American Bar Association Section of Litigation Committee on

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In This Issue

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

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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).

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

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 tedtimony 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

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

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 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

during litigation, the interviewer knew the survey was related to litigation, and the questions were not open-ended. Relying, in part, on *Yapp v. Union Pacific R.R. Co.*, 301 F. Supp. 2d 1030, 1037 (E.D. Mo. 2004), a case in which the court utilized a full *Daubert* analysis in precluding an expert's testimony during class certification proceedings, the court then *granted* plaintiffs' motion to strike. *Id.* at 197. It is curious that the court struck the declarations (and the expert's testimony based thereon) based, in part, on the involvement of defendant's counsel in the preparation of the declarations. The court had earlier relied upon *Thomas & Thomas Rodmakers, Inc. v. Newport Adhesives and Composites, Inc.*, 209 F.R.D. 159 (C.D. Cal. 2002), as precedent for use of a lower *Daubert* standard. In *Thomas*, the court admitted the testimony of plaintiff's expert who had assumed that the plaintiffs' counsel's allegations in the complaint were true in rendering his opinion, rather than relying upon actual data. *Id.* at 161. Under the *Thomas* court's reasoning, the defense expert's testimony in *Wal-Mart* should arguably have been admitted.

Merely describing the court's rulings demonstrates the potential for inconsistent results from the use of a lower *Daubert* standard during class certification proceedings. The court's twin errors in misinterpreting *Eisen* and utilizing a lower *Daubert* standard had serious consequences for class certification.

Dukes v. Wal-Mart: The Court's Class Certification Decision

On the same day the court rendered its ruling on the parties' motions to strike expert testimony, the court also issued its ruling on class certification. *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2004). The plaintiffs alleged that women employed in Wal-Mart stores were paid less than men in comparable positions, despite having higher performance ratings and greater seniority, and received fewer promotions to in-store management positions, in violation of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e *et seq.* ("Title VII"). Plaintiffs sought to certify a nationwide class of women who had been subject to Wal-Mart's allegedly discriminatory pay and promotions policies. The court ultimately certified plaintiffs' claims for equal pay and promotion with respect to issues of liability (including punitive damages) and injunctive and declaratory relief.

In discussing the legal standards for purposes of its class analysis, the court acknowledged that it must conduct a rigorous analysis to determine whether the prerequisites of Rule 23 had been met. 222 F.R.D. at 143 (citing *General Telephone*). The court cited *Eisen*, however, for the proposition that it could not inquire into the merits of the case. *Id.* at 144. In the court's opinion, the restriction on conducting a merits inquiry also applied to the court's review of the expert testimony presented by the parties, such that it should avoid a "battle of the experts." *Id.*, n.5. The court did not address the seemingly contrary directives of the Supreme Court to both avoid a merits inquiry (*Eisen*) and rigorously analyze whether plaintiffs have met the Rule 23 prerequisites (*General Telephone*).

The court relied heavily upon the plaintiffs' sociologist (Dr. Bielby) as part of its Rule 23(a)(2) commonality analysis to find "an inference of corporate uniformity and gender stereotyping that is common to all class members." *Id.* at 154. However, because of its reliance on a lower *Daubert* standard, the court did not subject the sociologists' testimony to the requisite rigorous analysis. For instance, the court explained that it "would be premature and inappropriate for the Court to determine the precise degree to which the forms of centralized control at Wal-Mart keep managerial discretion in check." *Id.* at 153 (citing *Eisen*). The court admitted that Dr. Bielby could only speculate that gender stereotyping was "likely" to exist at Wal-Mart, that Wal-Mart's practices make the promotion process "vulnerable" to gender stereotyping, that his opinions had a "built-in degree of conjecture, and that he could "not definitively state how regularly stereotypes play a meaningful role in employment decisions." *Id.* at 154. The court reasoned, however, that the "appropriate question *at this stage of the litigation* is not whether Dr. Bielby can make a conclusive determination, but whether it could add probative value to the inference of discrimination that plaintiffs allege." *Id.* (emphasis added). The court concluded that "*[f]or present purposes*, Dr. Bielby's testimony raises an inference of corporate uniformity and

gender stereotyping that is common to all class members." *Id.* (emphasis added).

The court next considered the plaintiffs' statistical evidence of alleged class-wide gender disparities in the form of testimony by a statistician and an economist. Wal-Mart challenged the methodology of plaintiffs' statistician because he aggregated data at a regional level and failed to account for certain variables. *Id.* at 156. Wal-Mart challenged the methodology of plaintiffs' economist because he had not based his opinion on Wal-Mart's internal applicant flow, but on a benchmarking analysis by "cherry-picking" comparative companies. *Id.* at 165.

The court stated that defendant's arguments sought "to engage the Court in a merits evaluation of the expert opinions." *Id.* at 155. The court rejected this approach, and reviewed the statistical evidence "through the proper lens of the standards applicable to a class certification motion." *Id.* (citing *Eisen*). Accordingly, the court held that it would evaluate the substance of the experts' testimony "only to the extent necessary to determine if it is sufficiently probative of an inference of discrimination to create a common question as to the existence of a pattern and practice of gender discrimination. . . ." Having set such a low threshold, it was not surprising that the court rejected defendant's arguments, qualifying its conclusion with phrases such as "at this stage" (*Id.* at 159), and "for purposes of this [class certification] motion" (*Id.* at 160).

The court's conclusion that plaintiffs had established commonality rests primarily on plaintiffs' expert testimony, as tested only by use of the court's lower Daubert analysis. It could be argued, therefore, that utilization of the lower standard was outcome-derivative of the class certification decision.

The court's conclusion that plaintiffs had established commonality rests primarily on plaintiffs' expert testimony, as tested only by use of the court's lower *Daubert* analysis. It could be argued, therefore, that utilization of the lower *Daubert* standard was outcome-determinative of the class certification decision. Accordingly, it is necessary to examine the underlying foundation for the court's construction of a lower *Daubert* standard, the so-called *Eisen* rule, to determine if that foundation is of sand or stone.

Eisen Does Not Construct a Wall Between Merits and Class Certification Analyses

Thirty years ago, the United States Supreme Court in *Eisen v. Carlyle & Jacqueline*, 417 U.S. 156 (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.

Id. at 177. From this single sentence of *dicta*, most plaintiffs' counsel, and some courts, have accepted the proposition that courts must assume, for purposes of class certification analysis, that whatever allegations and averments plaintiffs make are true, without any analysis of whether there is actually any factual support for such allegations and averments.

But the context in which the Supreme Court made that statement demonstrates its limits. *Eisen* presented the question of whether, under Federal Rule of Civil Procedure 23, the district court should have required the defendant rather than the plaintiffs in that case to bear the full cost of providing class notice to class members. The district court had held that the defendant should bear 90% of the cost because plaintiff was "more likely" to "prevail on his claims." *Id.* at 177. In other words, the district court had shifted the cost of notice to the defendant based on its assessment of the strength of the merits of the case. Read in its proper context, the *Eisen* dicta merely states 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. *Id.* at 178. Later Supreme Court cases clarified *Eisen's* dicta.

Later Supreme Court Decisions Clarify *Eisen*

Later Supreme Court decisions have made it clear that *Eisen* does not stand for the proposition plaintiffs' counsel often advance -- *Eisen* does not construct a wall between merits analysis and class certification analysis. In *Coopers & Lybrand v. Livesay*, the United States Supreme Court held that:

> Evaluation of many of the questions entering into determination of class action questions is intimately involved with the merits of the claims. The typicality of the representatives' claims or defenses, the adequacy of the representative, and the presence of common questions of law or fact are obvious examples. The more complex determinations required in Rule 23(b)(3) class actions entail even greater entanglement with the merits. . . .

437 U.S. 463, 469 (1978).

Four years later in *General Tel. Co. of Southwest v. Falcon*, the United States Supreme Court further clarified the relation between plaintiff's proof and class certification analysis in the context of Fed. R. Civ. P. 23(a)'s adequacy requirement:

> Sometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claim, and sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question. . . . [A]ctual, not presumed conformance with Rule 23(a) remains. . . indispensable. . . . [A] Title VII class action, like any other 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. 147, 160 (1982). Subsequent cases have confirmed that the Supreme Court's reasoning applies with equal force to class certification questions concerning the other prerequisites of Rule 23.

The Seventh Circuit Rejects the *Eisen* Rule

In a 2001 decision authored by Judge Frank H. Easterbrook for a panel including Judges Richard A. Posner and Ann C. Williams, the Seventh Circuit rejected the proposition that *Eisen* requires a court to certify a class based solely on the allegations in the pleadings. *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 675-76 (7th Cir. 2001). In this fraud and breach-of-warranty action, the district court had refused to consider the defendant's uncontroverted evidence that plaintiffs had not satisfied the elements for class certification. *Id.* at 674.

The Seventh Circuit vacated the order certifying the class, based on its consideration of evidence that illustrated "[n]agging issues of choice of law, commonality, and manageability." *Id.* at 677. The Seventh Circuit reasoned that, unlike Rule 12(b)(6) motions, a court ruling upon a motion for class certification need not accept the allegations in the complaint as true. *Id.* at 675-76. The court said that in contrast to a 12(b)(6) motion, which strictly tests the legal sufficiency of a pleading, a motion for class certification tests both the legal and factual sufficiency of a claim. *Id.* The order certifying a class or denying certification becomes the court's "last word" on the issue. *Id.* Thus, the court should consider whatever facts are relevant to the issue of class certification. *Id.*

The court analogized class certification with determinations of venue, *forum non conveniens*, and amount in controversy for diversity jurisdiction, in which courts routinely look to the merits of a case to resolve disputed issues. *Id.* at 676-77. The court explained that because these other Rule 12(b) motions are not governed by the 12(b)(6) requirement that the court accept the plaintiff's pleadings at face value, no reason exists to extend such a requirement to class certification. *Id.* at 677.

Additionally, the court reasoned that *Eisen*, *General Telephone*, and the 1966 amendments to Rule 23, dictate that a district court must "probe beyond the pleadings" in order to determine whether the plaintiffs are able to satisfy the Rule 23 certification requirements. *Id.*

Szabo interpreted *General Telephone* to hold that similarity of claims must be demonstrated rather than assumed. *Id.* at 677. Further, the Seventh Circuit reasoned that accepting the allegations in the pleadings as true places unfair power in the hands of plaintiffs' attorneys. *Id.* If courts were to blindly accept such allegations, plaintiffs' attorneys could use the pleadings in ways injurious to some members of the class or the defendants. *Id.* The court held that defendants as well as absent class members were therefore entitled to an independent judicial review of plaintiffs' allegations. *Id.*

The Majority of Circuits Now Recognize the Limits of *Eisen*

Szabo's rejection of the *Eisen* rule has been followed in scores of decisions within the Seventh Circuit. *See* Linda Mullenix, *Inroads on "Eisen"*, NAT'L L.J., Sept. 22, 2003 at 13. The First, Third, and Fourth Circuit Court of Appeals, and the United States Court of Federal Claims have also adopted *Szabo's* approach to class certification. *Id.*

The Third Circuit adopted *Szabo* outright, reasoning that in light of the Supreme Court's apparent rejection of *Eisen* as reflected in *Coopers & Lybrand* and *General Telephone*, it had the discretion to conduct a preliminary inquiry into the merits to determine whether the alleged claims would be properly resolved in a class action. *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 166-69 (3d Cir. 2001). The United States Court of Federal Claims shortly thereafter issued *Christopher Village, LP v. U.S.*, 50 Fed. Cl. 635, 643 (Fed. Fl. 2001) (denying class certification on grounds that the plaintiffs did not present evidence beyond the pleadings sufficient to refute the government's evidence).

Earlier this year, in *Tardiff v. Knox County*, 365 F.3d 1 (1st Cir. 2004), the First Circuit concluded that when faced with the issue 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 explained that "it is sometimes taken for granted that the complaint's allegations are necessarily controlling; but 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 (noting the split between the Second and Tenth circuits (discouraging any preliminary inquiry) and the Third and Seventh circuits (allowing such an inquiry)).

Most recently, in *Gariety v. Grant Thornton LLP*, 368 F.3d 356 (4th Cir. 2004), the Fourth Circuit held that the district court erred when it refused to look beyond the plaintiff's complaint before deciding that common questions of law or fact predominated over individual issues in a securities fraud case. The court explained that "the district court's reliance on mere assertions did not fulfill the requirement that the district court take a 'close look' at relevant matters, conduct a 'rigorous analysis,' and make findings in determining whether the plaintiffs had demonstrated that the requirements of Rule 23(b)(3) have been satisfied." *Id.* at 366-67.

Of course, there are still courts that continue to follow the Eisen rule, but they are becoming the minority, as more and more circuit courts realize the impossibility of making sensible certification decisions without looking to the underlying facts of a case.

In addition to courts that have explicitly adopted *Szabo*, the Fifth and Eleventh Circuits have held that it is appropriate to consider evidence outside the plaintiffs' pleadings to determine whether Rule 23's requirements are met. *See Castano v. American Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996) ("going beyond the pleadings is necessary, as the court must understand the claims, defenses, relevant facts and applicable substantive law in order to

make a meaningful determination of the certification issues"); *Rutstein v. Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1228, 1234 (11th Cir. 2000). The Ninth Circuit has issued seemingly conflicting decisions on the subject. *Compare In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 691 F.2d 1335, 1342 (9th Cir. 1982) (district court is bound to take the substantive allegations of the complaint as true), with *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 509 (9th Cir. 1992) ("we are at liberty to consider evidence which goes to the requirements of Rule 23 even though the evidence may also relate to the underlying merits of the case" (quotations and citations omitted)).

It appears that only the Second, Sixth and Tenth Circuits explicitly hold that the allegations in plaintiffs' complaint are controlling at the class certification stage. *See Reeb v. Ohio Dep't. of Rehab. and Corr.*, 2003 WL 22734623 (6th Cir. 2003); *See Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 291-93 (2d Cir. 1999); *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1290 n.7 (10th Cir. 1999). The Second Circuit has also held, based upon similar reasoning, that courts must utilize a "lower" *Daubert* standard in connection with class certification proceedings. *See e.g., In re Visa Check/MasterMoney Antitrust Litigation*, 280 F.3d 124, 135 (2d Cir. 2001).

Although no court has explicitly stated that the *Eisen* rule is dead, it certainly has lost its vitality. Courts are beginning to accept the *Eisen* rule for what it is—broad dicta that was born from an inimitable factual scenario. Of course, there are still courts that continue to follow the *Eisen* rule, but they are becoming the minority, as more and more circuit courts realize the impossibility of making sensible certification decisions without looking to the underlying facts of a case. In light of the decline of *Eisen*, this article will next address the related issue of the use of *Daubert* and the admissibility of expert testimony in class certification proceedings.

Daubert and the Admissibility of Expert Testimony in Class Certification Proceedings

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) the Supreme Court offered guidance as to how federal courts should determine whether expert evidence proffered pursuant to Rule 702 has met the admissibility requirements found in Rule 104(a). *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). In order to be admissible, the "subject of an expert's testimony must be 'scientific . . . knowledge.' The adjective 'scientific' implies a grounding in the methods and procedures of science." 509 U.S. at 589-90. The court further required that "in order to qualify as 'scientific knowledge,' an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation—*i.e.*, 'good grounds,' based on what is known." *Id.* 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).

Daubert identified several factors to assist courts in determining whether an expert's opinion is based on valid reasoning or methodology: (1) whether a method consists of a testable hypothesis; (2) whether the method has been subject to peer review and publication; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique's operation; and (5) whether the method is generally accepted. 509 U.S. at 593-94. The proponent of the expert testimony bears the burden of establishing the testimony's admissibility by a preponderance of the evidence. *See, e.g., Jaurequi v. Carter Mfg. Co., Inc.*, 173 F.3d 1076, 1082 (8th Cir. 1999).

Application of *Daubert* to Class Certification Proceedings

When considering a motion for class certification, federal district courts are required to conduct a rigorous analysis to determine whether plaintiffs have satisfied the Rule 23 prerequisites. *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 160-61 (1982). As noted earlier, plaintiffs typically argue that class certification is "not an occasion for examination of the merits of the case."