent results and judicial inefficiency. Why should the court and the parties be forced to evaluate an expert's methodology twice: once at the class certification stage using a lower *Daubert* standard, and later utilizing the full *Daubert* standard?

This article will first describe the *Wal-Mart* court's reasoning as reflected in its *Daubert* and class certification decisions. The origin of the

REMINDER: The Annual Conference of the ABA Litigation Section is scheduled for April 20-23, 2005 in New York. For more information, go to www.abanet.org/litigation/home.html

“Eisen rule” will then be analyzed, as well as later Supreme Court decisions clarifying *Eisen* and the recent federal circuit court decisions recognizing the limits of *Eisen*. Finally, this article will discuss *Daubert’s* application to class certification proceedings, and suggest that only by utilizing a full *Daubert* analysis can a court fulfill the Supreme Court’s mandate that district courts conduct a rigorous analysis as to whether plaintiffs have met their burden of satisfying the Rule 23 prerequisites. *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 161 (1982).

Dukes v. Wal-Mart: The Court’s Daubert Decision

The *Wal-Mart* court entered a separate decision addressing the parties’ motions to strike expert and non-expert testimony. *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 189 (N.D. Cal. 2004). In setting forth the legal standard for ruling on the motions to strike, the district court first noted that “arguments on the merits are improper at this stage of the proceedings” 222 F.R.D. at 191 (citing *Eisen*). The court believed that the restriction on conducting a merits inquiry applied equally to the court’s review of expert testimony. *Id.* Rather, the court stated that it “is clear to the Court that a lower [*Daubert*] standard should be employed at this [class certification] stage of the proceedings.” *Id.* (quoting *Thomas & Thomas Rodmakers, Inc. v. Newport Adhesives and Composites, Inc.*, 209 F.R.D. 159 762-63 (C.D. Cal. 2002)).

The court proceeded to utilize this “lower” *Daubert* standard in granting in part and denying in part plaintiffs’ and defendant’s motions to strike class certification expert testimony. 222 F.R.D. at 191. The standard the court articulated for evaluation of expert testimony was both “whether the expert’s evidence adds probative value to plaintiffs’ claims” (222 F.R.D. at 144, n.5), and “whether the expert’s evidence is sufficiently probative to be useful in evaluating whether class certification requirements have been met.” 222 F.R.D. at 191. Such a vaguely defined,

subjective standard breeds inconsistent results, as an analysis of the court’s opinion demonstrates.

The court first addressed Wal-Mart’s motion to strike the declaration of plaintiffs’ sociologist, Dr. Bielby, who conducted a “social framework analysis” of Wal-Mart by reviewing documents and deposition testimony regarding Wal-Mart’s culture and practices. *Id.* As noted in the court’s class certification decision, Dr. Bielby utilized “social science research” to conclude that gender stereotyping was “likely” to exist at Wal-Mart. 222 F.R.D. 137, 153. The court recognized that Dr. Bielby’s opinions have “a built-in degree of conjecture.” *Id.* at 154. For instance, Dr. Bielby conceded that he could not say whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking. *Id.* at 192. Nevertheless, based upon its “lower” *Daubert* standard, the Court concluded that Dr. Bielby’s opinion was “sufficiently probative to assist the court in evaluating the class certification requirements. . . ,” and *denied* defendant’s motion to strike Dr. Bielby’s testimony. *Id.*

The [Dukes] court’s twin errors in misinterpreting Eisen and utilizing a lower Daubert standard had serious consequences for class certification.

The court then analyzed plaintiffs’ motion to strike a collection of store manager declarations (which the court referred to as a “survey”). The declarations at issue were submitted by 239 Wal-Mart store managers randomly selected by defendant. *Id.* at 196. Each store

manager was asked a series of identical questions about a number of issues, including the factors they use to set pay rates and make job placement decisions. The answers from each store manager were recorded in declaration form, the store manager signed the declarations, and the results were tallied. *Id.* Defendant’s statistical expert, Dr. Haworth, relied upon the declarations, in part, to (1) challenge the decision of plaintiffs’ expert to aggregate employment data at the regional store level, and (2) support her opinion to disaggregate and analyze employment data on a store sub-unit by sub-unit basis.

The court criticized the declarations because they were designed and administered by counsel

