

Memorandum

To: Professor Dale Collins
From:
Re: Reliability Standards at Class Certification
Date:

Question Presented

You have asked me to determine what standards of reliability and relevance a district court would apply in deciding upon a motion to strike an expert declaration submitted in support of, or against, a motion for class certification?

Short Answer

While differences between the Courts of Appeals as to the nature and propriety of *Daubert* hearings remain, most circuits now explicitly require some form of *Daubert* analysis at the class certification stage. Additionally, even in circuits that do not specifically require a *Daubert* inquiry, a rapidly increasing number of district courts have begun to undertake *Daubert* analyses prior to deciding the certification question. There is a significant trend towards requiring *Daubert* prior to certification and courts will, more likely than not, conduct some form of *Daubert* analysis before deciding whether or not to certify a class.

Background

I. *Class Certification and the ‘Rigorous Analysis’ Standard*

Eisen v. Carlisle and Jacquelin, 417 U.S. 156 (1974)., and *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 160 (1982), constituted the chief restraints on the district court’s authority to inquire into issues overlapping with the merits at the class certification stage, prior to the Supreme Court’s recent decision in *Wal-Mart Stores, Inc. v Dukes*, 131 S. Ct. 2541, 2551 (2011). The *Eisen* Court cautioned courts against “allowing a representative plaintiff to secure the benefits of a class action without first satisfying the requirements for it” and thereby

allowing them “to obtain a determination on the merits of the claims advanced on behalf of the class without any assurance that a class may be maintained. *Eisen*, 417 U.S. at 177-78. *Falcon*, however, clarified that *Eisen* did not preclude all inquiries into issues that overlap with the merits at the certification stage and noted that a rigorous analysis would sometimes require “the court to probe behind the pleadings before coming to rest on the certification question.” Since *Falcon*, courts have developed three broad approaches to balancing the rigorous analysis distinguished by their varying treatment of expert testimony and the extent to which they integrate the admissibility standards of Rule 702, as elaborated by the Court *Daubert v Merrel Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), into the ‘rigorous analysis.’ More recently, the Supreme Court expressed its doubt as to whether *Daubert* was inapplicable at the class certification stage. *See, Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2554 (2011) (“The district court concluded that *Daubert* did not apply to expert testimony at the certification stage ... we doubt this is so.”) The Court went on to explain that the rigorous analysis mandated by *Falcon* requires courts to determine whether or not the requirements of Rule 23 have *in fact* been satisfied. *Wal-Mart*, 131 S. Ct. at 2551 (a party seeking class certification ... must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc.”). The Court also noted that *Eisen* had often been misinterpreted as forbidding a preliminary inquiry into the merits. The court explained that the language in *Eisen* referred to preliminary inquiries into the merits that didn’t pertain to Rule 23’s prerequisites and that “to the extent that the quoted statement goes beyond the permissibility of a merits inquiry for any other pretrial purpose, it is the purest dictum.” *Id.* at 2552 n.6. With this the Supreme Court definitively put to rest the already sclerotic, though once widespread, ‘no merits’ approach to class certification.

II. Brief Historical Survey of the Evolution of the ‘Rigorous Analysis’

a. Early Decisions & the “No Merits” Approach

Early decisions considering the role of experts at the class certification stage placed significant emphasis on *Eisen*'s prohibition on inquiries into the merits and tended to characterize the examination of expert evidence as extremely limited. Many courts initially ascribed to tests analogous to those set forth, and subsequently abandoned, by the Second Circuit in *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283 (2d Cir. 1999) and *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124 (2d Cir. 2001). In *Visa Check*, the court stated that as “a motion for class certification is not an occasion for examination of the merits of the case ... a district court must ensure that the basis of the expert opinion is not so flawed that it would be inadmissible as a matter of law.” *Visa Check*, 280 F.3d at 135 (quoting *Caridad*, 191 F.3d at 291) (internal quotation marks omitted). However, beginning circuit courts gradually came to understand *Falcon* as requiring a more stringent examination of the propriety of putative classes.

b. The Heightened Evidentiary Standard

The Seventh Circuit pioneered the shift towards more thoroughgoing scrutiny at the class certification stage. In *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, (7th Cir. 2001) the court stated that *Eisen* could not be read to prevent “the district court from looking beneath the surface of a complaint to conduct the inquiries identified in [Rule 23] and exercise the discretion it confers,” as such a reading would allow plaintiffs to “tie the judge’s hands by making allegations relevant to both the merits and class certification.” *Id.* at 677. This view rapidly attracted adherents among the Courts of Appeals, and even before the Supreme Court’s decision in *Wal-Mart*, only the D.C. Circuit had failed to explicitly require a heightened showing at the class certification stage. *See Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 581 (9th Cir. 2010) (“A

district court's analysis will often though not always, require looking behind the pleadings, even to issues overlapping the merits of the underlying claims.”); *Vallario v. Vandehey*, 554 F.3d 1259, 1266-67 (10th Cir. 2009) (“District courts ensure Rule 23’s provisions are satisfied by conducting a ‘rigorous analysis,’ and addressing the rule’s requirements through findings, regardless of whether these findings necessarily overlap with the merits.”); *In re New Motor Vehicle Canadian Export Antitrust Litig.*, 522 F.3d 6, 18 (1st Cir. 2008) (“It would be contrary to the rigorous analysis of the prerequisites established by Rule 23 before certifying a class to put blinders on as to an issue simply because it implicates the merits of the case.”) (internal citations omitted); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 316 (3d Cir. 2008) (“An overlap between a class certification requirement and the merits of a claim is no reason to decline to resolve relevant disputes when necessary to determine whether a class certification requirement is met.”); *In re IPO Securities Litig.*, 471 F.3d 24 (2d Cir. 2006) (“A district court may certify a class only after making determinations that each of the Rule 23 requirements has been met ... [and] the obligation to make such determinations is not lessened by overlap between a Rule 23 requirement.”); *Blades v. Monsanto Co.*, 400 F.3d 562, 567 (8th Cir. 2005) (“The preliminary inquiry at the class certification stage may require the court to resolve disputes going to the factual setting of the case, and such disputes may overlap with the merits of the case.”); *Unger v. Amedysis*, 401 F.3d 316, 321 (5th Cir. 2005) (“The plain text of Rule 23 requires the court to ‘find,’ not merely assume, the facts favoring class certification.”); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 366 (4th Cir. 2004) (“While an evaluation of the merits to determine the strength of plaintiffs’ case is not a part of Rule 23 analysis, the factors spelled out in Rule 23 must be addressed through findings, even if they overlap with issues on the merits.”). While a broad consensus now exists that factual findings are required, differences emerged as to

the extent of the factual review and the necessity of holding a *Daubert* hearing at the class certification stage.

III. *The Daubert Analysis*

The need to probe behind the pleadings to ascertain the propriety of class treatment after *Falcon* required the formulation of a reliability standard for expert testimony. For this purpose, courts have turned to the *Daubert* reliability inquiry. *Daubert* stated that the court must, in its capacity as gatekeeper, decide initially, whether an expert proposes to testify to 1) scientific knowledge that 2) will assist the trier of fact to understand or determine a fact in issue. The court then set forth a non-exhaustive list of factors courts should use in determining the reliability of expert testimony. The 2000 amendments to Rule 702, adopted to reflect the requirements of *Daubert* and its progeny, requires a court to determine that:

- a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence of determine a fact in issue;
- b) the testimony is based on sufficient facts or data;
- c) the testimony is the product of reliable principles and methods; and
- d) the expert has reliably applied the principles and methods to the facts of the case.

The aim of the *Daubert* inquiry, ensuring that expert testimony is sufficiently reliable to be of use to the jury, is distinct from the need to determine whether or not proponents have demonstrated conformance with the prerequisites of the Rule 23. Despite the fact that “the main purpose of *Daubert* exclusion is to protect juries from being swayed by dubious scientific testimony,” *In re Zurn Pex Plumbing Products Litig.*, 644 F.3d 604, 613 (8th Cir. 2011), some courts have incorporated the inquiry into the ‘rigorous analysis’ because, “the requirements of relevance and reliability set forth in *Daubert* serve as useful guideposts” for the court in evaluating expert evidence, *Kurihara v. Best Buy Co., Inc.*, 154 Lab.Cas. P 35, 344, 5 (N.D. Cal. 2007). The influence of *Daubert* on the ‘rigorous analysis’ is so ubiquitous that even courts

eschewing a full *Daubert* analysis at the certification stage often speak of a ‘lower’ or ‘focused’ *Daubert* standard. See *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 189, 191 (N.D. Cal. 2004) (“it is clear to the Court that a lower *Daubert* standard should be employed at this class certification stage of the proceedings.”); *Zurn Pex*, 644 F.3d at 614 (“We conclude that the district court did not err by conducting a focused *Daubert* analysis.”). Properly understood, the nature of the dispute over the applicability of *Daubert* to the ‘rigorous analysis’ does not concern whether or not the Federal Rules of Evidence apply to the class certification decision, but whether expert testimony that cannot withstand *Daubert*-like scrutiny is sufficiently reliable for a court to consider in deciding whether or not to grant class certification.

Daubert & The Contemporary ‘Rigorous Analysis’

I. Circuit Court Decisions Regarding the Applicability of *Daubert* at the Class Certification Stage

a. The Tailored *Daubert* Approach in the Eighth Circuit

In *Zurn Pex*, the Eighth Circuit stated that “because a decision to certify a class is far from a conclusive judgment on the merits of the case, it is of necessity not accompanied by the traditional rules and procedure applicable to civil trials.” *Zurn Pex*, 644 F.3d at 613 (quoting *Eisen*, 417 U.S. at 178) (internal quotation marks omitted). The *Zurn Pex* court then went on to note that bifurcated discovery in complex litigation was both efficient and incompatible with a full *Daubert* analysis, “while there is little doubt that bifurcated discovery may increase efficiency in a complex case such as this, it also means that there may be gaps in the available evidence.” *Id.* The court justified the lower *Daubert* standard on the grounds that at the class certification stage both evidentiary rulings and class certification are tentative. See *id.* (“A court’s rulings on class certification issues may also evolve.”); see also Fed. R. Civ. P. 23(c)(1)(C) (“An order that grants or denies class certification may be altered or amended before

final judgment.”) The court held that expert opinions should be allowed to adapt as gaps in the evidence are filled during merits discovery and courts may, if necessary, reexamine their prior evidentiary rulings as the litigation proceeds. *See, id.* As a result, during the initial class certification proceeding, the court should examine “the reliability of the expert opinions in light of the available evidence and the purpose for which they were offered.” *Zurn Pex*, 644 F.3d at 612.

The *Zurn Pex* court noted that the ‘tailored’ approach was distinct from the ‘fatally flawed’ analysis, and that the district court had expressly rejected the latter test by declining the plaintiff’s request to consider all evidence that was not fatally flawed. *See, id.* at 612 n.5. (“[The court] rejected the homeowner contention that it should consider all evidence that was not ‘fatally flawed’ and proceeded to apply *Daubert* by conducting a focused inquiry into expert reliability in light of the available evidence.”). The Eighth Circuit thus made clear that court’s applying the tailored *Daubert* standard were not presuming conformity with Rule 23’s requirements but were simply refusing to undertake a full blown *Daubert* analysis at the certification stage in the interest of efficiency.

b. *Circuit Court Decisions Requiring Thorough Daubert Analysis at the Class Certification Stage.*

While the Eighth Circuit allows for an abridged *Daubert* inquiry during the class certification proceedings, the Fifth, Sixth, Seventh, Ninth, and Eleventh Circuits have either expressly or impliedly mandated the application of a full blown *Daubert* analysis prior to class certification where the question of whether or not the purported class satisfies the Rule 23 requirements hinges in large part on expert testimony.

i. The Fifth Circuit

Courts requiring a full *Daubert* analysis view an in depth analysis of expert testimony as indispensable when determining whether or not the requirements of Rule 23 have been met. The Fifth Circuit has stated that while “courts are not to insist upon a ‘battle of the experts’ at the certification stage ... in many cases it makes sense to consider the admissibility of the testimony of an expert proffered to establish one of the Rule 23 elements.” *Unger v. Amedisys Inc.*, 401 F.3d at 323 n. 6 (5th Cir. 2005). As “in order to consider Plaintiffs’ motion for class certification with the appropriate amount of scrutiny, the Court must first determine whether Plaintiffs’ expert testimony” is reliable. *Id.* The court concluded that, in the context of securities fraud class actions premised on the fraud on the market theory, a district court cannot treat market efficiency differently from the other preliminary certification issues and must base its ruling on admissible evidence. *Id.* at 325 (“When a court considers class certification based on the fraud on the market theory it must ... base its ruling on admissible evidence [and] questions of market efficiency cannot be treated differently from other preliminary certification issues.”) While *Daubert* is not mentioned in the analysis, and the court was not dealing specifically with the Rule 23 requirements, the clear implication of the ruling is that rulings on preliminary certification issues must be grounded in admissible evidence. As a result, where doubt exists as to the admissibility of the expert evidence proffered to support class certification, the court must conduct a *Daubert* inquiry prior to ruling on the certification question. The Fifth Circuit, in clarifying its meaning with regard to its statement in *Unger* that a court must not insist upon a battle of the experts at the certification stage, stated that while court could not require expert testimony on the question of market efficiency as a matter of law, a court had the authority to hold that the particular expert testimony offered by the plaintiffs was insufficiently reliable to establish market efficiency. *Bell*

v. Ascendant Solutions, Inc., 422 F.3d 307, 314 n. 13 (5th Cir. 2005) (“The district court did not hold ... that expert testimony is required as a matter of law ... rather, the court found the particular expert testimony offered by the plaintiffs to be unreliable, then concluded that there was otherwise insufficient evidence.”). Currently, the Fifth Circuit requires, with regard to class certification, that proponents make a clear showing that the Rule 23 requirements have been met through the use of admissible evidence. As a result, while the Fifth Circuit utilizes a lower standard of proof, comparable to that required for a preliminary injunction, with regard to class certification, it has set forth a stringent standard of reliability for evidence used to meet this standard.

ii. The Seventh Circuit

The Seventh Circuit followed the Fifth Circuit in requiring that any challenges to the reliability of expert testimony be resolved prior to the class certification decision and specifically mandated a full *Daubert* inquiry where necessary. *See, American Honda Motor Co., Inc. v. Allen*, 600 F.3d 813, 815-816 (7th Cir. 2010) (“We hold 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 the class certification motion.”). In *American Honda*, the testimony of an expert was critical to establishing that all plaintiffs had suffered from an identical defect that injured the plaintiffs in the same way. As the expert’s report was necessary to establish the common injury to the purported class, the Seventh Circuit held that it was error not to rule on the admissibility of the evidence prior to certifying the class, as the district court’s failure to do so meant that it had not made all the necessary factual and legal inquiries into the contested issues. While the question of whether a court may weigh and compare admissible testimony was not before the court, the Seventh Circuit’s prior decision,

in *West v. Prudential Securities, Inc.*, 282 F.3d 935 (7th Cir. 2002), wherein it stated that “tough questions must be squarely decided, if necessary by holding evidentiary hearings and choosing between competing perspectives,” strongly suggests that courts may have to declare a winner in a battle between properly admissible experts. *West*, 282 F.3d at 938.

iii. The Eleventh Circuit

The Eleventh Circuit, in *Sher v. Raytheon Co.*, 419 F. App’x 887 (11th Cir. 2011), adopted the reasoning of *American Honda*. The court explicitly stated that the court must both conduct a *Daubert* hearing, in order to determine the admissibility of the proffered evidence, and then determine “facts, from the often conflicting evidence, sufficient to determine whether class certification is or is not appropriate.” *Sher*, 419 Fed.Appx at 891.

iv. The Ninth Circuit

The Ninth Circuit has repeatedly addressed the question of whether or not *Daubert* applies at the certification stage and the Circuit’s analysis has changed significantly under the influence of the Supreme Court’s dicta in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). Initially, in *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010), the court stated 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.” *Dukes*, 603 F.3d at 602 n.22. However, after the Supreme Court’s decision in *Wal-Mart*, the court, in *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970 (9th Cir. 2011) cited *Wal-Mart* and held that “the district court correctly applied the evidentiary standard set forth in *Daubert*,” to its analysis of the defendant’s motion to strike. *Ellis*, 657 F.3d at 982. The Ninth Circuit went on to remand the case after finding that the district court had confused the *Daubert* admissibility standard with the rigorous analysis required by Rule 23 and had not weighed the persuasiveness of the competing

admissible expert testimony in determining whether the proponents had carried their burden of proving the appropriateness of class treatment. *See, id.* (“Instead of judging the persuasiveness of the evidence presented, the district court seemed to end its analysis of the plaintiffs’ evidence after determining such evidence was merely admissible.”).

Despite some initial skepticism, the Ninth Circuit appears to have aligned itself with the weighted *Daubert* approach pioneered by the Fifth, Seventh and Eleventh Circuits. That said, some disagreement remains at the district court level. The Central District has argued that the cursory language regarding the applicability of *Daubert* in *Ellis* should not be read as requiring a full *Daubert* analysis and that the *Daubert* inquiry that the district court had engaged, bore a greater resemblance to the tailored analysis in *Zurn Pex*, than it did to the full *Daubert* approach mandated by *American Honda*. *See, Tait v. BSH Home Appliances Corp.*, No. SA CV 10-0711 DOC (ANx), 2012 WL 6699247 (C.D. Cal. Dec. 20, 2012) (“This Court ... concludes that the Eighth Circuit’s decision in [*Zurn Pex*] perfectly encapsulates the Ninth Circuit’s rule regarding the tailored *Daubert* analysis at class certification.”); *but see, Tietsworth v. Sears, Roebuck and Co.*, No. 5:09-cv-00288-JF (HRL), 2012 WL 1595112 at *7 n. 5 (“Plaintiff cites out-of-circuit authority for the proposition that the Court need not engage in a full *Daubert* analysis at the class certification stage...such an approach appears to be contrary to Ninth Circuit authority.”). While there is some disagreement as to the extent of the *Daubert* analysis, the Ninth Circuit now requires some manner of *Daubert* inquiry at class certification, and given the plain language in *Ellis* the courts in the Ninth will likely require a full *Daubert* analysis.

v. The Sixth Circuit

The Sixth Circuit most recently addressed the question of whether *Daubert* is applicable at the class certification stage in *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517 (6th Cir. 2008).

In *In re Scrap Metal* the circuit held that that neither the district court's refusal to exclude the report of the plaintiff's expert, or the court's decision to forego a *Daubert* hearing constituted an error. However, the Sixth Circuit's reasoning in *In re Scrap Metal* suggests that the *Daubert* threshold applies, at least with regard to the reliability of an expert's methodology, and a *Daubert* hearing may be required in certain circumstances. In affirming the district court's decision not to exclude the testimony of the plaintiffs' expert, the Sixth Circuit held that it could "not say that the district court abused its discretion in admitting [the expert's] testimony when the record shows that he performed his analysis according to a reliable method ... and reliably applied that method to the facts of the case." *Scrap Metal*, 527 F.3d at 533. In noting "that the district court did not abuse its discretion by failing to hold a *Daubert* hearing," the Sixth Circuit pointed out that "the record on the expert testimony was extensive, and the *Daubert* issue was fully briefed by the parties." The clear implication of the ruling is that in the Sixth Circuit, where a district court is not required to hold a *Daubert* evidentiary hearing to qualify an expert witness, see, *Clay v. Ford Co.*, 215 F.3d 663, 667 (6th Cir. 2000), a judge may forego a *Daubert* hearing so long as the testimony receives *Daubert*-like scrutiny.

II. *Recent District Court Decisions Concerning the Appropriatenes of Daubert Hearings at the Class Certification Stage.*

Though a number of circuits have yet to mandate *Daubert* inquiries at the class certification stage, a number of district courts within these circuits have engaged in *Daubert* analyses prior to determining the class certification question.

a. The First Circuit

The First Circuit most recently elucidated its standard for the evaluation of expert testimony during the class certification stage in *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6 (1st Cir. 2008). In *Motor Vehicles*, the First Circuit stated that "under

this circuit's approach, ... a searching inquiry is in order where there are not only disputed basic facts, but also a novel theory of legally cognizable injury." *In re Motor Vehicles*, 522 F.3d at 25-6. As a result, where the methodology of a plaintiff's expert is not well established as being reliable the court must a more rigorous inquiry is required. *See, id.* ("Reliance on a novel theory to establish a primary element of a claim necessitates a more searching inquiry into whether the plaintiffs will be able to prove the pivotal element of their theory."). While *Daubert* is nowhere mentioned, the test seems to envision level of scrutiny akin to that required under *Daubert* at least with respect to the methodology of the plaintiff's expert. Furthermore, in explaining one of its prior decisions, the court noted that it had "rigorously tested the evidence submitted by both sides." *Id.* at 25. This language suggests that the circuit allows a court to indulge in some expert dueling to the extent that it is justified by the novelty of the theory of injury.

Two years after the First Circuit's decision in *In re Motor Vehicles*, the District Court for the District of Massachusetts clearly stated that the court would only consider admissible evidence in determining whether a putative class satisfied the Rule 23 requirements. *See DeRosa v. Mass. Bay Commuter Rail Co.*, 694 F. Supp. 2d 87 (D. Mass. 2010) ("The court considers only admissible evidence in determining whether Rule 23's requirements have been met."). The court also specifically cited to *Daubert* in explaining why it had accorded no weight to a plaintiff's expert's report. Given that this decision to require that expert testimony offered at the class certification stage clear the *Daubert* threshold predated the Supreme Court's decision in *Wal-Mart*, the likelihood that this court's position will be more widely adopted within the First Circuit appears significant.

b. The Second Circuit

The Second Circuit's decision in *In re IPO* clearly disavowed the 'some showing' and 'fatally flawed' standards espoused in *Caridad* and *Visa Check*. *In re IPO*, 471 F.3d at 42 ("Our conclusions necessarily preclude the use of a 'some showing' standard, and ... we also disavow the suggestion in *Visa Check* that an expert's testimony may establish a component of a Rule 23 requirement simply by not being fatally flawed."). *In re IPO* also declined to follow "the dictum in [*Heerwagen v. Clear Channel Commc'ns*, 435 F.3d 219 (2d Cir. 2006)] suggesting that a district judge may not weigh conflicting evidence" regarding a Rule 23 requirement because the issue is identical to one on the merits. *Id.* However, the opinion left open the question of what reliability standards would apply to expert testimony.

While *In re IPO* strongly emphasized the need for legal and factual determinations into issues overlapping with the merits, the Second Circuit stressed, with equal force, the ample discretion of the district court to limit the extent of the inquiry in order to avoid a mini-trial. *Id.* at 41 ("a district judge has ample discretion to circumscribe both the extent of discovery ... and the extent of a hearing to determine whether such requirements are met in order to assure that a class certification motion does not become a pretext for a partial trial on the merits.") The emphasis upon the district court's discretion to limit the proceedings extent of hearings and discovery, as well as the fact that the court did not specifically require that class certification decisions rest upon admissible evidence suggests that district court's may retain substantial leeway in deciding whether or not to forego a full *Daubert* analysis. However, more recent decisions at the district court level illustrate that courts within the Second Circuit have begun to integrate *Daubert* inquiries into their analysis of the certification question. The Southern District of New York stated that Rule 702 and *Daubert* govern the admissibility of expert testimony and

implied that only admissible evidence would be considered in determining whether Rule 23's requirements had been met. *See, In re NYSE Specialists Securities Litig.*, 260 F.R.D. 55, 66 (S.D.N.Y. 2009). The district court explained that the court's "*Daubert* inquiry is limited to whether or not the [expert's reports] are admissible to establish the requirements of Rule 23." *Id.*

c. The Third Circuit

The Third Circuit has forcefully stressed that what is ultimately important is not the admissibility of evidence at trial, but rather that the "factual determinations necessary to make Rule 23 findings must be made by a preponderance of the evidence." *In re Hydrogen Peroxide*, 552 F.3d at 320. The court asserted that "opinion testimony should not be uncritically accepted as establishing a Rule 23 requirement because the court holds the testimony should not be excluded, under *Daubert* or for any other reason." *Id.* at 323. The *In re Hydrogen Peroxide* court also cited approvingly to *Blades v. Monsanto* where the Eighth Circuit affirmed a decision made by the district court where the district court had reviewed all expert testimony, weighted the evidence as it saw fit, and denied a defendant's *Daubert* objection. *See, id.*

The Third Circuit's decision, though, was made against a backdrop of various courts within the circuit pursuing an unweighted *Daubert* approach to class certification. The analysis undertaken by the court in *In re Pressure Sensitive Labelstock Antitrust Litig.*, No. 3:03-MDL-1556, 2007 WL 4150666, at *6 (M.D. Pa. Nov. 19, 2007), provides the paradigmatic example of the unweighted approach. In *In re Labelstock*, the court held that the proponent of class certification has met its burden so long as the expert testimony offered in support of class certification clears the reliability threshold established by *Daubert*. The court stated that "to the extent that [class certification] involves a battle of the experts, it is not appropriate for the Court to determine which expert is more credible at the time." *In re Labelstock*, 2007 WL 4150666, at

*7 (alterations in the original). However, *Labelstock* made clear that “the Court will consider each opinion of the experts, unless it is shown that the opinion is the kind of ‘junk science’ that a *Daubert* inquiry at this preliminary stage ought to screen.” *Id.* (quoting *In re Linerboard Antitrust Litig.*, 203 F.R.D. 197, 217 n. 13 (E.D. Pa. 2001)). The district court feared that Third Circuit precedent did not authorize the mini-trial that would result were the court to weigh the relative persuasiveness of admissible expert testimony. *Id.* The district court in *Hydrogen Peroxide* had performed a similar analysis and the court sought to shift the circuit towards a weighted approach, stating that “weighing conflicting expert testimony at the certification stage is not only permissible; it may be integral to the rigorous analysis Rule 23 demands.” *In re Hydrogen Peroxide*, 552 F.3d at 323. The court also noted that the parties had agreed before the district court that Rule 702 should apply at the certification stage and that, on appeal neither party argued otherwise so the question of the necessity of *Daubert* hearing was not before the court. *See, id.* at 315 n. 13. As a result, while the court enunciated a standard of proof higher than bare *Daubert* admissibility, the decision left open the possibility that the court retained the discretion to consider all evidence and weight it appropriately. However, district courts in the Third Circuit have begun to either explicitly require that evidence proffered in support of, or against, certification clear the *Daubert* admissibility threshold. *See, In re Chocolate Confectionary Antitrust Litig.*, 289 F.R.D. 200 (M.D. Pa. 2012) (“The court finds that a thorough *Daubert* analysis is appropriate at the class certification stage ... in light of the court’s responsibility to apply a rigorous analysis.”); *Neale v. Volvo Cars of North America, LLC*, No. 2:1 O-cv-4407, slip op. at 2 (D.N.J. Mar. 1, 2013) (holding that defendant’s expert did not satisfy *Daubert* and noting that the Supreme Court has expressed doubt as to the inapplicability of *Daubert* at the class certification stage.). As a result, while the Third Circuit has not specifically

required a plenary *Daubert* analysis, courts retain the authority to undertake such an analysis and *Daubert* inquiries are becoming increasingly commonplace.

d. The Fourth Circuit

While the Fourth Circuit's decision in *Gariety* placed the circuit at the forefront of the movement towards a heightened 'rigorous analysis,' the circuit has so far declined to elaborate on the applicability of *Daubert* at the class certification stage. However, two recent district court opinions have justified the appropriateness of *Daubert* hearings prior to certification. The court, in *Rhodes v. E.I. du Pont de Nemours & Co.*, No. 6:06-cv-00530, 2008 WL 2400944, at *11 (S.D. W. Va. June 11, 2008), ordered a *Daubert* hearing *sua sponte* citing the need to protect absent class members, the significance of expert testimony to the litigation, and a desire not to cede the judicial power to any plaintiff capable of hiring a competent expert. *See Rhodes*, 2008 WL 2400944, at *11. The court, however, did not suggest that the 'rigorous analysis' required a *Daubert* hearing but rather that "neither the Federal Rules of Evidence nor the Rules of Civil Procedure prohibit use of *Daubert* at the class certification stage and Rule 23 does not specifically provide for, require, or prohibit specific proceedings." *Id.* The court premised the imposition of a *Daubert* hearing on the court's broad discretion in deciding whether to certify the class, the lack of any known bar to requiring a *Daubert* hearing, and upon considerations of fairness and efficiency. *See id.* *Rhodes* was cited to by another court in the Fourth Circuit even as that court decided against requiring a *Daubert* hearing. In *In re Red Hat, Inc. Sec. Litig.*, 261 F.R.D. 83 (4th Cir. 2009), the court denied the *Daubert* objections of all parties noting that 1) the objections largely concerned the evidentiary bases, rather than the methodologies, of the various experts, 2) the evidentiary bases were necessarily limited by the extent of discovery, and 3) the issues implicated could be resolved through class-wide proof. *See Red Hat*, 261 F.R.D. at 94.

The court then clarified that it did “not mean to suggest that a *Daubert* analysis can never be undertaken at the class certification stage and/or when merits discovery has not occurred,” and provided *Rhodes* as an example of a situation where a *Daubert* hearing might be warranted. *Id.* at 94 n. 14. The district courts in the Fourth Circuit appear to have at least the authority, and perhaps even an obligation, to conduct *Daubert* hearings under certain circumstances.

e. The Tenth Circuit

The Tenth Circuit only recently explicitly clarified that it required more than a mere pleading standard in *Vallario v. Vandehey*. The court, in *Vallario*, stated that “before a district court certifies a class it must ensure that the requirements of Rule 23 are met,” and explained that “district courts ensure Rule 23’s provisions are satisfied by conducting a ‘rigorous analysis,’ addressing the rule’s requirements through findings, regardless of whether these findings necessarily overlap with the merits.” *Vallario*, 554 F.3d at 1266-67. While the Tenth Circuit did not address the applicability of *Daubert* to the class certification proceedings in *Vallario*, district courts, citing the *Daubert* dictum in *Wal-Mart*, have begun to require full *Daubert* analyses at the certification stage. *See Miller v. Farmers Ins. Group*, No. CIV-10-466-F., 2012 WL 8017244, at *5 (“The Supreme Court [has] signaled that the full *Daubert* analysis applies at the class certification stage... although the statement was dictum, the court concludes that *Daubert* and Rule 702 apply with full force at the class certification stage.”) (internal citations omitted); *In re Cox Enters., Inc. Set-Top Cable Television Box Antitrust Litig.*, No. 09-ML-2048-C., 2011 WL 6826813, at *14 (“The Supreme Court recently suggested in dicta that *Daubert* applied to expert testimony at the class certification stage ... therefore the court will evaluate [the expert’s testimony] in light of the requirements outlined in *Daubert* and its progeny.”). District courts in the Tenth Circuit, much like the district courts in the Third Circuit, have decided to adopt the

Supreme Court's *Wal-Mart* language regarding *Daubert* even as they clearly identify the statements as non-binding dicta.

f. The D.C. Circuit

The D.C. Circuit appears to be the last bastion of the 'No Merits' approach although the Court of Appeals hasn't provided any substantial guidance regarding expert testimony. However, there has been a shift in the treatment of expert testimony at the district court level. In 2007, the District Court for the District of Columbia, in discussing the necessary showing by a plaintiff's expert upon a motion to certify an antitrust class, stated that "plaintiffs, at this stage in the proceedings, need only demonstrate a *colorable* method by which they intend to prove class-wide impact." *In re Nifedipine Antitrust Litig.*, 246 F.R.D. 365, 370 (D.D.C. 2007). The *In re Nifedipine* court also asserted that a court, "in reaching its decision, must refrain from either deciding the merits of the plaintiff's claims or indulging in a duel between opposing experts." *Id.* at 369. These formulations have been disavowed by the recent District Court for the District of Columbia opinion in *Kottaras v. Whole Foods*, 281 F.R.D. 16 (D.D.C. 2012). In *Kottaras*, the district court stated that "although this Circuit has not articulated clear standards for evaluating expert evidence at the class certification stage, the Court agrees with other courts that the rule calls for careful and searching analysis." *Kotarras*, 181 F.R.D. at 26. In addition to eschewing the prior 'colorable method' standard, the court intimated that *Daubert* might be applicable. The court cited the disagreement between *American Honda* and *Zurn Pex* as to the extent of the necessary *Daubert* inquiry at the class certification stage and then implied its adoption of the *Seventh Circuit* standard. *See, id.* at 24. While the court did not explicitly characterize its inquiry as *Daubert* inquiry and conspicuously failed to mention the Supreme Court's obiter dictum regarding *Daubert* in *Wal-Mart*, the court considered the expert testimony of both experts in

determining that the plaintiff's expert's "proposed methodology is not sufficiently developed to meet Plaintiff's burden of showing that common questions predominate." *Id.* at 26. As a result, it appears likely that the courts within the D.C. Circuit will no longer apply a 'no merits' approach and will begin to explicitly require either a tailored or a full blown *Daubert* inquiry at the class certification stage.

Conclusion

The federal courts have rapidly integrated the *Daubert* inquiry into the *Falcon* 'rigorous analysis' notwithstanding the paucity of the Supreme Court authority on the subject. Considering the attention that the question of whether *Daubert* applies at the certification has garnered among all of the circuits, the Supreme Court's own silence is deafening. The Court's unwillingness to resolve the dispute definitively became all the more apparent after the Court decided *Comcast Corp. v. Behrend*, 133 S.Ct. 1426 (2013), on grounds that had nothing to do with the court's decision to grant certiorari with regard to the question of *Daubert's* applicability. *See, Comcast*, 133 S.Ct. at 1436 (Ginsburg J. dissenting) (chastising the majority for abandoning the question the Court had instructed the parties to brief). However, despite the Court's unwillingness to squarely face the tough question of *Daubert's* applicability to class certification proceedings, the pre-existing trend towards mandated *Daubert* inquiries, and the Court's obiter dictum in *Wal-Mart*, suggest that *Daubert* will become increasingly entwined with the 'rigorous analysis' mandated by Rule 23.