

CLASS ACTION

APRIL

2015

ALERT

THIRD CIRCUIT WEIGHS IN ON APPLICATION OF *DAUBERT*  
AT CLASS CERTIFICATION STAGE

By Keith E. Whitson and Ira Neil Richards

Since the Supreme Court's decision in *Comcast v. Behrend*, 113 S. Ct. 1426 (2013) courts evaluating expert testimony at the class certification stage may not simply accept that testimony at face value. The Supreme Court did not, however, articulate what standard should be applied in evaluating such testimony. Most courts now recognize that the standards of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), must be addressed in some form before the class can be certified, but courts differ on whether a "full" *Daubert* analysis is required, or whether some lesser analysis is permissible. In *In re: Blood Reagents Antitrust Litigation*, No. 12-4067 (3d Cir. April 8, 2015), the United States Court of Appeals for the Third Circuit required what appears to be a full, rigorous analysis where opinion testimony relates to a requirement for certification.

In that case, plaintiffs sought damages for alleged horizontal price-fixing by blood reagent manufacturers. Plaintiffs relied on an expert witness's analyses and damage models in part to satisfy Rule 23(b)(3)'s requirement that common questions predominate over individual issues. The district court determined that the models offered by plaintiffs "could evolve to become admissible evidence," and therefore determined that the plaintiffs had satisfied the predominance requirement of Rule 23(b)(3). The district court also rejected defendant's challenges to the

models, finding that those arguments went to the merits rather than certification issues. This decision was rendered prior to *Comcast*, which reversed a Third Circuit decision addressing expert testimony in a horizontal price-fixing case.

On appeal, the Court of Appeals recognized that *Comcast* requires a "rigorous" analysis of expert testimony at the class certification stage, and noted that courts must make a "definitive determination" that Rule 23's requirements have been satisfied before class certification is appropriate. This determination requires a "rigorous" analysis. The Court then held that, when expert testimony affects class certification issues, a review of *Daubert's* standards must be part of that analysis:

We join certain of our sister courts to hold 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*.

The Court further stated that "[e]xpert testimony that is insufficiently reliable to satisfy the *Daubert* standard cannot 'prove' that the Rule 23(a) requirements have been met 'in fact,' nor can it establish 'through evidentiary proof' that Rule 23(b) is satisfied."

The Court cited as support both the Seventh Circuit's decision in *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802 (7<sup>th</sup> Cir. 2012) and the Eighth Circuit's decision in *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604 (8<sup>th</sup> Cir. 2011), two cases which appear to apply *Daubert* at the class certification stage in two different manners. The Court stated: "We have no occasion to examine whether there might be some variation between the Seventh and Eighth Circuit formulations. Consistent with our holding here, both courts limit the *Daubert* inquiry to expert testimony offered to prove satisfaction of Rule 23's requirements." Nevertheless, the Court's language does not appear to authorize any "limited" review, but instead, instructs that expert testimony must satisfy *Daubert*.

Recognizing that the district court's decision predated *Comcast*, the Court remanded for the district court to consider "*Comcast's* ramifications for antitrust damages models [and] proving antitrust impact." However, the Court did state the district court's "could evolve" standard was inconsistent with *Comcast*. The Court then instructed the district court to determine which challenges to expert testimony related to the requirements of Rule 23 "and then, if necessary, to conduct a *Daubert* inquiry before assessing whether the requirements of Rule 23 have been met." Previously, the Court held that a *Daubert* inquiry is only the first step – once opinion testimony is deemed admissible, its credibility still must be examined in light of any competing testimony or other evidence. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008).

Despite its reference to the 8<sup>th</sup> Circuit decision, and consistent with the growing trend, it appears that a full *Daubert* analysis is required in the Third Circuit when expert testimony is offered to prove the requirements of Rule 23. Based on *Blood Reagents*, parties addressing class certification in the Third Circuit cannot take a "wait-and-see" approach to expert testimony. Parties relying on expert testimony on a disputed class certification issue should present a fully formed opinion that

can withstand a full *Daubert* inquiry, and parties challenging such testimony likewise should be prepared for a full *Daubert* analysis. ♦

*This summary of legal issues is published for informational purposes only. It does not dispense legal advice or create an attorney-client relationship with those who read it. Readers should obtain professional legal advice before taking any legal action.*

*For more information about Schnader's Class Action Practice Group or to speak with a member of the firm, please contact:*

*Ira Neil Richards*  
Chair, Class Action Practice Group  
215-751-2503  
[irichards@schnader.com](mailto:irichards@schnader.com)

*Keith E. Whitson*  
Co-chair, Product Liability Practice Group  
412-577-5220  
[kwhitson@schnader.com](mailto:kwhitson@schnader.com)