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Expert Analysis

Does 'Dukes' Require Full 'Daubert' Scrutiny at Class Certification?

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When moving or opposing a motion for class certification, litigants with increasing frequency rely on expert testimony. This has manifested in a debate among district courts, and more recently, among certain circuit courts, as to the level of *Daubert* scrutiny to be applied at the early class certification stage. In its recent decision in *Wal-Mart Stores Inc. v. Dukes*, the U.S. Supreme Court, while addressing whether plaintiffs met Rule 23(a)(2)'s "commonality" requirement, seemingly entered the fray.[1] Specifically, the Court noted, in dicta, that "[t]he District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings." The Supreme Court's response: "[w]e doubt that is so…."

While far from categorical, coming from the Supreme Court, this dicta undoubtedly will, and has, been seized upon by some to argue that the Court has endorsed a requirement that a full *Daubert* examination at class certification is required in every case—thereby taking away the district court's discretion in formulating a case-specific class certification inquiry. For many of the reasons detailed below, including those articulated by the U.S. Court of Appeals for the Eighth Circuit in its recent decision in *In re Zurn Pex Plumbing Products Liability Litigation*, in the words of the Supreme Court, we doubt that is so.

'Daubert'

Daubert v. Merrell Dow Pharmaceuticals Inc. requires that courts ensure expert testimony presented at trial be both relevant and reliable.[2] This *Daubert* test has been applied in varying degrees at the class certification stage by district courts in determining whether proffered expert testimony can be utilized to assess whether the requisites of Rule 23 have been met.[3] Prior to the Supreme Court's decision in *Dukes*, the appropriate scope of a court's inquiry into an expert's testimony at the class certification stage had mostly been left to the discretion of the district court to be determined on a case-by-case basis.[4]

Some district courts have embraced a lower, or more tailored, *Daubert* examination, citing the preliminary stage in the litigation and the limited discovery often taken to that point.[5] Many of these courts found that a lower *Daubert* examination should not include any "statistical dueling of experts" at the class certification stage (i.e., that class certification was not the proper place to engage in weighing conflicting expert evidence).[6]

> What is clear is that the Supreme Court's dicta does not dictate any particular level of 'Daubert' inquiry.

Other district courts have applied a more rigorous *Daubert* examination at the class certification stage, including resolving disputes between the parties' respective experts.[7] In the last year, at least two circuit courts have expressly addressed the issue.

Seventh Circuit

The U.S. Court of Appeals for the Seventh Circuit in *American Honda Motor Company Inc. v. Allen* denied plaintiffs' request for class certification after finding that a full *Daubert* examination was necessary under the facts of that case.[8] *American Honda* is a products liability case that involved claims of defective motorcycles. In moving for class certification, plaintiffs sought to demonstrate the predominance of common issues by relying on an expert report prepared by a motorcycle engineer. In response, defendants moved to strike the expert report as unreliable under *Daubert*. Although voicing concern about the expert's methodology and its reliability, the court nonetheless denied the motion and granted class certification. Defendants appealed.

The Seventh Circuit held that "the district court must perform a full *Daubert* analysis before certifying the class if the situation warrants." In the Seventh Circuit's view, when an expert's report is "critical" to class certification, the district court must "conclusively rule on any challenge to the expert's qualifications or submissions prior to ruling on a class certification motion." While acknowledging the great latitude that district courts have in making independent determinations as to how to measure expert reliability and when expert testimony is in fact reliable, the Seventh Circuit criticized the district court for not providing sufficient findings that the expert report in that case was in fact reliable enough to support plaintiffs' class certification request.

Ninth Circuit: 'Dukes'

Dukes involved a gender discrimination action brought by female employees of Wal-Mart against their employer under Title VII. The plaintiffs sought and were granted class certification by the district court.[9] The decision was affirmed by the U.S. Court of Appeals for the Ninth Circuit sitting en banc, which held that "[a]t the class certification stage, it is enough that [the expert] presented scientifically reliable evidence tending to show that a common question of fact…exists with respect to all members of the class."[10] The

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Ninth Circuit also noted that it was "not convinced by the dissent's argument that *Daubert* has exactly the same application at the class certification stage as it does to expert testimony relevant at trial."

The Supreme Court granted review, leading many to believe that the Court would take the opportunity to resolve the apparent conflict between the circuits as to what level of scrutiny experts should be subjected to at the class certification stage. It did not. Instead, the Court suggested in dicta that some level of *Daubert* examination is necessary at class certification.[11] However, the Court made no definitive holdings in this respect and did not elaborate as to what level of *Daubert* examination it deemed acceptable. The Court simply expressed its doubt that the district court's conclusion that *Daubert* did not apply at class certification was correct. As such, this dicta, while not to be disregarded, does not preclude district courts from continuing to exercise their own discretion as to whether to apply a full or more tailored *Daubert* examination.

Eighth Circuit Addresses Dicta

Since the Supreme Court's *Dukes* decision was issued, few courts have addressed the Supreme Court's "[w]e doubt that is so" dicta, suggesting that it may not have the impact that some portend. Of those courts that have addressed it, there has been only one circuit court decision to date: *In re Zurn Pex Plumbing Products Liability Litigation*.[12]

Zurn involved a products-liability claim, where the plaintiffs sought, and were granted, class certification despite the district court applying a more focused *Daubert* analysis. In support of class certification, plaintiffs initially presented evidence from two experts, which defendants moved to strike. The parties disputed the proper application of *Daubert*. The plaintiffs argued at this stage in the litigation that the expert testimony should only be excluded if it was "so flawed it cannot provide any information as to whether the requisites of class certification have been met." The defendants asserted that the court should conduct a "full and conclusive *Daubert*" review before certifying the class. The *Zurn* district court judge took what the Eighth Circuit described as a "middle course" between the parties' positions.

The district court concluded that given the stage of the litigation, a full and conclusive *Daubert* inquiry would not be necessary or productive, especially since expert opinions could shift during the course of merits discovery. Instead, the district court conducted a more focused *Daubert* examination limited to whether the experts' opinions should be considered in deciding the issues related to class certification. Based on this examination, the court allowed plaintiffs' experts' testimony and certified the class. Defendants appealed.

The Eighth Circuit affirmed. The circuit court found that the trial judge did not abuse its discretion in not conducting a full *Daubert* review. In so holding, the Eighth Circuit rejected defendants' argument that the district court must determine conclusively at the early class certification stage whether the expert evidence will ultimately be admissible at trial. The Eighth Circuit cited its own precedent, and said that the fact that merits discovery had not even commenced resulted in a very limited record that made a "full and conclusive" *Daubert* inquiry impossible at that time.

Instead, the Eighth Circuit held that all that is required at the certification stage is that the court scrutinize the expert testimony "in light of the criteria for class certification and the current state of the evidence." The majority for the circuit court makes only passing reference to the Supreme Court's *Dukes* dicta in one of its footnotes, merely noting that its endorsement of a "focused" *Daubert* inquiry did not diverge from the Supreme Court's suggestion in *Dukes* that there should be some *Daubert* examination.

The Eighth Circuit's opinion is notable in several respects. Initially, coming on the heels of the Supreme Court's *Dukes* decision, it suggests that absent a definitive ruling by the Supreme Court on this issue, circuit courts will not mandate a full *Daubert* analysis in every case at class certification; but, they will continue to allow district courts the discretion to determine on a case-by-case basis what level of *Daubert* scrutiny to apply. This is consistent with *Daubert*, which gives district courts considerable discretion in deciding in a particular case how to go about determining whether expert testimony is reliable. It is also consistent with Fed. R. Civ. P. 23, which allows district courts wide discretion to determine the scope of a class certification hearing. In addition, the *Zurn* decision easily concludes that the Supreme Court's *Dukes* dicta does not mandate a full *Daubert* examination in every case, but instead suggests only that *Daubert* applies in some way at the certification stage of class-action proceedings. Accordingly, the *Zurn* opinion suggests that this dicta will not have a meaningful impact on the admissibility of expert testimony at class certification.

Conclusion

In the *Dukes* dicta language itself, and the *Zurn* opinion above, what is clear is that the Supreme Court's dicta does not dictate any particular level of *Daubert* inquiry. Instead, it merely suggests that *Daubert* applies to expert testimony at the class certification stage and leaves it up to the lower court's discretion to apply *Daubert* on a case-by-case basis. This is nothing new and is unlikely to have a meaningful impact on class certification proceedings.

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1. *Wal-Mart Stores Inc. v. Dukes*, 131 S.Ct. 2541 (June 20, 2011).

2. 509 U.S. 579, 597 (1993).

3. See *In re Visa Check/Mastermoney Antitrust Litig.*, 192 F.R.D. 68, 77 (E.D.N.Y. 2000), aff'd, 280 F.3d 124 (2d. Cir. 2001).

4. See, generally, *Dukes v. Wal-Mart Stores Inc.*, 603 F.3d 571, 594 (9th Cir. 2010), cert. granted in part, 131 S. Ct. 795 (U.S. 2010) and rev'd, 131 S. Ct. 2541 (2011).

5 See, e.g., In re Static Random Access Memory Antitrust Litig., 264 F.R.D. 603, 616 (N.D. Cal. 2009); *Turner v. Murphy Oil USA Inc.*, No. 05-4206, 2006 WL 91364, at *2 (E.D. La. Jan. 12, 2006); *Ancar v. Murphy Oil, U.S.A. Inc.*, Civ. A. No.: 06-3246 C/W, 2007 WL 3270763, at *1-2 (E.D. La. Nov. 2, 2007).

6. See, .e.g., *Ancar v. Murphy Oil, U.S.A. Inc.,* Civ. A. No.: 06-3246 C/W, 2007 WL 3270763, at *1-2 (E.D. La. Nov. 2, 2007).

7. See, e.g., *In re Scientific-Atlanta Inc. Sec. Litig.*, No. 1:01-CV-1950-RWS, 2007 WL 2683729, at *17-19 (N.D. Ga. Sept. 7, 2007).

8. 600 F.3d 813, 814-16 (7th Cir. 2010).

9. See *Dukes v. Wal-Mart Stores Inc.*, 222 F.R.D. 137 (N.D. Cal. 2004).

10. See *Dukes v. Wal-Mart Stores Inc.,* 603 F.3d 571, 602 (9th Cir. 2010) (en banc), rev'd on other grounds, 564 U.S.__, 131 S.Ct. 2541, __L.Ed.2d__ (2011).

11. See *Dukes*, 131 S.Ct. at 2554.

12. 644 F.3d 604, 612 (8th Cir. 2011).