An Update On Daubert And Class Certification

Law360, New York (April 22, 2013, 12:43 PM ET) -- In an article last year, we noted a split among federal courts regarding how — if at all — to evaluate the reliability of an expert's testimony for purposes of class certification, with the Eighth Circuit endorsing a limited or "focused" Daubert test in In re Zurn Pex Plumbing Products Liability Litigation, 644 F.3d 604, 613 (8th Cir. 2011), and the Seventh Circuit applying a full Daubert analysis in American Honda Motor Co. v. Allen, 600 F.3d 813, 815-16 (7th Cir. 2010).

When the defendants in Zurn Pex filed a petition for certiorari, some commentators predicted that this may be the next class action issue to head to the U.S. Supreme Court. That was not to be. Last month, the parties settled the case, and the petition for certiorari was voluntarily dismissed.

Although the Supreme Court did touch briefly on expert issues as they related to class certification last month in Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013), the ruling did not address Daubert directly. In Comcast, the Supreme Court reversed a sweeping class action encompassing more than 2 million current and former Comcast subscribers who alleged violations of federal antitrust laws. See 133 S. Ct. 1426.

The Supreme Court held that the class at issue failed the requirements of Rule 23(b)(3) because the plaintiffs' damages theory did not fit their theory of liability, and "[q] uestions of individual damage calculations will inevitably overwhelm questions common to the class." Id. at 1433.

Notably, the court did not address whether the expert testimony supporting the plaintiffs' damages theory was reliable — the Daubert question was not before the court because Comcast did not challenge the admissibility of the plaintiffs' expert's testimony in the district court.

However, the court did reaffirm that class certification requires a "rigorous analysis" that includes examination of expert opinions and concluded that it was erroneous to "refus[e] to entertain arguments against [the plaintiffs'] damages model that bore on the propriety of class certification simply because those arguments would also be pertinent to the merits determination." Id. at 1432-33.

The Supreme Court's decision in Comcast clearly endorses an in-depth analysis of plaintiffs' class action theories at the class certification stage even where the merits are implicated. Along with the Supreme Court's dicta in Wal-Mart v. Dukes, 131 S. Ct. 2541, 2553-54 (2011) ("The District Court concluded that Daubert did not apply to expert testimony at the class certification stage of class-action proceedings. We doubt that this is so."), this suggests that the court may favor a full Daubert analysis with regard to experts' class certification opinions. At this point, however, it seems unlikely that the court will make its position on that issue clear any time soon.

Absent such guidance from the Supreme Court, courts will likely continue to take varying approaches as to whether and to what degree a Daubert analysis is required at the class certification stage. In the last year, the trend seems to favor a full Daubert

analysis.

See, e.g., In re Chocolate Confectionary Antitrust Litig., MDL No. 1935, No. 1:08-MDL-1935, at *4-5 (M.D. Pa. Dec. 7, 2012) ("[d]espite the paucity of relevant precedent in the Third Circuit and the discordant views percolating in the circuits, the court finds that a thorough Daubert analysis is appropriate at the class certification stage of this [multidistrict litigation] in light of the court's responsibility to apply a 'rigorous analysis'"); Moore v. Napolitano, No. 00-953 (RWR/DAR), at *12 (D.D.C. Feb. 25, 2013) (finding class certification expert was "qualified to offer his expert testimony and his opinions [were] relevant and based on reliable methodology" under Rule 702 and Daubert).

However, some courts still take the position that it is an open question. See Kottaras v. Whole Foods Market Inc., 281 F.R.D. 16, 24 (D.D.C. 2012) ("it is unclear whether a full analysis of [a class certification expert's] report and testimony is even appropriate at this stage" in light of the conflict between Zurn Pex and American Honda).

District courts within the Ninth Circuit seem to be particularly confused as to the correct standard for evaluating expert testimony at class certification. A number of district courts have held that the Ninth Circuit approved the application of a full Daubert inquiry in Ellis v. Costco Wholesale Corp., 657 F.3d 970, 982 (9th Cir. 2011), by holding that the district court correctly applied Daubert to a motion to strike an expert opinion submitted in support of class certification. See Tietsworth v. Sears, Roebuck and Co., No. 5:09-cv-00288-JF (HRL), at *7 (N.D. Cal. May 4, 2012).

According to the court in Tietsworth, Zurn Pex and other out-of-state authorities finding that the "Court need not engage in a full Daubert analysis at the class certification stage" are "contrary to Ninth Circuit authority approving application of Daubert in the context of class certification" in Ellis. Id.; see also Kilby v. CVS Pharmacy Inc., No. 09cv2051-MMA (KSC), at *2 (S.D. Cal. Apr. 4, 2012) (noting that in Ellis, "the Ninth Circuit approved the application of Daubert to expert testimony presented in support of or opposition to a motion for class certification"); Akaosugi v. Benihana Nat. Corp., No. C 11-01272 WHA, at *2 (N.D. Cal. Mar. 23, 2012) (Ellis "concluded that Daubert applies at the class-certification stage").

By contrast, Tait v. BSH Home Appliances Corp., No. 10-0711, at *23-24 (C.D. Cal. Dec. 20 2012), held that a tailored Daubert standard, like the one adopted in Zurn Pex, applies at class certification. Specifically, the test adopted in Tait merely "analyze[s] whether an expert's opinion was sufficiently reliable to prove or disprove the existence of the Rule 23 criteria, such as commonality and predominance." Id.

One thing is clear from all these cases: Daubert motions are fast becoming central to class certification. And while Comcast managed to defeat class certification at the Supreme Court without filing any Daubert motions, few defendants are likely to take that chance going forward.

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