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Certification claims come under tighter scrutiny

'Daubert'-lite approach to expert claims has been falling out of favor.

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PRIOR TO THE 2003 amendments to Rule 23 of the Federal Rules of Civil Procedure, Rule 23(c)(1)(C) provided that "class certification may be conditional." As a result, some courts accepted the suggestion that class certification could be granted on a tentative basis, even if it was unclear that the Rule 23 requirements had been satisfied. For example, in *In re School Asbestos Litigation*, 789 F.2d 996, 1011 (3d Cir. 1986), the court affirmed a conditional class certification order based on the presumption that the district court subsequently could resolve manageability issues of "serious concern."

To clarify that orders such as these were not permitted by Rule 23, the 2003 amendments deleted the conditional class certification provision, and the advisory committee explained: "A court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met."

Courts nevertheless have continued to grant class certification motions based on presumptions that class counsel will later satisfy the requirements of Rule 23. In particular, some courts have based manageability, predominance and other Rule 23 findings on expert-opinion testimony offered by class counsel while presuming that such opinion testimony would later survive a challenge under *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993). Some of the largest class actions recently certified arguably have been based on untested expert opinions.

For example, in *Dukes v. Wal-Mart Stores Inc.*, 222 F.R.D. 137, 154 (N.D. Calif. 2004), the court expressed doubts as to the "built-in degree of conjecture" and speculative nature of the plaintiffs' expert-opinion testimony but, having refused to test whether their methods complied with *Daubert*, accepted the opinion testimony as satisfying the plaintiffs' burden of proving commonality and granted class certification.

Courts and litigants that embrace this approach reason that a *Daubert* analysis of opinion testimony at the class certification stage would impermissibly delve into the merits of the case. On the other hand, critics argue a "*Daubert*-lite" approach is inconsistent with the U.S. Supreme Court's directive that district courts apply a "rigorous analysis" to requests for class certification. *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 160-61 (1982).

Though a prevailing trend has emerged in favor of ever higher degrees of scrutiny for expert opinions offered at the class certification stage, no reported decision has addressed the effect of the deletion of the conditional certification provision from Rule 23 on this issue. This change, however, lends weight to the argument that such evidence should be subject to a rigorous *Daubert* analysis, just as it would be at any other stage in the proceeding.

The 'Eisen' rule

Thirty-two years ago, the Supreme Court in *Eisen v. Carlyle & Jacqueline*, 417 U.S. 156, 177 (1974), issued the following statement: "[N]othing in either the language or history of Rule 23...gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." From this single sentence of dicta, some courts have accepted the proposition that courts must assume, for purposes of a class certification analysis, that the allegations and averments made by class counsel are true. Advocates of this proposition often referred to it as the "*Eisen* rule."

But the context in which the Supreme Court made this statement demonstrates its limits. *Eisen* presented the question of whether, under Rule 23, the district court should have required the defendant rather than the plaintiff to bear the full cost of providing notice of the certification order to class members. The district court had held that the defendant should bear 90% of the cost because the plaintiff was "more likely" to "prevail on his claims."

A 2003 rule change appears to make the matter explicit.

In other words, the district court had shifted the cost of notice to the defendant based on a merits assessment of the plaintiff's case. Read in context, the *Eisen* dicta could be viewed as merely stating the obvious: It is improper to shift the entire burden of notice payment from one party to another based on the court's preliminary calculus of which party will ultimately prevail on the merits of the claim.

Later Supreme Court decisions have made it clear that *Eisen* does not mean that averments offered in support of class certification are subject to some form of minimalist evidentiary threshold or that some form of wall has been erected between merits and class certification analyses. In *General Telephone*, the court explained that "actual, not presumed conformance with Rule 23(a) remains... indispensable" and that a class action "may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." 457 U.S. at 160.

Following *General Telephone*, the 7th U.S. Circuit Court of Appeals in *Szabo v. Bridgeport Machines Inc.*, 249 F.3d 672, 675-76 (7th Cir. 2001), rejected the proposition that *Eisen* requires a court to certify a class based solely on

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the allegations in the pleadings, and held that similarity of claims must be demonstrated rather than assumed. Further, the 7th Circuit reasoned that accepting the allegations in the pleadings as true places unfair power in the hands of class counsel. If courts were to blindly accept such allegations, class counsel could use the pleadings in ways injurious to some members of the class or the defendants. The court held that the defendants as well as absent class members were therefore entitled to an independent judicial review of the plaintiffs' allegations.

Szabo's rejection of the so-called *Eisen* rule was quickly followed by several of its sister courts of appeals. The 3d Circuit adopted *Szabo* outright and concluded that it had the discretion to conduct a preliminary inquiry into the merits to determine whether the claims could be properly resolved in a class action. *Newton v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 259 F.3d 154, 166-69 (3rd Cir. 2001). The U.S. Court of Federal Claims likewise held in *Christopher Village L.P. v. U.S.*, 50 Fed. Cl. 635, 643 (2001), that class certification was not proper when the plaintiffs did not present evidence beyond their pleadings sufficient to refute the government's evidence bearing on the individual nature of the plaintiffs' claims.

Similarly, in *Tardiff v. Knox County*, 365 F.3d 1 (1st Cir. 2004), the 1st Circuit concluded that when faced with the choice of accepting the complaint's factual allegations as true or attempting to resolve disputed contentions during the class certification process, the court should opt for the latter. The court said that "class action machinery is expensive and in our view the court has the power to test disputed premises early on if and when the class action would be proper on one premise but not another." Id. at 4.

Thus, it is becoming generally accepted that a party seeking to certify a class action bears the "strict" burden of proving that the requirements of Rule 23 have been met. *Shook v. El Paso County*, 386 F.3d 963, 968 (10th Cir. 2004). Indeed, the 2d Circuit recently held that satisfaction of the Rule 23 requirements "cannot be shown by less than a preponderance of the evidence." *Heerwagen v. Clear Channel Communications*, 435 F.3d 219, 232-33 (2d Cir. 2006).

In *Daubert*, the Supreme Court offered guidance as to how courts should determine whether an expert opinion is admissible under the Federal Rules of Evidence. To be admissible, the proposed testimony must be supported by appropriate validation—i.e., "good grounds," based on what is known. 509 U.S. at 590. The court explained that "this entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue." Id. at 592-93. A court must make this determination in all cases in which the "testimony reflects scientific, technical, or other specialized knowledge." *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137, 141 (1999).

As the court observed in *In re Pharmaceutical Industry Average Wholesale Price Litigation*, 230 F.R.D. 61, 87 (D. Mass. 2005), however: "In evaluating a motion for class certification, one of the thorniest issues is deciding the weight to be accorded an expert's opinion." For example, the 2d Circuit initially adopted a permissive approach, directing district courts to consider any methodology proffered in support of a motion for class certification so long as the methodology was not "fatally flawed." *In re Visa/ Check/Master Money Antitrust Litig.*, 280 F.3d. 124, 135 (2001) ("in assessing whether to certify a class, the Court's inquiry is limited to whether or not the proposed methods are so insubstantial as to amount to no method at all"). Recently, however, the 2d Circuit significantly limited its holding in *Visa/Check* and explained that a district court should weigh expert testimony when necessary to resolve the "independent question of whether plaintiff had made a proper showing of predominance." *Heerwagen* 435 F.3d at 232-33. The 1st Circuit likewise held in *In re Polymedica Corporate Securities Litigation*, 432 F.3d 1, 5, 17 (2005), that a district court must critically evaluate and resolve conflicting expert testimony offered at the class certification stage. And the 7th Circuit similarly endorsed a rigorous review of opinion testimony, reasoning in *West v. Prudential Securities*, 282 F.3d 935, 938 (2002), that a failure to scrutinize an expert's methodology amounts to a "delegation of judicial power to the plaintiffs, who can obtain class certification just by hiring a competent expert."

Testing a key expert's methodology and assumptions under *Daubert* at the certification stage makes sense, argue advocates for this procedure, because in a massive, high-stakes putative class action the litigation costs may run into the hundreds of millions of dollars. *Tardiff*, 365 F.3d at 4-5. When a single expert's opinion is the key to a class certification motion and the class proponents bear the burden of proving the class certification elements by a preponderance of the evidence, the question should not be whether the expert's methodology is so insubstantial as to preclude class certification, but rather whether the expert's assumptions and methodology are reliable enough to satisfy the rigorous analysis required for class certification.

No to the 'certify now, fully evaluate later' approach.

Two bites at the apple

Moreover, a strong argument can be made that it is inefficient for a court to consider the expert testimony twice—once at the class certification stage using a lower *Daubert*-lite standard, and later using a full *Daubert* review. And allowing class counsel two bites at the admissibility apple can be viewed as unfair both to those who oppose the class and the absent class members. The opponents to the class are forced to litigate the issue twice. But perhaps more importantly, the absent class members' rights may be bound up with those of the class representatives only to be substantially impaired or lost altogether when class counsel's opinion testimony is ultimately excluded following a full *Daubert* review.

As federal courts increasingly demand strict compliance with the Rule 23 prerequisites, class counsel have responded by shifting issues such as the availability of classwide proof of causation into expert reports, and by using *Eisen* as a shield to prevent judicial scrutiny of such opinions during class certification proceedings. Courts have often rejected this interpretation of *Eisen*. Shorn of its conditional certification provision, Rule 23 now appears to preclude such a "certify now, fully evaluate later" approach to class certification. Courts therefore would do well to critically review and resolve expert-opinion disputes at the class certification stage with the application of a full and rigorous *Daubert* analysis. NLJ