WHAT EVIDENCE SATISFIES RULE 23?

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I. Introduction

After *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013), the courts of appeals are split on whether, or to what extent, the Federal Rules of Evidence should apply to evidence presented at the class certification stage.[1] A plurality of circuits do not require district courts to apply the Rules of Evidence to fact evidence, in some cases going so far as to consider it an abuse of discretion for a district court to refuse to consider fact evidence solely because it is inadmissible under the Rules. But the emerging—though by no means unanimous—consensus is that challenged expert evidence critical to class certification should be subject to *Daubert* analysis.

Though seemingly inconsistent, this position is not an entirely unreasonable approach for handling evidence at a preliminary stage of litigation before discovery is complete. Regardless of the stage of litigation, the admissibility of expert evidence rises or falls based on the reliability of the expert's methodology, acceptance of those methods in the scientific literature, and other *Daubert* factors, and the conclusions of an expert whose methods are unreliable should be given no weight, not merely less weight.

But whether certain pieces of fact evidence will ultimately be deemed admissible may not be known until after discovery is complete. It might be difficult to authenticate evidence that the parties do not dispute is accurate until after extensive discovery.

[1] See, Alexander Madrid, Allison Ebeck, Chelsey Dawson, "Courts' Clashing Standards For Evidence At Class Certification," Law 360 (July 15-16, 2021)(online with subscription at Law360.com).

The downfall of this approach is that it leaves unclear what standard should apply to fact evidence presented at class certification if the Rules do not apply. Should courts weigh evidence, *e.g.*, an inadmissible affidavit or unauthenticated document, based on a party's mere assurance that it will be able to admit the evidence at trial? Considering that the class certification stage can often all but determine the outcome of the litigation, treating it as a preliminary stage with relaxed evidentiary requirements is problematic and may lead to district courts certifying (or refusing to certify) classes based on evidence that should never have come before them. Thus, the best practice would be to subject all expert evidence to a rigorous *Daubert* analysis and to apply the Rules to fact evidence, albeit less rigidly than in a jury trial.

II. Fact evidence

The Sixth, Eighth, and Ninth Circuits have held that factual evidence does not have to be admissible to be considered at the class certification stage. *Lyngaas v. Ag*, 992 F.3d 412, 428–29 (6th Cir. 2021) (holding that evidentiary proof required to satisfy the Rule 23(b) requirements "need not amount to admissible evidence, at least with respect to nonexpert evidence"); *In re Zurn Pex Plumbing Prod. Liab. Litig.*, 644 F.3d 604, 611, 614 (8th Cir. 2011) (holding that a district court need not "decide conclusively at the class certification stage what evidence will ultimately be admissible at trial."); *Sali v. Corona Reg'l Med. Ctr.*, 909 F.3d 996, 1004 (9th Cir. 2018) ("Inadmissibility alone is not a proper basis to reject evidence submitted in support of class certification.").[2] The D.C. Circuit has similarly held in a *per curiam* opinion issued before *Behrend*. *In re Rand Corp.*, No. 02-8007, 2002 WL 1461810, at *1 (D.C. Cir. July 8, 2002) (holding that "the propriety of a district court's refusal to scrutinize for admissibility and probative

[2] *Sali* is particularly interesting, as the Ninth Circuit (as discussed below) applies evidentiary standards to *expert*, but not *fact* evidence. See also, *Ellis v. Costco Wholesale Corp*., 657 F.3d 970, 982 (9th Cir. 2011).

value evidence proffered to demonstrate that the requirements of Federal Rule of Civil Procedure 23(a) are satisfied is well-settled.").

On the other side, the Fifth Circuit is thus far the only appellate court to expressly require that all fact evidence presented at the class certification stage be admissible. In *Unger v. Amedisys Inc.*, 401 F.3d 316, 319 (5th Cir. 2005), the Fifth Circuit, with little discussion, stated:

> Like our brethren in the Third, Fourth, Seventh and Ninth Circuits, we hold that a careful certification inquiry is required and findings must be made based on adequate admissible evidence to justify class certification. Because the district court erroneously applied too lax a standard of proof to the plaintiffs' fraud-on-the-market allegations, we must vacate the class certification and remand."

Id. at 319 (bold added). The *Unger* opinion actually focuses more on the District Court's lack of the required "rigorous analysis" than on evidentiary requirements, leading to remand of the action with this statement,

> Although we owe considerable deference to district courts in reviewing certification decisions, we cannot affirm the order as it is presently supported. After a more thorough inquiry, however, certification may ultimately prove correct. When a court considers class certification based on the fraud on the market theory, it must engage in thorough analysis, weigh the relevant factors, require both parties to justify their allegations, and base its ruling on admissible evidence. Questions of market efficiency cannot be treated differently from other preliminary certification issues. Courts cannot make an informed decision based on bare allegations, one-sided affidavits, and unexplained Internet printouts.

Id. at 325. Despite the "admissibility" language, one District court in the circuit read *Unger* as requiring a flexible standard different from admissibility.

> This Court finds the Ninth Circuit approach [in *Sali v. Corona Reg'l Med. Ctr*., 909 F.3d 996 (9th Cir. 2018)], which focused on the 'ultimate admissibility' of a piece of evidence to be not only persuasive but more consistent with Unger's focus on whether the proffered evidence is verifiable or reliable, as opposed to 'admissible' under a specific rule. This flexible approach is also consistent with the Fifth Circuit's recent clarification that, even at the summary judgment stage, the 'substance or content' of evidence need not be admissible under the Federal Rules of Evidence so long as the material may be presented at trial in an admissible form. *Patel v. Tex. Tech. Univ*., 941 F.3d 743, 746 (5th Cir. 2019)."

Edwards v. City of Tupelo, Mississippi, No. 1:17-CV-131-DMB-DAS, 2020 WL 4927497, at *5 (N.D. Miss. Aug. 21, 2020).[3]

The First Circuit has not imposed this requirement but suggested that it may do so, if presented with the opportunity, stating in *In re Asacol Antitrust Litig.*, 907 F.3d 42, 53 (1st Cir. 2018) "[t]he fact that plaintiffs seek class certification provides no occasion for jettisoning the rules of evidence and procedure" and it could not "sanction[] the use of inadmissible hearsay to prove injury to each class member at or after trial."

The Second and Third Circuits seem also to be leaning in that direction, if less decisively. *See In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006), (holding that determinations that each of the Rule 23 requirements have been met "can be made only if the judge resolves factual disputes relevant to each Rule 23 requirement and finds that whatever underlying facts are relevant to a particular Rule 23 requirement have been established and is persuaded to rule, based on the relevant facts and the applicable legal standard, that the requirement is met;"); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 306 (3d Cir. 2008) ("In deciding whether to certify a class under Fed. R. Civ. P. 23, the district court must make whatever factual and legal inquiries are necessary and must consider all relevant evidence and arguments presented by the parties.").

The circuits which that don't require admissibility for factual evidence at the class phase appear to view class rulings, made as early as practicable, as preliminary or "tentative" rulings that can be altered or amended under Rule 23(c)(1)(C).*See* Sali, 909 F.3d at 1004 ("transforming a preliminary stage into an evidentiary shooting match inhibits an early determination of the best manner to conduct the action."). Courts have also analogized evidence at the class phase to "the

[3] One state court appears to follow this approach. *Jackson v. Unocal Corp*., 262 P.3d 874, 886 (Colo. 2011).

analogous field of standing," finding "the proof required to establish standing varies at the complaint, summary judgment and trial phases," and the "manner and degree of evidence required" at the preliminary class certification stage is not the same as "at the successive stages of the litigation"—i.e., at trial. *Sali*, 909 F.3d at 1006 (9th Cir. 2018). Other courts contrast certification with the evidence required at summary judgment stage. See, *Zurn Pex*, 644 F.3d at 613 ("Because summary judgment ends litigation without a trial, the court must review the evidence in light of what would be admissible before either the court or jury. In contrast, a court's inquiry on a motion for class certification is 'tentative,' 'preliminary,' and 'limited.'") (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.11 (1978)); ***Lyngaas***, 992 F.3d at 429 ("unlike a summary-judgment decision or a judgement after trial, a class-certification order is inherently tentative.") (cleaned up).

Lessening the evidentiary burden overlooks the enormous pressure that class certification places on defendants to settle, regardless of the merits of the plaintiffs' claims. *See, e.g.*, *Coopers & Lybrand* , 437 U.S. at 476 ("Certification of a large class may so increase the defendant's potential liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense."); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (explaining that, following class certification, "facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low" and referring to mass tort settlements in such circumstances as "judicial blackmail"). This pressure is compounded by allowing plaintiffs seeking class certification to base their argument on inadmissible evidence or to rely on plaintiffs' counsel's promise that the plaintiff will present the evidence in admissible form at trial.

The Sixth Circuit's reasoning in ***Lyngaas*** demonstrates how unworkable this approach is. In that case, the district court certified a class based on evidence that the plaintiff claimed he would

be able to admit at trial. 992 F.3d at 429. The court considered this evidence, even though "[s]ummary judgment and class certification occurred simultaneously in this case[.]" *Id.* The plaintiff then failed to authenticate and thus admit the evidence at trial. *Id.* at 428. The Sixth Circuit upheld the district court, because "[t]he defendants … did not move to decertify the class after the district court found at the bench trial that Lyngaas's evidence … was inadmissible[.]" *Id.* Thus, *Lyngaas* seems to stand for the proposition that, though relaxed evidentiary standards at class certification are appropriate because of its "preliminary" nature, a district court may also consider inadmissible evidence for class certification purposes, even when class certification and summary judgment are simultaneous. This undercuts the justification for considering inadmissible evidence at class certification; by the summary judgment stage, the plaintiff should have had admissible evidence not only to certify a class but to prevail at trial. This and similar holdings also provide no disincentive for plaintiffs to present inadmissible evidence at class certification and simply assure the court that they can present the evidence in an admissible form at trial.

One district court has made a persuasive case for relying on admissible evidence. In *In Anderson Living Tr. v. WPX Energy Prod., LLC*, 306 F.R.D. 312, 378 n.39 (D.N.M. 2015), the court pointed to the Supreme Court's "important clue in *Wal–Mart* indicating that the Federal Rules of Evidence apply in class certification hearings: 'The District Court concluded that *Daubert* did not apply to testimony at the certification stage of class-action proceedings. We doubt that is so....'" *Id.* (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 354 (2011)). The court then pointed out that, as long as class certification hearings do not fit into any of the exceptions in Fed. R. Evid. 1101(b), then the Federal Rules of Evidence should apply to them. *Id.*

The *Anderson Living* court also invoked the importance of the class certification decision. "[A] certified class action often settles, often for a large amount of money[.]" *Id.* The court also

pointed to the decision of Congress and the Supreme Court to grant litigants an interlocutory appeal of the class certification decision as evidence that they too recognized the importance of this stage. *Id.* (citing Fed. R. Civ. P. 23(f)).

But the court recognized that judges cannot entirely screen themselves from hearing inadmissible evidence, as they must make the admissibility determination to begin with. *Id.* And the court opined that judges are better at handling such evidence than juries in any case. *Id.* The court's solution is "for the judge to consider all but the most egregiously inadmissible pieces of evidence as they are presented, and factor any evidentiary infirmity into the weight he or she gives to them." *Id.* This approach has the benefit of avoiding an "evidentiary shooting match" at the class certification stage (*Zurn Pex,* 644 F.3d at 613) without opening the floodgates to inadmissible evidence at a stage of the litigation nearly comparable in importance to a dispositive motion.

III. Expert Evidence

Expert evidence can sometimes be critical to the class certification determination. See, *Good v. Am. Water Works Co. Inc*., 310 F.R.D. 274, 284 (S.D.W. Va. 2015)(Striking plaintiffs' class damage experts under *Daubert* resulted in denial of certification of class wide damages). All but one circuit to have considered whether the district court should perform a full *Daubert* analysis on expert evidence critical to the class certification inquiry have held that it must. *See Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 815–16 (7th Cir. 2010) (holding that "when an expert's report or testimony is critical to class certification, … a district court must conclusively rule on any challenge to the expert's qualifications or submissions prior to ruling on a class certification motion. That is, the district court must perform a full *Daubert* analysis before certifying the class if the situation warrants.") (citation omitted); *In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 187 (3d Cir. 2015) (holding that "a plaintiff cannot rely on challenged expert testimony, when

critical to class certification, to demonstrate conformity with Rule 23 unless the plaintiff also demonstrates, and the trial court finds, that the expert testimony satisfies the standard set out in *Daubert*."); *Prantil v. Arkema Inc.*, 986 F.3d 570, 576 (5th Cir. 2021) (holding that "if an expert's opinion would not be admissible at trial, it should not pave the way for certifying a proposed class."); *Grodzitsky v. Am. Honda Motor Co.*, 957 F.3d 979, 984 (9th Cir. 2020) ("In evaluating challenged expert testimony in support of class certification, a district court should evaluate admissibility under the standard set forth in *Daubert*.") (cleaned up); *Sher v. Raytheon Co.*, 419 F. App'x 887, 890–91 (11th Cir. 2011) ("Here the district court refused to conduct a *Daubert*-like critique of the proffered experts' qualifications. This was error"). See generally, Marcy Hogan Greer, A Practitioner's Guide to Class Actions 417, 420 (2nd Ed. 2017)(*Daubert* Challenges at Class Certification).

The Third and Fifth Circuits considered the need to apply *Daubert* at the certification stage to be "a natural extension of the Supreme Court's admonition … to conduct a rigorous analysis of the proposed class's conformity with Rule 23." *Prantil*, 986 F.3d at 575 (cleaned up). *See also Blood Reagents Antitrust Litig.*, 783 F.3d at 188 (citing *Dukes*, 564 U.S. at 354).

The leading case finding a *Daubert* analysis is not required at the class phase appears to be the Eighth Circuit's opinion in *In re: Zurn Pex Plumbing Products Liability Litigation*, 644 F.3d 604, 610–11 (8th Cir. 2011).[4]

> The main purpose of *Daubert* exclusion is to protect juries from being swayed by dubious scientific testimony. That interest is not implicated at the class certification stage where the judge is the decision maker. The district court's "gatekeeping function" under *Daubert* ensures that expert evidence "submitted *to the jury*" is sufficiently relevant and reliable, *Bonner v. ISP Technologies, Inc.*, 259 F.3d 924, 929 (8th Cir.2001) (emphasis added), but "[t]here is less need for the gatekeeper to

[4] "Shortly after *Wal-Mart*, the Eight Circuit decided that a full and conclusive *Daubert* review was not necessary at the class certification stage in *Cox v. Zurn Pex, Inc*." Damian D. Capozzola, Daubert as applied to class actions and class certification, Expert Witnesses in Civil Trials § 2:48 (Westlaw October 2021 Update).

> keep the gate when the gatekeeper is keeping the gate only for himself," *United States v. Brown*, 415 F.3d 1257, 1269 (11th Cir.2005). Similar reasons support less stringent application of *Daubert* in bench trials. *See* Charles Alan Wright, Victor James Gold, 29 *Fed. Prac. & Proc. Evid.* § 6266, n. 90.2 (2010), and cases cited. The "usual concerns of the [*Daubert*] rule—keeping unreliable expert testimony from the jury—are not present in such a setting." *Metavante Corp. v. Emigrant Sav. Bank*, 619 F.3d 748, 760 (7th Cir.2010).

Id.

Notably, the majority in *Zurn Pex* made no reference to *Dukes*—though the dissent did, arguing that "the Supreme Court has expressed disapproval of the position taken by the court today. … The statement, to be sure, is dictum, but inferior courts can take their cues from the Supreme Court's dicta." 644 F.3d at 627 (Gruender, J. dissenting) (cleaned up). And of course, the *Zurn Pex* court did not have the benefit of *Behrend*. But in *Smith v. ConocoPhillips Pipe Line Co.*, 298 F.R.D. 575, 581 (E.D. Mo. 2014), *rev'd and remanded*, 801 F.3d 921 (8th Cir. 2015), a chemical contamination case, the Court followed *Zurn Pex* as binding precedent and found "it need not determine at this stage whether Plaintiffs' experts' opinions will ultimately be admissible at trial…. For purposes of Plaintiffs' motion, the Court must simply determine to its satisfaction whether Plaintiffs' experts' testimony establish a Rule 23 requirement." Id. (citations omitted).

In any case, the circuit split on how to apply *Daubert* at class certification is more a matter of form than substance, as a district court recently explained. *See Desai v. Geico Cas. Co.*, No. 1:19-CV-2327, 2021 WL 5762999, at *10 (N.D. Ohio Dec. 6, 2021). The court noted that the Seventh Circuit, whose position commentators have deemed to be the "most demanding[,]" requires *Daubert* to be applied, "only where 'an expert's report or testimony is critical to class certification.'" *Id.* (quoting *Am. Honda*, 600 F.3d at 815). And under the Eighth Circuit's approach, "a district court examines the reliability of the expert opinions in light of the available evidence

and the purpose for which they are offered and with Rule 23's requirements in mind." *Id.* (cleaned up).

For the sake of analytical consistency, however, courts should apply *Daubert* to expert evidence critical to the class certification decision, just as they would apply it to expert evidence used at any other point in the litigation. Though relaxing the application of the Rules of Evidence as applied to fact evidence may make a certain amount of sense, given the stage of litigation and consequent limits on evidence revealed through discovery, an expert either uses reliable methods that pass muster under *Daubert*, or he does not, irrespective of the stage of litigation. And to the extent that limitations on evidence obtained through discovery may hamper an expert's ability to apply his methods reliably, the answer is phased discovery so that the expert can obtain necessary evidence, not limiting, let alone abandoning, *Daubert*. This is because, as discussed above, "certification changes the risks of litigation often in dramatic fashion." *Prantil*, 986 F.3d at 575.

IV. Conclusion

The Federal Rules of Evidence should apply to all evidence presented at the class certification stage. This is an important, at times crucial stage of a case, and allowing a party to present inadmissible evidence based on a mere assurance that it will find a way to admit the evidence later in the proceedings makes little analytical sense and runs the risk of leading to wrongful class certifications. Even so, district courts should have the flexibility to evaluate evidence on the borders of admissibility, not only because class certification is a preliminary stage of the litigation at which discovery is often incomplete, but also because judges are generally better able than juries to evaluate such evidence. But there is no reason—and no circuit has held—that expert evidence critical to the certification decision should not be subjected to some form of *Daubert* review. Whatever limitations may arise from incomplete discovery, an expert whose

opinion may make or break an effort to certify a class should be required to base that opinion on reliable methods. To hold otherwise would create an unnecessary breach in the gate *Daubert* created for keeping out unreliable expert testimony.