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Opposing class certification with a one-two punch

A 'Daubert' motion plus a brief opposing certification may work.

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AT THE END OF 2008, the 3d U.S. Circuit Court of Appeals issued an important decision that raised the bar for plaintiffs to obtain class certification. See *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008).

While *Hydrogen Peroxide* is a landmark decision in class certification law, it can also be understood as the latest case in a continuing trend among federal appellate courts holding that district courts should carefully weigh and resolve conflicting expert testimony at the class certification stage.

Because most circuits now require district courts to rigorously weigh expert testimony when assessing class certification motions, the combination of a motion under *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993), and a separate brief opposing class certification can provide an effective "one-two" punch for defendants trying to defeat class certification.

In *Hydrogen Peroxide*, the 3d Circuit vacated the district court's order certifying a class of direct hydrogen peroxide purchasers because it applied too lenient a standard in certifying the class.

One of the most important holdings in *Hydrogen Peroxide* concerned how courts should treat conflicting expert testimony at the class certification stage. According to *Hydrogen Peroxide*, the "proper task" for a district court is to

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"carefully consider all relevant evidence and make a definitive determination that the requirements of Rule 23 have been met before certifying a class." 552 F.3d at 320. The "obligation to consider all relevant evidence and arguments extends to expert testimony, whether offered by a party seeking class certification or by a party opposing it." Id. at 307.

In *Hydrogen Peroxide*, the defendants argued that the district court failed to consider their expert's opinions and improperly deferred to the opinions of the plaintiffs' expert.

The 3d Circuit began its analysis by discussing

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the intersection between *Daubert* and class certification. The district court denied the defendants' motion to exclude the opinion of the plaintiffs' expert under *Daubert*, a ruling that the defendants did not challenge on appeal. The 3d Circuit held that even if a district court rules that expert testimony should not be excluded under *Daubert*, that does not necessarily mean that the testimony should be "uncritically accepted as establishing a Rule 23 requirement." Id. at 323. Rather, "a district court's conclusion that an expert's opinion is admissible does not necessarily dispose of the ultimate question—whether the district court is satisfied, by all the evidence and arguments including all relevant expert opinion, that the requirements of Rule 23 have been met." Id. at 315 n.13.

Like any matter relevant to a Rule 23

requirement, expert opinion "calls for rigorous analysis." Id. at 323. This principle "is especially important to bear in mind when a party opposing certification offers expert opinion." Id. Accordingly, weighing conflicting expert testimony is not only "permissible" at the certification stage, but "it may be integral to the rigorous analysis Rule 23 demands." Id. The 3d Circuit concluded, "Resolving expert disputes in order to determine whether a class certification requirement has been met is always a task for the court—no matter whether a dispute might appear to implicate the 'credibility' of one or more experts." Id. at 324.

This does not, however, make weighing expert opinions "necessary in every case or unlimited in scope." Id. In certain cases, district courts "may find it unnecessary to consider certain expert opinion" in the exercise of their sound discretion. Id. However, the 3d Circuit noted that district courts may not decline to resolve a genuine legal or factual dispute, including disputes between experts, because of a "concern for avoiding credibility issues" or "concern for an overlap with the merits." Id.

Trend toward greater scrutiny

In several decisions of the past few years, other federal courts of appeals have tended toward greater scrutiny of expert testimony.

In *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 26 (1st Cir. 2008), the 1st Circuit held that when a Rule 23 requirement relies on a novel or complex theory, district courts must conduct a "searching inquiry" into whether the theory is viable and whether facts necessary for the theory to succeed exist. The 1st Circuit, noting that discovery had closed since the district court granted class certification, vacated the district court's decision to certify a class so that the plaintiffs could

present their completed damages analysis on remand. In its discussion, the court cited *In re Xcelera.com Sec. Litig.*, 430 F.3d 503, 512-16 (1st Cir. 2005), in which the district court had “actively evaluated” the testimony of competing experts. *New Motor Vehicles*, 522 F.3d at 25.

In *Dukes v. Wal-Mart Inc.*, 509 F.3d 1168, 1179 (9th Cir. 2007), the defendant argued that the testimony of the plaintiffs’ expert sociologist did not satisfy the standards of Rule 702 and *Daubert*. The 9th Circuit held that *Daubert* did not preclude the testimony because the defendant did not challenge the expert’s methodology, but simply whether the conclusion he reached was persuasive. According to the 9th Circuit, the standard at the class certification stage is whether the expert “presented properly-analyzed, scientifically reliable evidence” that tends to support an element of Rule 23. *Id.* In the same opinion, the 9th Circuit held that the district court had discretion to strike the defendants’ survey evidence under *Daubert* because the survey methodology was unreliable.

The district court in *In re Initial Public Offerings Sec. Litig.*, 471 F.3d 24, 31 (2d Cir. 2006), ruled that weighing competing expert reports was inappropriate at the class certification stage and that a plaintiff could meet its burden under Rule 23 by offering expert testimony that is not “fatally flawed.” The 2d Circuit held that district courts may not grant class certification without determining that each Rule 23 requirement is met and must resolve underlying factual disputes that relate to a Rule 23 requirement, even if they also relate to the merits of the case. In addition, the 2d Circuit expressly rejected the suggestion that an expert’s testimony may establish a Rule 23 requirement simply by being not fatally flawed.

In *Blades v. Monsanto Co.*, 400 F.3d 562, 569-70 (8th Cir. 2005), the defendants moved to strike the plaintiffs’ expert under *Daubert*, but the district court denied that request in favor of considering all the evidence at the class certification stage. After considering the evidence, the district court denied certification because the plaintiffs could not prove fact of injury on a classwide basis. On appeal, the plaintiffs argued that the district court improperly resolved disputes between the experts related to the merits of the case. The 8th Circuit held that in ruling on class certification, courts may be required to resolve expert disputes. The 8th Circuit affirmed the district court’s findings concerning the experts’ dispute because they were limited to a prerequisite to certification in antitrust class actions.

In *West v. Prudential Sec. Inc.*, 282 F.3d 935, 938 (7th Cir. 2002), the district court certified a class of investors because each side was supported by a reputable financial economist, and that conflict was, by itself, enough to support class certification. The 7th Circuit reversed the district court’s decision, holding that the district court’s view amounted to a “delegation of judicial power to the plaintiffs,” who could obtain certification simply by hiring

a competent expert. According to the 7th Circuit, district courts “may not duck hard questions by observing that each side has some support.” *Id.* Rather, they must confront and decide those questions.

‘Daubert’ at certification stage?

Most federal courts of appeals now hold that district courts have an obligation to evaluate conflicting expert testimony at the class certification stage. However, none squarely addresses whether *Daubert* applies at the class certification stage.

Some courts have found that the rules of evidence do not apply or should be relaxed when a considering evidence relating to a motion for class certification because *Daubert*’s gatekeeping function was “designed to keep unreliable scientific opinion from juries.” *In re FedEx Ground Package Sys. Inc. Employment Practices Litig.*, 2007 WL 3027405, at *4 (N.D. Ind. Oct. 15, 2007) (applying “substantially relaxed” Rule 702 analysis).

However, due to the “pivotal status of class certification in large-scale litigation,” 552 F.3d at 310, *Hydrogen Peroxide* held that some level of *Daubert* review is necessary to ensure that courts do not base class certification decisions on unreliable expert testimony.

Today, most district courts follow one of two approaches in evaluating *Daubert* motions filed at the class certification stage.

Some district courts conduct a full *Daubert* analysis of expert testimony that relates to Rule 23 requirements. See, e.g., *Rhodes v. E.I. du Pont de Nemours and Co.*, 2008 WL 2400944, at *10-12 (S.D. W.Va. June 11, 2008) (discussing historical application of *Daubert* at the class certification stage and holding that expert opinions must be reliable and relevant under *Daubert*); *Srail v. Village of Lisle*, 249 F.R.D. 544, 557-64 (N.D. Ill. 2008) (applying *Daubert* to assess admissibility of plaintiffs’ experts at class certification stage but denying *Daubert* motion).

Other district courts have held that “it is not necessary...to engage in a full-fledged *Daubert* analysis at the class certification stage.” *In re Wal-Mart Stores Inc. Wage and Hour Litig.*, 2008 WL 413749, at *14 (N.D. Calif. Feb. 13, 2008); accord, e.g., *Ammons v. La-Z-Boy Inc.*, 2008 WL 5142186, at *13 (D. Utah Dec. 5, 2008) (holding that courts should look at whether the evidence is sufficiently probative in evaluating whether class certification requirements are met); *In re Katrina Canal Breaches Consol. Litig.*, 2007 WL 3245438, at *12 (E.D. La. Nov. 1, 2007) (declining to undertake full *Daubert* examination at class certification stage but conducting “vigorous” review under Rule 702 “limited to the opinion’s reliability and relevance to the requirements of class certification under Rule 23”).

In *Hydrogen Peroxide*, the district court held that evaluation of expert testimony on class certification should be “perhaps less exacting” than at trial, *In re Hydrogen Peroxide Antitrust Litig.*, 240 F.R.D. 163, 170 (E.D. Pa. 2007), a

statement the 3d Circuit did not address. Thus, while *Hydrogen Peroxide* requires a “rigorous analysis” of expert testimony, it left open whether that analysis must entail a full-fledged *Daubert* inquiry. 552 F.3d at 315 n.13, 323.

Weighing a ‘Daubert’ motion

Because denial of certification can be the “death knell” for litigation, *Hydrogen Peroxide*, 552 F.3d at 310, defendants should consider filing a *Daubert* motion at the class certification stage, particularly given the direction in which the law is moving.

First, the court could grant the motion. Striking the plaintiffs’ expert could reduce and even eliminate the likelihood of class certification. Second, a *Daubert* motion gives defendants two chances to attack the plaintiffs’ expert—in the *Daubert* brief and in the brief in opposition to class certification. In some cases, the subject matter of expert testimony is complex. A *Daubert* motion can present arguments against an expert in a way that is more technical and does not detract from (and indeed can complement) the arguments in the main class certification opposition brief. Even if the court denies the *Daubert* motion, the arguments in the motion could help persuade the court to deny certification.

There are also potential drawbacks to filing a *Daubert* motion at the class certification stage. First, *Daubert* motions are costly. Second, filing a *Daubert* motion could delay the proceedings, as the court will have a second substantial motion to consider. Third, the plaintiffs may respond by filing a *Daubert* motion of their own. Opposing that motion could be expensive and delay the proceedings further. If the court grants the plaintiffs’ motion, the chances of defeating class certification are diminished.

Fourth, filing a *Daubert* motion may draw extra attention to the other party’s expert. If the court denies the *Daubert* motion, that could enhance the stature of the expert in the court’s mind.

Fifth, just as a *Daubert* motion gives the movant two chances to attack the other party’s expert, the other party gets two chances to explain or clarify its expert’s opinions.

Because class certification is usually the critical event in class litigation and the law is trending in favor of more rigorous analysis of conflicting expert testimony, defendants should consider filing a *Daubert* motion in addition to the traditional brief opposing class certification. While application of *Daubert* is not uniform in the federal district courts, in light of *Hydrogen Peroxide* and this recent trend, *Daubert* motions at this stage will become more commonplace and have a greater likelihood of success. ■

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