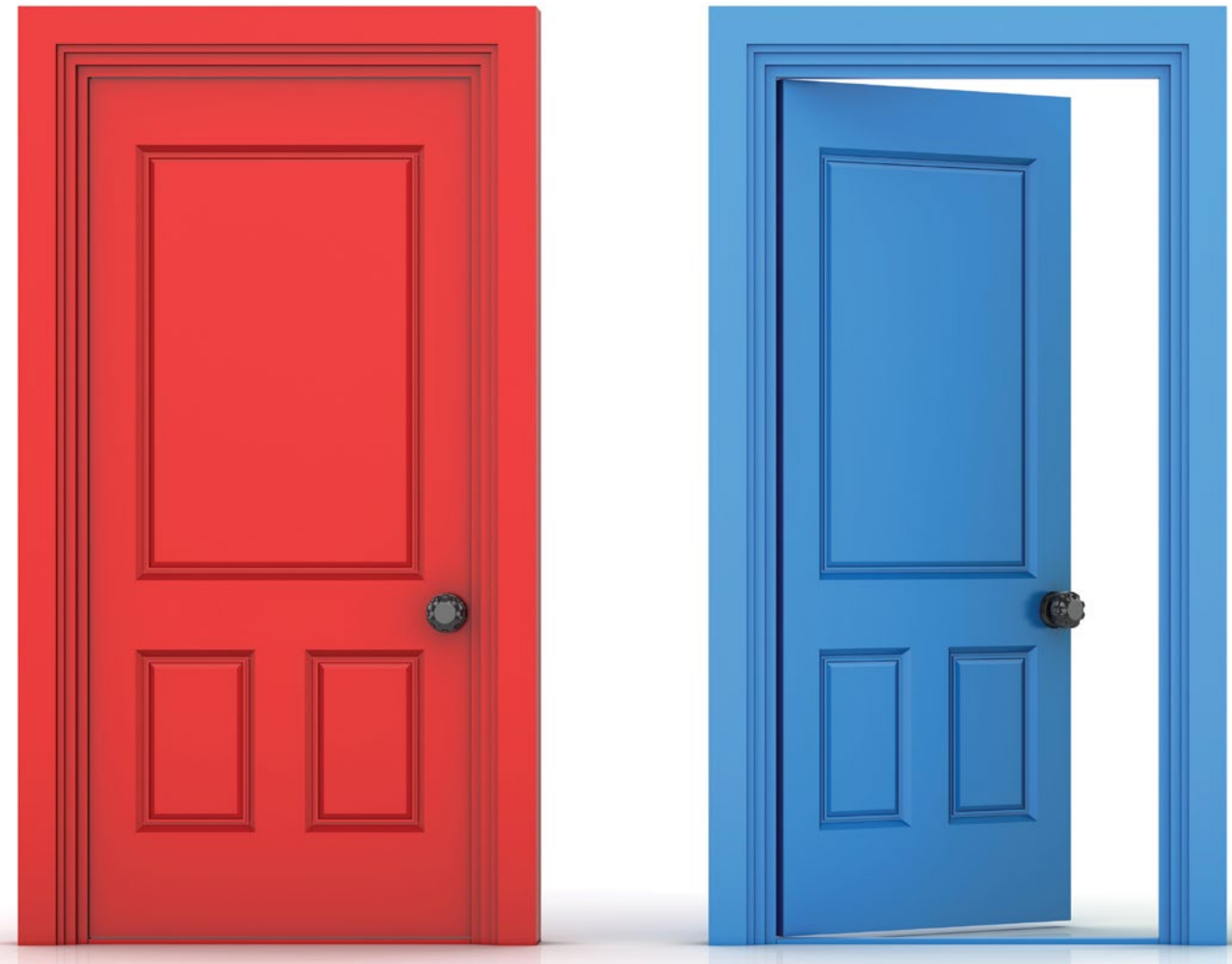
Litigating Expert Testimony at the Class Certification Stage



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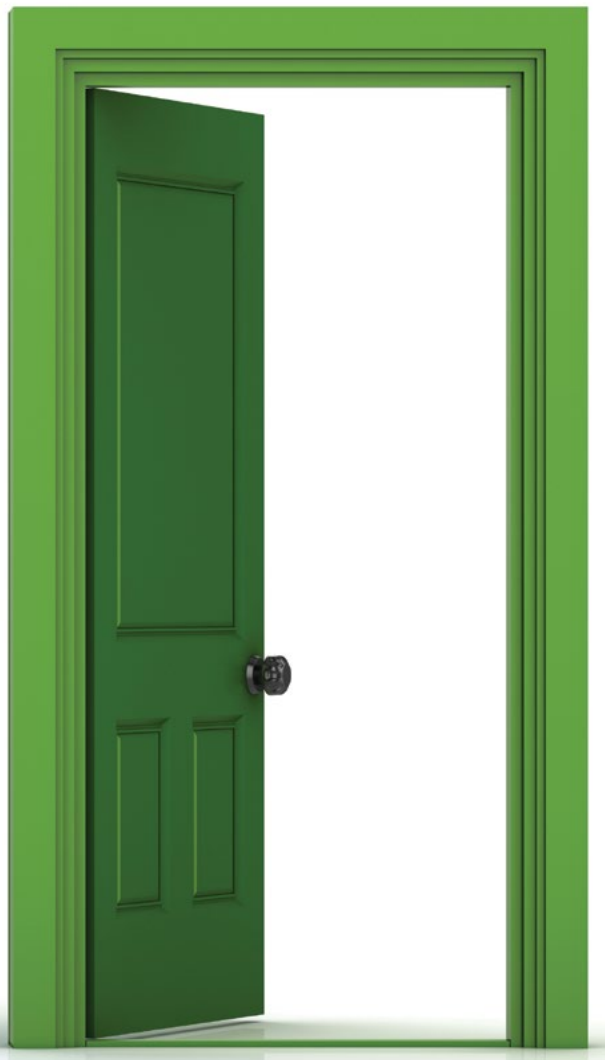
The testimony of expert witnesses can be critical to a court's class certification decision. However, courts have applied varying admissibility standards for expert evidence at the class certification stage. Counsel navigating putative class actions should consider the extent to which expert testimony may inform the court's certification inquiry and be prepared to address *Daubert* challenges early in the case.



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Soon after a putative class action complaint is filed, class certification motion practice begins. Although it is early in the litigation, the court must conduct a rigorous analysis that looks beyond the pleadings to determine whether the putative class plaintiff has satisfied the requirements for class certification. To determine whether these requirements have been met, courts typically allow the parties to engage in discovery tailored to the issues of class certification, which often includes expert testimony. In turn, a party faces inevitable challenges to the proffered expert testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*

Courts must consider how to evaluate expert testimony offered during the class certification stage and whether to conduct a full-scale *Daubert* inquiry before reaching discovery on the merits and the substance of the underlying claims. The US Supreme Court has yet to directly address how *Daubert* applies at the class certification stage, leaving the standard unsettled in the lower courts.

Before providing expert testimony to support or oppose a class certification motion, counsel should understand:

- The required elements for class certification.
- The types of expert analyses and reports that parties commonly use at the class certification stage.
- The *Daubert* standard of admissibility.
- The Supreme Court precedent addressing expert testimony as part of the class certification analysis.
- The varying judicial approaches to *Daubert* at the class certification stage.
- The key takeaways from the developing case law.

CLASS CERTIFICATION ANALYSIS

Federal Rules of Civil Procedure (FRCP) 23(a) and (b) set out the requirements a putative class plaintiff must meet for a court to certify a class action. The court must make the certification decision at "an early practicable time" after the plaintiff files suit (FRCP 23(c)(1)(A)).

To determine whether the class certification prerequisites have been met, the court must conduct a "rigorous analysis," and the party seeking class certification must "affirmatively demonstrate" compliance with FRCP 23. Although class certification is not technically a merits inquiry, the proof necessary to certify a class action and to establish the merits of the underlying claims often overlap. (*Comcast Corp. v. Behrend*, 569 U.S. 27, 33-34 (2013) (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350-51 (2011)).)

The putative class plaintiff must prove all four of the required elements of FRCP 23(a) and show that the class action fits into at least one of the categories enumerated in FRCP 23(b).

The required elements of FRCP 23(a) are:

- **Numerosity.** The class is so numerous that joinder of all members is impracticable (FRCP 23(a)(1)).
- **Commonality.** There are questions of law or fact common to the class (FRCP 23(a)(2)).
- **Typicality.** The claims or defenses of the representative parties are typical of the claims or defenses of the class (FRCP 23(a)(3)).
- **Adequacy.** The representative parties will fairly and adequately protect the interests of the class (FRCP 23(a)(4)).

FRCP 23(b) provides for class treatment in cases where:

- Prosecuting separate actions by or against individual class members would create a risk of prejudice to either the defendant or the plaintiffs (FRCP 23(b)(1)).
- The party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive or corresponding declaratory relief is appropriate for the whole class (FRCP 23(b)(2)).
- Questions of law or fact common to class members predominate over any questions affecting only individual members, and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy (FRCP 23(b)(3)). The Supreme Court has noted that fulfilling the predominance criterion requires a court to take a "close look" at whether common questions predominate over individual ones to test "whether proposed classes are sufficiently cohesive to warrant adjudication by representation" (*Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615-16, 623-24 (1997)). FRCP 23(b)(3) is the most common category for class actions seeking monetary damages.

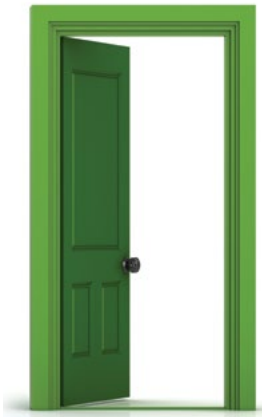
In addition to these statutory prerequisites, courts typically require a putative class plaintiff to show that the class is sufficiently definite, an implicit requirement known as ascertainability (see, for example, *Ocwen Loan Servicing, LLC v. Belcher*, 2018 WL 3198552, at *3 (11th Cir. June 29, 2018); *Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc.*, 821 F.3d 992, 995-96 (8th Cir. 2016) (collecting cases)).

Search Class Actions: Certification and Non-Statutory Grounds for Challenging a Class Action: Standing and Ascertainability for more on the prerequisites and procedures for class certification.

COMMON TYPES OF EXPERT EVIDENCE AT THE CLASS CERTIFICATION STAGE

Parties often use expert testimony to bolster or refute evidence offered in the class certification process. For example, parties commonly use an expert's opinion to support arguments related to the commonality and predominance requirements (FRCP 23(a)(2), (b)(3)). Although these two factors are independent, they both are meant to ensure that individual differences among class members will not overwhelm questions common to the class.

In many instances, individual class members are not known at the class certification stage, but a general class definition is alleged. Therefore, expert analyses, reports, and testimony can be important for a party to sufficiently show or rebut some cohesion among every (as yet unknown) member of the putative class. The types of expert evidence that may be relevant varies depending on the substantive area in which a class action arises. For example, expert evidence may include:



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- Economic methods in an antitrust action to show the antitrust impact of a defendant's alleged anticompetitive price increases and to estimate the resulting damages (see, for example, *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 810 (7th Cir. 2012)).
- Engineering analysis in a product liability action to show how a product's design defect affected the product uniformly (see, for example, *Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 814 (7th Cir. 2010)).
- Regression modeling in an environmental contamination action to show the diminution in value of properties allegedly contaminated by a defendant's improper hazardous waste disposal (see, for example, *Sher v. Raytheon Co.*, 419 F. App'x 887, 888-89 (11th Cir. 2011)).
- Statistical evidence in an employment discrimination action to show pay and promotion disparities between men and women (see, for example, *Dukes*, 564 U.S. at 356). (For more information, search Expert Considerations in Employment Discrimination Class Actions on Practical Law.)
- Event studies in a securities fraud action to show:
  - whether damages can be measured on a classwide basis (see, for example, *Ludlow v. BP. P.L.C.*, 800 F.3d 674, 683-84, 687 (5th Cir. 2015)); or
  - the effect of an occurrence, such as the public disclosure of information, on a security during a specified time period in an attempt to isolate that effect from other potential influences (see, for example, *IBEW Local 98 Pension Fund v. Best Buy Co., Inc.*, 818 F.3d 775, 779-80 (8th Cir. 2016)). (For more information, search Exchange Act: Section 10(b) Litigation Experts on Practical Law.)

Plaintiffs may also use expert evidence to fulfill the numerosity requirement of FRCP 23(a)(1). For example, an expert's statistical analysis in a product liability case can show the number of defective products manufactured and released by a defendant company (see *Cone v. Vortens, Inc.*, 2019 WL 1407420, at *2-3 (E.D. Tex. Mar. 28, 2019)).

Search Expert Toolkit for a collection of resources to assist counsel with the use of experts in federal litigation.

DAUBERT CHALLENGES

Where a party challenges an opposing expert's proposed testimony, that evidence generally is subject to review under the Supreme Court's seminal decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc*. A so-called *Daubert* motion seeks to exclude all or part of the expert evidence because the evidence fails to meet the standards set out in Federal Rule of Evidence (FRE) 702. The court serves as a gatekeeper to ensure that the expert is sufficiently qualified, and that the expert's opinion rests on a reliable foundation and is relevant to the task at hand.

The Supreme Court identified a non-exhaustive list of factors that lower courts may use to evaluate whether the reasoning or methodology underlying an expert's opinion is sufficiently reliable, including whether the expert's theory or technique:

- Can be and has been tested.
- Has been subjected to peer review and publication.
- Is subject to any known or potential error rates.
- Is subject to any applicable standards and controls.
- Is generally accepted in the relevant scientific or expert community.

This more stringent review of expert testimony, as opposed to lay person testimony, ultimately aims to prevent the jury from hearing misleading evidence in resolving factual disputes. (See *Daubert*, 509 U.S. 579, 593-94, 597 (1993).)

In non-class litigation, *Daubert* motion practice generally occurs after the parties have conducted fact discovery, including exchanging expert reports and taking expert depositions. If a party challenges an expert's opinion as inadmissible by filing a *Daubert* motion, a court must then conduct a *Daubert* analysis and may hold an evidentiary hearing on the motion. To minimize expense and delay in non-class litigation, a court may opt to bifurcate the discovery process, with initial deadlines for fact discovery and, once that has been completed, later deadlines for expert discovery.

In putative class actions, however, parties often offer expert testimony early in the proceedings to address the class certification requirements. Because the class certification inquiry may overlap with the merits inquiry, the parties may later rely on that same expert testimony at the summary judgment

or trial stages. In these circumstances, it is unsettled whether a court should perform the full *Daubert* analysis at the class certification stage or instead employ a more tailored approach and reevaluate the testimony later in the case.

Search Experts: Daubert Motions for more on FRE 702, the grounds for a *Daubert* motion, components and timing of the motion, evidentiary hearings, and the standard on appeal.

SUPREME COURT: UNANSWERED QUESTIONS

In recent years, the Supreme Court addressed the role of expert testimony at the class certification stage in two seminal decisions, *Wal-Mart Stores, Inc. v. Dukes* and *Comcast Corp. v. Behrend*. In both of these cases, the Supreme Court found that the plaintiffs did not meet class certification requirements and the lower court had improperly certified the class. In so holding, however, the Court declined to expressly rule on whether and to what extent the expert opinions offered in support of class certification were subject to a *Daubert* analysis. Instead, the Court ruled only on whether the plaintiffs had satisfied their FRCP 23 requirements. (*Comcast*, 569 U.S. at 29, 32 n.4, 33-34; *Dukes*, 564 U.S. at 345-46, 353-54.)

Even though the Supreme Court did not rule on the *Daubert* issue, the Court in these two cases emphasized the rigorous analysis that courts must employ to determine whether the plaintiffs have satisfied the class certification requirements.

WAL-MART STORES, INC. v. DUKES

In *Dukes*, an employment discrimination case, the Supreme Court addressed whether the plaintiffs had satisfied the commonality requirement of FRCP 23(a)(2). The Court concluded that the plaintiffs had failed to show that their gender discrimination claims, which challenged the reasons for particular employment decisions, would "produce a common answer to the crucial question *why was I disfavored*." The plaintiffs had relied on an expert to show that Wal-Mart, the defendant company, operated under a general policy of discrimination. However, the expert's analysis failed to demonstrate how discriminatory reasons played a role in Wal-Mart's employment decisions. (*Dukes*, 564 U.S. at 352-55.)

Although the parties had disputed whether the expert's testimony met the admissibility standards under FRE 702 and *Daubert,* the Supreme Court did not reach that issue. Instead, the Court determined that "even if properly considered," the expert's testimony "does nothing to advance respondents' case." However, the Court suggested that *Daubert* might be the appropriate standard at the class certification stage. (*Dukes*, 564 U.S. at 354 ("[T]he District Court concluded that *Daubert* did not apply to expert testimony at the certification stage ... We doubt that is so ...").)

COMCAST CORP. v. BEHREND

In *Comcast*, an antitrust case, the Supreme Court considered whether an expert's damages model sufficiently showed the ability to measure classwide damages to satisfy the predominance requirement of FRCP 23(b)(3). The Court confirmed that its precedent requiring courts to employ a rigorous analysis for the FRCP 23(a) requirements applies with equal force to the courts' consideration of whether FRCP 23(b)(3) has been satisfied, particularly for the predominance requirement. (*Comcast*, 569 U.S. at 33-34.)

The parties in *Comcast* had briefed the issue of whether the admissibility standards for expert evidence set out in FRE 702 and *Daubert* apply in class certification proceedings (569 U.S. at 39 (Ginsburg, J., dissenting)). However, noting that the parties had not challenged the expert in the courts below, the Supreme Court ruled on the predominance requirement and not on the admissibility issue. The Court found that common issues would not predominate because the plaintiffs' expert's opinion did not present a classwide theory of damages that matched the accepted theory of antitrust liability. (*Comcast*, 569 U.S. at 32 n.4, 34.)

FEDERAL COURTS: SLIDING SCALE

In light of the uncertainty in this area, federal courts have addressed in varying ways the extent to which a *Daubert* analysis is required at the class certification stage. The weight of authority favors allowing *Daubert*-style challenges at the class certification stage (see *In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Practices & Antitrust Litig.*, 2019 WL 1569294, at *2 (D. Kan. Apr. 11, 2019) (collecting cases)).

Recent decisions have fallen into the following three general groups:

- Courts applying a full-scale *Daubert* analysis where the expert testimony is deemed critical to the class certification inquiry.
- Courts applying a limited *Daubert* analysis that considers the reliability of the expert testimony without conclusively establishing whether it would be admissible at trial.
- Courts declining to apply *Daubert* where the expert testimony would not help establish the required elements for class certification.

FULL *DAUBERT* ANALYSIS

In determining how to evaluate expert testimony in the context of class certification, some courts focus on the substance of the proffered testimony and whether it is "critical" to the class certification decision. Courts have deemed expert testimony to be critical where it is key to demonstrating compliance with the FRCP 23 requirements. (See, for example, *Messner*, 669 F.3d at 812-14 (finding that because the expert's report and testimony "laid the foundation" for the defendant's entire argument in opposition to class certification and the district court "relied on" the expert's reasoning, the district court erred by refusing to rule on the plaintiffs' *Daubert* motion before making the class certification decision); *EpiPen*, 2019 WL 1569294, at *3 (noting that "the role and scope of the *Daubert* analysis increases in step with the importance of the expert opinion," and if the "plaintiff relies entirely on expert evidence to satisfy a Rule 23(a) requirement for certification, a nearly full-fledged *Daubert* analysis may be appropriate").)

Under this view, because the significance of the expert testimony may inform whether a full *Daubert* analysis is required, at least one court has found that it is "incumbent on the challenging party to establish the importance of the expert" relative to the

plaintiff's FRCP 23 burden (*EpiPen*, 2019 WL 1569294, at *3; see also *Messner*, 669 F.3d at 812-13 (noting that where the district court has any doubts about whether an expert's opinions "may be critical for a class certification decision," it should nonetheless make an explicit *Daubert* ruling)).

The Third, Seventh, and Eleventh Circuits have held that where the testimony is deemed critical to the class certification determination, the district court must resolve expert challenges by performing a full *Daubert* analysis before deciding whether to certify the class. These decisions reject the theory that a thorough expert review can be side-stepped in the early stages of the proceedings. (See *In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 187-88 (3d Cir. 2015); *Sher*, 419 F. App'x at 890-91; *Am. Honda Motor Co.*, 600 F.3d at 815-17; see also *In re Carpenter Co.*, 2014 WL 12809636, at *3 (6th Cir. Sept. 29, 2014) (noting that this is an open issue, but that the district court did not abuse its discretion in applying *Daubert* to critical expert witnesses supporting class certification); *Campbell v. Nat'l R.R. Passenger Corp.*, 311 F. Supp. 3d 281, 294-96 (D.D.C. 2018) (collecting cases and agreeing with "the heavy weight of authority" that a district court must conduct a full *Daubert* inquiry at the class certification stage).)

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Notably, the Seventh Circuit emphasized that a full *Daubert* inquiry should apply to experts offered both by plaintiffs in support of class certification and by defendants in opposition, despite the rule that it is the party seeking class certification that must affirmatively demonstrate compliance with FRCP 23 (*Messner*, 669 F.3d at 812-14 (holding that the district court erred in declining to rule on the plaintiffs' *Daubert* motion at the class certification stage); see also *Cotromano v. United Techs. Corp.*, 2018 WL 2047468, at *8 (S.D. Fla. May 2, 2018) (citing *Messner* and noting that the obligation to make a conclusive ruling on any *Daubert* challenge to critical expert submissions applies whether the court grants or denies certification)).

The full *Daubert* approach is buttressed by:

- The Supreme Court's decisions in *Dukes* and *Comcast*, which emphasize the rigorous analysis and evidentiary proof required at the class certification stage and that merits inquiries may need to be addressed (see above *Supreme Court: Unanswered Questions*).
- The *Daubert* requirement that expert testimony that has not been proven to be scientifically reliable cannot be admitted, even at an early stage in the proceedings (see above *Daubert Challenges*).
- The 2003 amendments to FRCP 23 that removed language that previously permitted conditional class certification and instead require that courts deny certification where they are not satisfied that the FRCP 23 requirements have been met (see 2003 Advisory Committee's Note to FRCP 23(c)(1)(c)).

(See *In re Blood Reagents*, 783 F.3d at 187-88 & n.7; *Messner*, 669 F.3d at 812-14; *Campbell*, 311 F. Supp. 3d at 294-96.)

The Second Circuit has not directly addressed this issue. It has found that a district court properly considered the admissibility of expert testimony at the class certification stage, but it has not held that such an analysis is required (*In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 129-30 (2d Cir. 2013) (rejecting the defendant's argument that the district court erred in failing to hold a *Daubert* hearing at the class certification stage on the grounds that the district court "considered the admissibility of the expert testimony on the papers" and made "the requisite findings")). Nonetheless, courts in the Second Circuit have applied *Daubert* to expert evidence submitted at the class certification stage (see *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 299 F. Supp. 3d 430, 470-71 (S.D.N.Y. 2018) (collecting cases holding that "expert evidence submitted at the class certification stage is subject to the *Daubert* standard" for the purpose of determining whether the FRCP 23 requirements were met); *Royal Park Invs. SA/NV v. Deutsche Bank Nat'l Tr. Co.*, 2018 WL 1750595, at *7 (S.D.N.Y. Apr. 11, 2018) (noting that courts in the Second Circuit have found that the "'scope of the *Daubert* analysis is cabined by its purposes at this stage'" and limited to whether the expert evidence is admissible to establish the FRCP 23 requirements) (citation omitted)).

The Fifth Circuit also has not directly addressed whether *Daubert* applies at the class certification stage, and recent district court cases in the Fifth Circuit apply a limited *Daubert* approach (see below *Limited Daubert Analysis*). However, the Fifth Circuit's pre-*Dukes* decision in *Unger v. Amedisys Inc.* may provide a window into the position the court might take if the issue were to come before it. In *Unger*, the Fifth Circuit vacated a lower court's class certification decision because the lower court had not required sufficiently rigorous proof in reaching its conclusion (401 F.3d 316, 319 (5th Cir. 2005) (holding that the court's "findings must be made based on adequate admissible evidence to justify class certification")). Although *Unger* did not involve expert testimony presented at the class certification stage, the court suggested in dicta that a full *Daubert* approach may be necessary before a court makes a class certification decision (401 F.3d at 323 n.6).

LIMITED *DAUBERT* ANALYSIS

Instead of scrutinizing the substance of the proffered expert testimony, some courts instead have held that, while some inquiry into the expert testimony should be conducted at the class certification stage, establishing ultimate admissibility of the proffered evidence under *Daubert* is not required (see *Sali v. Corona Reg'l Med. Ctr.*, 909 F.3d 996, 1004 (9th Cir. 2018) ("Limiting class-certification-stage proof to admissible evidence risks terminating actions before a putative class may gather crucial admissible evidence."); *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 611 (8th Cir. 2011) ("We have never required a district court to decide conclusively at the class certification stage what evidence will ultimately be admissible at trial."); see also *Cone,* 2019 WL 1407420, at *3 ("While the Fifth Circuit has not explicitly decided this question since *Wal-Mart*, the courts in this circuit appear to follow a limited *Daubert* approach.")).

In parting ways with the majority of circuits to address this issue, the Eighth Circuit approved of a lower court's decision to apply a "tailored" *Daubert* analysis, which examined the reliability of the experts' opinions in light of the available evidence and the purpose for which they were offered. The Eighth Circuit also noted that where the parties had sought bifurcated discovery, as in the case before it, there may be "gaps" in available evidence at the class certification stage and expert opinions "may have to adapt" as those gaps are filled by merits discovery. (*Zurn Pex Plumbing*, 644 F.3d at 612-13 (noting that there was no disagreement about the experts' qualifications or methodologies).)

Likewise, the Ninth Circuit has noted that the rigorous analysis required at the class certification stage does not equate to conducting a mini-trial, and it has held that *Daubert* admissibility is not dispositive but rather should go to the weight of the expert evidence at class certification. In other words, the persuasiveness of the evidence should be examined at class certification, rather than its ultimate admissibility. (*Sali*, 909 F.3d at 1004-06.)

Although the Ninth Circuit's recent holding in *Sali* supports a modified *Daubert* approach, the court may eventually revisit the issue to resolve the apparent conflict between *Sali* and the court's previous holding in *Ellis v. Costco Wholesale Corp.*, in which the court approved of the full *Daubert* approach applied by the lower court (657 F.3d 970, 982 (9th Cir. 2011) (finding that the district court "correctly applied" the *Daubert* standard but must look beyond admissibility alone in conducting a rigorous analysis)). Indeed, when the Ninth Circuit denied rehearing *en banc* in *Sali,* the dissent (of five circuit judges) highlighted the apparent conflict between *Ellis* and *Sali* and expressed support for a full *Daubert* approach (*Sali v. Corona Reg'l Med. Ctr.*, 907 F.3d 1185, 1188 n.7, 1189-90 (9th Cir. 2018) (Bea, C.J., dissenting)).

The Eighth and Ninth Circuits have cited a few rationales for requiring only a limited *Daubert* analysis, including that:

- Class certification rulings may be revisited after merits discovery such that a conclusive *Daubert* inquiry is not necessary at the certification stage.
- A decision to certify a class is not a judgment on the merits and may be altered or amended before final judgment under FRCP 23(c)(1)(C), and therefore it need not be accompanied by the traditional rules and procedures applicable to civil trials.
- *Daubert* exclusion is meant to protect juries from being swayed by dubious scientific testimony, an interest that is not implicated at the class certification stage where the judge is the decisionmaker.
- A more tailored *Daubert* approach comports with case management principles involved in complex litigation and, in particular, class actions.

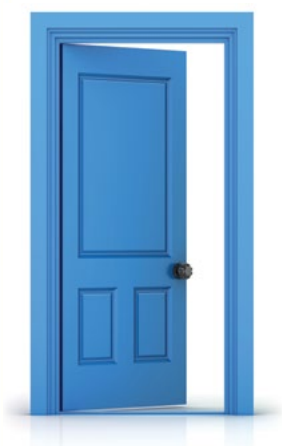
(*Zurn Pex Plumbing*, 644 F.3d at 612-14; see *Sali*, 909 F.3d at 1004.)

NO *DAUBERT* ANALYSIS

Like the Supreme Court in *Dukes* (see above *Wal-Mart Stores, Inc. v. Dukes*), some courts have declined to address *Daubert* challenges at the class certification stage where, even if admitted, the proffered expert evidence would not help establish the required elements for certification (see, for example, *Grodzitsky v. Am. Honda Motor Co.*, 2014 WL 718431, at *6 (C.D. Cal. Feb. 19, 2014); *Franklin v. Gov't Emps. Ins. Co.*, 2011 WL 5166458, at *5 (W.D. Wash. Oct. 31, 2011)).

KEY TIPS AND TAKEAWAYS

Courts have been imposing stricter standards of proof to support class certification motions since the Supreme Court's decision in *Dukes*. While the Supreme Court has not expressly defined the scope of a *Daubert* inquiry at the class certification



Even in jurisdictions that do not require a full *Daubert* review, the expert's opinion must withstand the rigorous analysis courts must apply to the FRCP 23 determination.

CLASS ACTION TOOLKIT: CERTIFICATION

The Class Action Toolkit: Certification available on Practical Law offers a collection of resources to help counsel with issues related to class action certification. It features a range of continuously maintained resources, including:

- Class Actions: Class Certification Discovery
- Class Actions: Certification Checklist
- Ethical and Privilege Issues in Class Action Communications
- Appealing a Class Certification Decision Under FRCP 23(f)
- Decertifying a Class Action
- Class Actions: Notice Requirements
- Class Action Certification: Case Tracker
- Class Action and Multidistrict Litigation Comparison Chart

stage, an increasing number of courts recognize that *Daubert* plays a significant role. In light of the developing case law, counsel navigating putative class actions should:

- **Consider retaining a qualified expert at the outset of the case.** By involving an expert at the earliest possible point in a case, counsel will be able to consult with the expert to tailor discovery requests at the class certification stage and ensure the expert obtains the information needed to provide a reliable opinion sufficient to withstand a potential *Daubert* challenge. Even in jurisdictions that do not require a full *Daubert* review, the expert's opinion must withstand the rigorous analysis courts must apply to the FRCP 23 determination. (For more information, search Experts: Locating and Retaining an Expert on Practical Law.)
- **Prepare for *Daubert* challenges early in the proceedings.** Where expert testimony might be beneficial for class certification as well as merits-based issues, counsel should be prepared to address arguments concerning full-fledged expert discovery and *Daubert* challenges early in the litigation. These issues are particularly likely to arise where expert testimony may be deemed critical to the class certification inquiry. In light of the significance of class certification to the trajectory of a class action, counsel should consider making *Daubert* challenges at this early stage. Once merits discovery occurs, the parties may obtain additional evidence that can be used as a basis for the expert to either draft a new report or supplement the report used at the class certification stage. At the summary judgment or trial stage, counsel will have the opportunity to file additional *Daubert* motions directed to the experts' opinions on the merits issues.
- **Consider the circuit in which the case is pending.** While some jurisdictions have established bright-line rules on how to evaluate expert testimony at the class certification stage, others may differ between courts even within the same circuit. Until the Supreme Court provides clear guidance, the lower courts may continue to take varying approaches to *Daubert* at class certification. Currently, parties can generally expect:
  - a full *Daubert* review in the Third, Seventh, and Eleventh Circuits;
  - a more limited *Daubert* review in the Eighth and Ninth Circuits; and
  - some level of a *Daubert* review, which may be either full or limited, in the Second and Fifth Circuits.
- **Do not overlook potential class certification challenges.** The use of an expert at the class certification stage imposes the threshold step for courts to determine the admissibility of the expert testimony, in those jurisdictions that apply some form of *Daubert*. As discussed above, counsel should be prepared for this threshold step, including *Daubert* motions and hearings. However, counsel should not lose sight of the next step in the class certification process, in which a court will weigh the expert evidence (if admitted) to determine whether the FRCP 23 requirements have been satisfied. A court may find an expert opinion admissible but still rule the opinion is insufficient to demonstrate the relevant FRCP 23 element.

The authors would like to thank Skadden associate Mollie Kornreich and former Skadden associate Hannah C. Sowell for their invaluable assistance in the preparation of this article.