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Expert Testimony at the Certification Stage: The Impact of *Comcast v. Behrend*

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By now it is well known that there has been a sea change in the way that federal courts approach class certification. A series of circuit decisions beginning in the mid-2000s, culminating in the U.S. Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, have made clear that plaintiffs cannot obtain class certification merely by pleading the requirements of Federal Rule of Civil Procedure 23.[1] Instead, plaintiffs must affirmatively demonstrate that those requirements are satisfied. And district courts must conduct a ''rigorous analysis'' to ensure that plaintiffs have met that burden, an inquiry that often overlaps with the merits of the case. However, lower courts continue to disagree about the appropriate standard to employ when evaluating expert evidence at the class certification stage. In particular, courts are split on the issue of whether the standard set forth in *Daubert v. Merrell Dow Pharmaceuticals*[2] should apply.

When the Supreme Court granted *certiorari* in *Comcast v. Behrend*,[3] many expected that the Court would resolve the disagreement among the lower courts as to the role of *Daubert* at the class certification stage. However, because the defendant in *Behrend* had failed to object to the admission of the expert's testimony, and therefore forfeited the right to challenge admissibility on appeal, the Court did not directly address the *Daubert* issue.

Nevertheless, the *Behrend* decision will likely have a significant impact on the treatment of expert evidence at the class certification stage for at least two reasons. First, it reinforces that courts must rigorously scrutinize the adequacy of the plaintiff's expert evidence on the Rule 23 requirements, even if that requires inquiry into the merits of the plaintiff's claim. Courts may not side-

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[1] 131 S. Ct. 2541, 2551 (2011); *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 26 (1st Cir. 2008); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 316 (3d Cir. 2008); *Regents of Univ. of Cal. v. Credit Suisse First Boston*, 482 F.3d 372, 395 (5th Cir. 2007); *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 41-42 (2d Cir. 2006); *Blades v. Monsanto Co.*, 400 F.3d 562, 572 (8th Cir. 2005); *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 675-77 (7th Cir. 2001).

[2] 509 U.S. 579 (1993).

[3] 133 S. Ct. 24 (U.S. Jun. 25, 2012) (order granting *certiorari*).

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step a battle of the experts simply because resolution of the contested issues implicates a merits question. Second, although the *Behrend* Court did not speak to *Daubert* directly, it strongly suggested that the core *Daubert* principles of reliability and fit—particularly, fit—play a key role at the class certification stage.

Expert Evidence at the Class Certification Stage: The Legal Landscape

In *Dukes*, the Court held that Federal Rule of Civil Procedure 23 ''does not set forth a mere pleading standard,'' and instead requires a plaintiff to ''prove that there are *in fact* sufficiently numerous parties, common questions of law or fact,'' typicality of claims or defenses, and adequacy of representation.[4] The plaintiff must also demonstrate that one of the provisions of Rule 23(b) is satisfied.[5] The *Dukes* Court emphasized that in determining whether a plaintiff has made the necessary showing under Rule 23, courts must conduct a ''rigorous analysis'' of the evidence—including expert evidence—even if such an inquiry ''will entail some overlap with the merits of the plaintiff's underlying claim.''[6]

Although the Court expressed ''doubt'' as to the soundness of the trial court's conclusion that *Daubert* did not apply at the class certification stage, it did not resolve the issue.[7] As such, the Circuits remain split as to whether *Daubert*, or some form of it, should be applied when evaluating expert evidence offered in support of class certification.

The Seventh Circuit held in *American Honda Motor Co. v. Allen* that when expert evidence is ''critical to class certification,'' a district court must ''perform a full *Daubert* analysis before certifying the class if the situation warrants.''[8] Similarly, the Fifth Circuit in *Unger v. Amedisys, Inc.*, although not addressing *Daubert* explicitly, observed that ''[i]n many cases, it makes sense to consider the admissibility'' of expert evidence at the Rule 23 stage, because ''[i]n order to consider Plaintiffs' motion for class certification with the appropriate amount of scrutiny, the Court must first determine whether Plaintiffs' expert testimony supporting class certification is reliable.''[9] In contrast, the Eighth Circuit held in *In re Zurn Plex Plumbing Products Liability Litigation* that a full *Daubert* analysis was ''impractical'' at the class certification stage because the parties had engaged in limited discovery and thus only a limited evidentiary record was available.[10]

[4] 131 S. Ct. at 2551.

[5] *Comcast v. Behrend*, 133 S. Ct. 1426, 1432 (2013).

[6] 131 S. Ct. at 2551.

[7] *Id.* at 2554.

[8] 600 F.3d 813, 815-16 (7th Cir. 2010). The Eleventh Circuit adopted the same view in an unpublished opinion. *See Sher v. Raytheon Co.*, 419 Fed. App'x 887, 890 (11th Cir. 2011) (unpublished).

[9] 401 F.3d 316, 323 n.6 (5th Cir. 2005).

[10] 644 F.3d 604, 612 (8th Cir. 2011) (noting that it was ''not convinced that the approach of *American Honda* would be the most workable or that it would [best] serve case management''). The Eighth Circuit did, however, endorse a relaxed *Daubert* inquiry—often referred to as a ''*Daubert*-lite'' approach. *See id.* (approving district court's ''tailored'' *Daubert* analysis, which examined ''the reliability of the expert opinions in light of the available evidence and the purpose for which they were offered''). Numerous district courts have also adopted some form of *Daubert*-lite analysis at the class certification stage. *See, e.g.*, *Tait v. BSH Home Appliances Corp.*, No. 10-cv-0711 (C.D. Cal. Dec. 20, 2012); *Leite v. Crane Co.*, 868 F. Supp. 2d 1023, 1035 (D. Haw. 2012); *In re Gen. Motors On-Star Litig.*, No. __ (Jan. 12, 2011).

The Third Circuit Decision In *Behrend v. Comcast*

The Third Circuit weighed in on the proper treatment of expert evidence at the class certification stage in *Behrend v. Comcast Corp.*[11] In this case, subscribers of Comcast television services in the Philadelphia market brought suit against Comcast for violations of federal antitrust laws and sought certification of a class of current and former Comcast subscribers in the market. The plaintiffs proposed four theories of antitrust impact, *i.e.*, four ways in which Comcast allegedly distorted the market and increased cable subscription rates.[12]

The District Court found that only one of these theories—that Comcast's activities reduced the level of competition from ''overbuilders''—was capable of classwide proof.[13] To show that damages were measurable on a classwide basis, the plaintiffs offered the expert testimony of Dr. James McClave, who compared actual cable prices in the Philadelphia market with hypothetical prices that would have existed in the absence of all of Comcast's alleged anticompetitive conduct.[14] However, Dr. McClave's model did not attempt to isolate the portion of damages resulting from the ''overbuilder'' theory. Instead, he purported to calculate an overcharge caused by all four types of allegedly unlawful conduct, even those the District Court found unsuitable for class treatment.[15]

Despite this flaw in the expert's methodology, the Third Circuit affirmed the District Court's order certifying the class.[16] Rejecting Comcast's argument that certification was inappropriate because the expert's model failed to isolate damages attributable to the exclusion of ''overbuilders,'' the Third Circuit held that such an examination of the expert's methodology would require an inquiry into the merits that was inappropriate at the class certification stage.[17] The Third Circuit further explained that the plaintiffs were not required to ''tie each theory of antitrust impact to an exact calculation of damages'' to obtain class certification.[18] In addition, although the Third Circuit did not resolve the role of *Daubert* at the class certification stage (because the issue had not been preserved by Comcast), it observed that ''[w]e have not reached the stage of determining on

[11] 655 F.3d 182 (3d Cir. 2011), *rev'd*, 133 S. Ct. 1426 (2013).

[12] *Id.* at 195.

[13] *Id.* An ''overbuilder'' is a company that builds and offers customers an alternative cable service in an area where another cable company already operates. *Id.* at 187. The plaintiffs alleged that Comcast intentionally excluded competition from overbuilders by denying them access to a local sports channel, requiring contractors to enter into non-compete agreements, and inducing potential customers to sign up for long-term contracts with special discounts in the areas where the competitors intended to overbuild. *Id.*

[14] *Id.* at 200-01.

[15] *Id.* at 203; *see also id.* at 216 (Jordan, J., dissenting).

[16] *Id.* at 205-06.

[17] *Id.* at 206.

[18] *Id.*

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the merits whether the methodology is a just and reasonable inference or speculative.''[19]

In a partial dissent, Judge Jordan disagreed, finding that because Dr. McClave's damages model failed to identify the damages caused by ''overbuilding,'' the only liability theory capable of classwide proof, the model could not support a finding of predominance under Rule 23(b).[20]

Judge Jordan stated that he would have applied *Daubert* and found Dr. McClave's opinion inadmissible for lack of ''fit,'' a component of the *Daubert* inquiry that requires that the expert's opinion be ''sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute.''[21] Judge Jordan reasoned that Dr. McClave's analysis failed the ''fit'' requirement because it was ''disconnected from Plaintiffs' only viable theory of antitrust impact, i.e., reduced overbuilding, and thus, . . . c[ould] not help the jury determine whether reduced overbuilding caused damages.''[22] But, he concluded, ''regardless of whether we frame the issue as a question of fit under *Daubert* or simply ask whether the District Court abused its discretion by relying on irrelevant evidence, we are effectively asking the same question. . . . The short of it is, Dr. McClave's model no longer fits the case.''[23]

The Supreme Court's *Behrend* Decision

The Supreme Court granted *certiorari* in *Behrend* on the question of ''[w]hether a district court may certify a class action without resolving whether the plaintiff class had introduced admissible evidence, including expert testimony to show that the case is susceptible to awarding damages on a class-wide basis.''[24] However, it subsequently became apparent that Comcast had not objected to the admission of Dr. McClave's damages model under the Federal Rules of Evidence and *Daubert*, and therefore had forfeited its right to argue that Dr. McClave's testimony was not admissible.[25] Thus, the Court declined to address the issue (at least directly) on which it initially granted review.

Rather than dismiss the writ of *certiorari* as improvidently granted, however, the Court opted to address whether ''certification was improper because [the plaintiffs] had failed to establish that damages could be measured on a classwide basis.''[26] Reversing the Third Circuit, the Court held that the class action was improperly certified and emphasized that a court must make a ''determination that Rule 23 is satisfied, even when that requires inquiry into the merits of the claim.''[27]

The Court explained that because Dr. McClave's model did not isolate the damages resulting from the only theory capable of classwide proof, the model could not demonstrate that common damages questions would predominate over individual damages calculations.[28] For instance, the Court explained, some members of the putative class might have seen their cable rates increase due to one of the theories of antitrust impact that the District Court had found unsuitable for class action treatment, while others might have paid increased rates due to another of the four theories.[29]

The Court rejected the Third Circuit's reasoning that it was ''unnecessary to decide'' at the class certification stage whether the model was ''a just and reasonable inference or speculative'' because the model successfully ''provided a method to measure and quantify damages on a classwide basis.''[30] The Court explained that on ''that logic, at the class-certification stage *any* method of measurement is acceptable so long as it can be applied classwide, no matter how arbitrary the measurements may be.''[31]

Implications for the Treatment Of Expert Evidence at the Certification Stage

Although the Supreme Court did not directly address whether an expert's opinion must be admissible at the class certification stage, or whether the opinion must past muster under a full blown *Daubert* analysis, its decision will nevertheless have significant implications for the treatment of expert evidence at the class certification stage.

First, *Behrend* reinforces that courts must subject expert evidence at the class certification stage to ''rigorous'' scrutiny to ensure that the requirements of Rule 23 are satisfied, even if this requires ''the court to probe behind the pleadings'' and evaluate issues that overlap with the merits.[32] And as lower courts have made clear,

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[19] *Id.* 206; *see also id.* at 203 n.13 (interpreting *Dukes* ''to require a district court to evaluate whether an expert is presenting a model which could evolve to become admissible evidence, and not requiring a district court to determine if a model is perfect at the class certification stage'').

[20] *Id.* at 214-15 (Jordan, J., dissenting).

[21] *Id.* at 216 (quoting *United States v. Schiff*, 602 F.3d 152, 173 (3d Cir. 2010)).

[22] *Id.*

[23] *Id.* at 215 n.18. In fact, Judge Jordan noted that although Comcast had never described its challenge to certification as a challenge to the admissibility of Dr. McClave's testimony, ''the substance of Comcast's challenge was that Dr. McClave's damages testimony was irrelevant and, therefore, did not fit the case.'' *Id.*

[24] 133 S. Ct. at 1431 n.4.

[25] *Id.*; *see also id.* at 1436 (Ginsburg, J., dissenting).

[26] *Id.* at 1431 n.4 The Dissent took the Majority to task for not dismissing the writ as improvidently granted, arguing that the Majority ''depart[ed] from our ordinary practice, risk[ed] inaccurate judicial decisionmaking, and [wa]s unfair to [the plaintiffs] and the courts below.'' *Id.* at 1441 (Ginsburg, J., dissenting).

[27] *Id.* at 1433.

[28] *Id.* at 1435.

[29] *Id.* at 1434.

[30] *Id.* at 1433.

[31] *Id.*

[32] On this point, *Behrend* is arguably in tension with another recent class certification ruling by the Court in *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 133 S. Ct. 1184 (2013). There, the Court held that a named plaintiff in a securities fraud case need not establish the materiality of the alleged misrepresentation in order to obtain class certification on the basis of the ''fraud-on-the-market'' theory, despite the fact that proof of materiality is a necessary element of that theory, and despite that the plaintiff could only establish predominance if the fraud-on-the-market theory were applicable. *Id.* at 1195. The Court reasoned, first, that ''materiality can be proved through evidence common to the class,'' and second, that materiality was an essential element of the plaintiff's claim on the merits. *Id.* at 1195-96. Thus, ''[a]bsent proof of materiality, the claim of the Rule 10b-5 class will fail in its entirety.'' *Id.* at 1196. Materiality was therefore a dispositive merits issue that was ''properly addressed at trial or in a ruling on a summary judgment motion,'' not at the class certification

such rigorous scrutiny often requires a district court to resolve conflicting expert testimony.[33] Indeed, as the Third Circuit observed in *In re Hydrogen Peroxide*, ''[w]eighing conflicting expert testimony at the class certification stage is not only permissible; it may be integral to the rigorous analysis Rule 23 demands.''[34] Thus, *Behrend* confirms that courts may not sidestep a battle of the experts, or any other issue bearing on class certification, simply because resolution of the contested issues requires inquiry into the merits of the case.[35]

Second, *Behrend* teaches that the essential elements of a *Daubert* analysis play a role in the class certification inquiry. Federal Rule of Evidence 702 and *Daubert* require that the expert's methodology be reliable and that the expert's proffered testimony fit the particular case.[36] As to reliability, the Court made clear that courts must resolve at the class certification stage whether an expert's ''methodology is a just and reasonable inference or speculative.''[37] A court may not blindly rely on an expert opinion simply because its methodology can be applied classwide, as that approach would allow opinions employing ''arbitrary'' methodology to serve as the basis for class certification, thereby ''reduc[ing] Rule 23(b)(3)'s predominance requirement to a nullity.''[38]

As to ''fit,'' although the Supreme Court did not explicitly frame the issue in terms of *Daubert* (as Judge Jordan did below), its core holding was essentially that Dr. McClave's damages model could not establish Rule 23's predominance requirement because it did not fit the plaintiffs' liability case. The Supreme Court explained:

> [i]f [the plaintiffs] prevail on their claims, they would be entitled only to damages resulting from reduced overbuilder competition, since that is the only theory of antitrust impact accepted for class-action treatment by the District Court. It follows that a model purporting to serve as evidence of damages in this class action must measure only those damages attributable to that theory. If the model does not even attempt to do that, it cannot possibly establish that damages are susceptible of measurement across the entire class.[39]

In other words, if the damages model is not consistent with the liability case, it will inevitably ''identif[y] damages that are not the result of the wrong,'' and thus it cannot possibly establish that questions common to the class will predominate over individual damages calculations.[40] This flaw in Dr. McClave's opinion is essentially the same as that identified by Judge Jordan, who relied explicitly on *Daubert*. The model could not ''bridge the differences between supra-competitive prices in general and supra-competitive prices attributable to overbuilding,'' and therefore was simply not ''relevant.''[41]

Conclusion

While the *Behrend* Court did not provide a definitive answer as to whether a formal *Daubert* analysis is required at the class certification stage, it indicated that the ''rigorous'' scrutiny mandated by *Dukes* essentially requires consideration of the core *Daubert* principles of reliability and fit. If expert evidence is unreliable or not tied to the facts of the case, it cannot show that the class certification requirements have been met. Moreover, *Behrend* teaches that courts may not ''refus[e] to entertain arguments'' challenging on those grounds an expert opinion offered in support of class certification ''simply because those arguments would also be pertinent to the merits determination.''

In the wake of *Behrend*, defendants in putative class actions should not hesitate to challenge the reliability of an expert's methodology and the lack of fit between the expert's opinions and the facts that must be established to obtain class certification under Rule 23. And because questions of reliability and fit are not limited to the admissibility of expert evidence, but also bear on its persuasiveness, defendants should consider doing this even in jurisdictions that have not yet required, or have rejected, a full *Daubert* inquiry at the class certification stage.

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stage. *Id.* at 1197. Hence, the Supreme Court arguably did in *Amgen* what it said was improper in *Behrend*, namely, ''refusing to entertain arguments . . . that bore on the propriety of class certification, simply because those arguments would also be pertinent to the merits determination.''

[33] *See, e.g.*, *In re Hydrogen Peroxide*, 552 F.3d at 323; *In re New Motor Vehicles*, 522 F.3d at 26; *In re IPO*, 471 F.3d at 41-42 (same).

[34] 552 F.3d at 323.

[35] *See In re High-Tech Employee Antitrust Litig.*, No. 11-cv-02509 (N.D. Cal. Apr. 5, 2013) (holding that *Behrend* requires a district court to resolve a battle of the experts to ensure that the predominance requirement of Rule 23 is met).

[36] *Schiff*, 602 F.3d at 172-73.

[37] *Behrend*, 133 S. Ct. at 1433.

[38] *Id.*

[39] *Id.* (citing *Story Parchment Co. v. Peterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931)).

[40] *See id.* at 1434.

[41] *See id.* at 1435; *id.* at 1434 (quoting *Behrend*, 655 F.3d at 216 (Jordan, J., dissenting)).

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