The Role of *Daubert* in Scrutinizing Expert Testimony in Class Certification

George G. Gordon[*] *and Irene Ayzenberg-Lyman*[**]

ABSTRACT

Courts have substantially heightened the standard of proof for class certification motions over the last several years. In 2011, the Supreme Court in Wal-Mart Stores, Inc. v. Dukes *reaffirmed that Rule 23 requires a "rigorous analysis." That analysis often requires the resolution of conflicting expert opinions. Accordingly, an increasing number of courts have been applying* Daubert v. Merrell Dow Pharmaceuticals, Inc. *to test expert opinions at the class certification stage. The Supreme Court in* Dukes *did not address directly the role of* Daubert *at class certification, but it suggested that at least some form of* Daubert *analysis is proper. The Supreme Court's more recent decision in* Comcast Corp. v. Behrend *reinforced that view. Lower courts, however, continue to differ regarding how to apply the principles of* Daubert *at the class certification stage. Although most courts recognize that there is a role for* Daubert *analysis in assessing expert testimony regarding class certification, they differ regarding the nature and depth of that analysis.*

This article argues that, consistent with Supreme Court precedent, district courts should determine whether expert testimony is admissible under Daubert *prior to giving that testimony any weight in the class certification analysis. The* Daubert *analysis may have to be tailored in some cases where discovery is ongoing and the relevant record is incomplete. Some form of* Daubert *analysis is required, however, even when the defendants have not formally challenged the expert's opinion under* Daubert*. Such an outcome would be consistent with the rigorous analysis required at the class certification stage, and would promote predictability and uniformity.*

TABLE OF CONTENTS

[*] Mr. Gordon is a partner in Dechert LLP's Antitrust Practice Group.

[**] Ms. Ayzenberg-Lyman is an associate in Dechert LLP's Antitrust Practice Group.

The authors express their appreciation to Christine C. Levin, a partner in Dechert's Antitrust Practice Group, for helpful insights and comments. Dechert represented FMC Corporation in *In re Hydrogen Peroxide Antitrust Litigation* in all United States and European proceedings.

INTRODUCTION

For several years, there has been a trend among the courts of appeals to impose a stricter standard of proof to support motions for class certification. No longer satisfied with a "threshold showing"[1] that class certification is appropriate, courts more frequently require a "rigorous analysis"[2] of the elements of Rule 23. In 2011, the Supreme Court in *Wal-Mart Stores, Inc. v. Dukes*,[3] affirmed this standard of proof, emphasizing that "Rule 23 does not set forth a mere pleading standard," but rather requires a plaintiff to "prove that there are *in fact* . . . common questions of law or fact."[4]

This "rigorous analysis" will often require the resolution of conflicting expert reports. The Third Circuit in *In re Hydrogen Peroxide Antitrust Litigation*,[5] for example, held that "[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."[6] As a result, an increasing number of courts have been applying *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[7] to test expert opinion at the class certification stage. The Supreme Court in *Dukes* did not address directly the question of the role of *Daubert* at class certification, but it suggested that at least some form of *Daubert* analysis is proper.[8]

Since the *Dukes* decision, however, lower courts have differed with respect to how to apply the principles of *Daubert* at the class certification stage. Although most courts seem to recognize that there is a role for *Daubert* analysis in assessing expert testimony, they differ regarding the nature and depth of that analysis. Some courts are applying a full *Daubert* review before making a certification decision while others are performing a more tailored *Daubert* analysis.

Recently, in *Comcast Corp. v. Behrend*,[9] the Court again tightened the requirements at class certification.[10] Although *Comcast* touched upon

---

1 *See* Lumco Indus., Inc. v. Jeld-Wen, Inc., 171 F.R.D. 168, 174 (E.D. Pa. 1997).

2 *See In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 323 (3d Cir. 2008).

3 Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011).

4 *Id.* at 2551.

5 *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305 (3d Cir. 2008).

6 *Id.* at 323.

7 Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).

8 *See Dukes*, 131 S. Ct. at 2553–54.

9 Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013).

10 *Id.* at 1432–35 (holding that a class was improperly certified because the method proposed for providing classwide damages did not match the theory of liability accepted in the case).

expert issues as they relate to class certification, it did not decide the question of whether a *Daubert* analysis is required. A fair reading of the Court's opinion, however, is that *Daubert* will continue to have a crucial role at class certification, at least when expert testimony is integral to the analysis of whether the requirements of Rule 23 have been met.

Under *Comcast*, district courts should determine whether expert testimony is admissible under *Daubert* prior to giving that testimony any weight in the class certification analysis. In fact, district courts should engage in a *Daubert* analysis even when the defendants have not formally challenged the expert's opinion under *Daubert*. Such an outcome would be consistent with the rigorous analysis required at the class certification stage, and would promote predictability and uniformity. To be clear, moreover, the *Daubert* inquiry is often only a starting point. It should not end the analysis. Even if an expert's methodology is deemed reliable under *Daubert*, the court must also determine whether the expert testimony is persuasive in establishing the relevant Rule 23 requirement that it is offered to support.

That said, there may be rare cases when, in scrutinizing expert testimony under *Daubert*, a district court should be permitted to take into account differences between class certification and the merits stage of the litigation. At the time of class certification, discovery is often ongoing and the relevant record may be incomplete. As a result, the court may need to tailor the *Daubert* analysis to account for the constraints that the expert faced in reaching his or her conclusions, particularly if the plaintiff can show that it is not at fault for the incomplete record. Indeed, where the record is incomplete in some material respect through no fault of the plaintiff's, defense counsel may want to consider advocating for a tailored or limited analysis to avoid prejudicing a potential later *Daubert* challenge to an expert's opinion based on a more complete evidentiary record.

Experience suggests, however, that parties in class actions often have a fairly robust discovery record with respect to the data relevant to the class determination at the time the class motion is litigated, even if some aspects of merits discovery remain to be completed. If that is the case, there may be little reason to tailor the *Daubert* analysis. Plaintiffs ought not to be permitted to use the argument that the record is not yet complete to hide what is, in reality, a failure of proof.

I. THE "REVIVAL" OF RIGOROUS ANALYSIS AT THE CLASS CERTIFICATION STAGE

In *Eisen v. Carlisle & Jacquelin*,[11] the Supreme Court cautioned district courts against conducting "a preliminary inquiry into the merits of a suit" at the class certification stage.[12] That language, however, arose in the context of an issue related to which party should pay for class notice.[13] It had nothing to do with whether or not the requirements of Rule 23 were met. Nevertheless, plaintiffs advocating for class certification successfully seized on that language to argue that district courts should take a hands off approach to anything that looked remotely like an inquiry into the merits. The Supreme Court's post-*Eisen* direction in *General Telephone Co. of the Southwest v. Falcon*[14] that district courts should engage in a "rigorous analysis" of whether or not Rule 23's requirements were met[15] did little to slow this trend, at least initially.

In this environment, plaintiffs generally were able to obtain class certification by simply having an expert claim that a "plausible methodology" existed to establish a crucial element of the case.[16] Courts required very little in the way of a demonstration that the proffered methodology was reliable or would actually work using the available evidence. Defense experts who disagreed were largely ignored, and courts frequently resolved doubts in favor of certifying the class.

In *In re Linerboard Antitrust Litigation*,[17] for example, the court held that the plaintiffs met Rule 23's requirement that common issues of law and fact predominated over individual issues even though plaintiffs' expert presented little more than "several charts" to support plaintiffs' assertions.[18] The court also dismissed defendants' argument that the predominance of individualized issues made proof of antitrust impact (or "fact of damages") on a classwide basis impossible simply by pointing to the fact that, like in *In re Corrugated Container Antitrust Litig.*,[19] "plaintiffs' expert identified two generally accepted methodologies which

---

11 Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

12 *Id.* at 177.

13 *Id.* at 178.

14 Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147 (1982).

15 *See id.* at 161.

16 *See, e.g.*, California v. Infineon Techs. AG, No. C 06-4333 PJH, 2008 WL 4155665, at *9 (N.D. Cal. Sept. 5, 2008) (stating that courts must "discern only whether plaintiffs have advanced a plausible methodology to demonstrate that antitrust injury can be proven on a class-wide basis").

17 *In re* Linerboard Antitrust Litig., 203 F.R.D. 197 (E.D. Pa. 2001).

18 *Id.* at 215.

19 *In re* Corrugated Container Antitrust Litig., 80 F.R.D. 244 (S.D. Tex. 1978).

he *planned* on using to determine impact and damages."[20] Indeed, reading the *Linerboard* opinion, one would not know that defendants even had an expert.

The approach reflected in *Linerboard* and numerous similar decisions virtually ignored or, at best, paid lip service to the "rigorous analysis" called for by *Falcon*. In *In re Visa Check/MasterMoney Antitrust Litigation*,[21] for instance, although the Second Circuit recognized that a "rigorous analysis" of Rule 23's requirements is required, it ultimately suggested that the *mere existence* of a plaintiff's expert report was sufficient to justify certification as long as the expert report "was not fatally flawed."[22] The court also stressed that the district court "may not weigh conflicting expert evidence or engage in statistical dueling of experts."[23]

Such decisions not only brushed aside *Falcon*, but also reflected little concern for the serious implications of class certification for the parties, particularly defendants. Among other things, certification may induce a substantial settlement of weak claims based simply on the litigation costs incurred in defending a class action. Moreover, the risk of being found liable, even if small, is substantial when faced with a class judgment in the hundreds of millions of dollars, before trebling.[24]

The Seventh Circuit in *Szabo v. Bridgeport Machines, Inc.*[25] was among the first courts to breathe new life into *Falcon*'s direction that an appropriately rigorous analysis of class certification may require the district court to probe beyond the pleadings.[26] In *Szabo*, the district court had

---

[20] *Id.* at 214, 219 (emphasis added).

[21] *In re* Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124 (2d Cir. 2001), *overruled by In re* Initial Pub. Offerings Sec. Litig., 471 F.3d 24 (2d Cir. 2006).

[22] *Id.* at 135.

[23] *Id.* (internal quotation marks omitted); *see also* Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 291–93 (2d Cir. 1999) (acknowledging *Falcon*'s "rigorous analysis" requirement, but reversing district court's denial of class certification even though the plaintiff's statistical expert's report contained deficiencies that "may prove fatal at the merits stage"), *overruled by Initial Pub. Offerings*, 471 F.3d 24.

[24] Some courts did recognize this risk in assessing class certification. *See, e.g.*, Castano v. Am. Tobacco Co., 84 F.3d 734, 752 (5th Cir. 1996) (decertifying multistate action brought on behalf of all smokers and nicotine dependent persons and their families against tobacco companies because the district court failed to consider how variations in state law would affect predominance and superiority). The purported class in *Castano* encompassed approximately ninety million Americans and would have exposed defendants to billions of dollars in damages. *See, e.g.*, Editorial, *A Classy Ruling*, WALL ST. J., May 24, 1996, at A10.

[25] Szabo v. Bridgeport Machs., Inc., 249 F.3d 672 (7th Cir. 2001).

[26] *Id.* at 677–78. Courts before *Szabo* had alluded to the fact that earlier cases had been reading *Eisen* in a manner that conflicted with *Falcon*. For example, in *Waste Management Holdings, Inc. v. Mowbray*, 208 F.3d 288 (1st Cir. 2000), the First Circuit

certified a class in a lawsuit alleging breach of warranty and negligent misrepresentation.[27] The Seventh Circuit vacated the certification order, noting that "[i]t is unlikely that dealers in different parts of the country said the same things to hundreds of different buyers" or that problems with the product were uniform.[28] The *Szabo* court emphasized that district courts must evaluate and weigh facts, which sometimes requires a "court to probe beyond the pleadings before coming to rest on the certification question . . . ."[29]

A change in attitude regarding class certification was also reflected in, and further motivated by, the 2003 amendments to Rule 23 of the Federal Rules of Civil Procedure. Those amendments altered the required timing of class certification motions from "as soon as practicable" to "an early practicable time,"[30] thus "[a]llowing time for limited discovery supporting certification motions."[31] The amendments also removed the provision that class certification decisions "may be conditional," further supporting the notion that a court must consider carefully all the relevant evidence before making a class certification decision.[32]

The Eighth Circuit, in *Blades v. Monsanto Co.*,[33] picked up the thread, and perhaps took things a step further than *Szabo* in emphasizing the potential need at the class stage to resolve disputes overlapping with the merits. In *Blades*, the court held that purchasers of corn and soybean seeds could not demonstrate individual injury with proof common to the class because there was a wide variation in the list prices for seeds and proof of

---

stated:

> *Eisen*, fairly read, does not foreclose consideration of the probable course of the litigation at the class certification stage. Indeed, such a proscription would be inconsistent not only with the Court's subsequent opinion in [*Falcon*], but also with the method of Rule 23. After all, a district court must formulate some prediction as to how specific issues will play out in order to determine whether common or individual issues predominate in a given case.

Id. at 298. In *Szabo*, however, the Seventh Circuit was more forceful in requiring some proof of plaintiffs at the class certification stage, *see Szabo*, 249 F.3d at 677–78, and that case is therefore most often cited for starting this trend.

[27] *Id.* at 673–74.

[28] *Id.* at 677–78.

[29] *Id.* at 677 (internal quotation marks omitted).

[30] FED. R. CIV. P. 23 advisory committee's note (2003) (internal quotation marks omitted).

[31] Weiss v. Regal Collections, 385 F.3d 337, 347 n.17 (3d Cir. 2004).

[32] *See* FED. R. CIV. P. 23 advisory committee's note (2003) (internal quotation marks omitted).

[33] Blades v. Monsanto Co., 400 F.3d 562 (8th Cir. 2005).

injury depended on individualized market conditions.[34] The court stressed that a district court must "look[] behind the pleadings" in conducting a class certification inquiry.[35] Furthermore, the Eighth Circuit recognized that this inquiry "may require the court to resolve disputes going to the factual setting of the case, and such disputes may overlap the merits of the case" and involve conflicting expert opinions.[36]

Szabo and *Blades* laid the foundation for the Third Circuit's *Hydrogen Peroxide* decision, as well as similar decisions from the First and Second Circuits,[37] calling for more rigorous analysis at the class certification stage, including resolution of factual disputes. In *Hydrogen Peroxide*, the Third Circuit held that prior to certifying a class, the district court must (1) make findings that each Rule 23 requirement is met by a preponderance of the evidence, (2) resolve all factual and legal disputes relevant to class certification, even if they overlap with the merits of the cause of action, and (3) consider all evidence, including expert testimony opposing class certification.[38]

The First and Second Circuits have reached the same conclusion. In *In re Initial Public Offerings Securities Litigation*,[39] the Second Circuit held that district courts must resolve all factual disputes relevant to each Rule 23 requirement and find that all of the underlying facts have been established prior to certifying a class, even when such findings overlap with the merits or require an assessment of expert credibility.[40] Later in *In re New Motor Vehicles Canadian Export Antitrust Litigation*,[41] the First Circuit held that district courts must engage in a "searching inquiry" into the validity of the plaintiffs' classwide impact theory.[42] That inquiry requires plaintiffs to establish "the key logical steps behind their theory," and where the theory or an expert's methodology are disputed, the district court must resolve the dispute prior to certifying the class.[43]

The Supreme Court affirmed the reasoning in these cases in *Dukes*, emphasizing that "Rule 23 does not set forth a mere pleading standard," but

---

34 *Id.* at 572–73.

35 *Id.* at 566.

36 *Id.* at 567–70.

37 *See In re* New Motor Vehicles Canadian Exp. Antitrust Litig., 522 F.3d 6 (1st Cir. 2008); *In re* Initial Pub. Offerings Sec. Litig., 471 F.3d 24 (2d Cir. 2006).

38 *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 307–08 (3d Cir. 2008).

39 *In re* Initial Pub. Offerings Sec. Litig., 471 F.3d 24 (2d Cir. 2006).

40 *Id.* at 41–42.

41 *In re* New Motor Vehicles Canadian Exp. Antitrust Litig., 522 F.3d 6 (1st Cir. 2008).

42 *Id.* at 26.

43 *Id.* at 25–29.

rather requires a plaintiff to "prove that there are *in fact* . . . common questions of law or fact."[44] The Court confirmed that this analysis requires the district court to conduct a "rigorous analysis" that frequently "will entail some overlap with the merits of the plaintiff's underlying claim."[45] The Court in *Dukes* also acknowledged that lower courts had misread *Eisen* to forbid any factual inquiry that overlapped with the merits.[46] In *Dukes*, the almost-forgotten legacy of *Falcon* was redeemed.

II. THE IMPLICATIONS OF A "RIGOROUS ANALYSIS" FOR EXPERT TESTIMONY ON CLASS CERTIFICATION

In many cases, expert testimony plays an important role in supporting or opposing class certification. For example, in antitrust litigation, experts are typically asked to opine on the availability of established methodologies for proving essential elements of the plaintiff's claim, such as classwide "impact" (typically defined as the "fact of damages," as opposed to the amount of damages), using proof common to the class.[47] For years, really decades, defendants fought a losing battle, arguing that showing classwide impact would require highly individualized proof and that class experts had failed to show that their proffered methodologies were reliable or would actually work using common proof. Courts were generally dismissive of such arguments, accepting with little analysis the opinion of a class expert that reliable, well-accepted methodologies would allow him or her to show impact using proof common to the class.[48]

After *Dukes*, *Hydrogen Peroxide*, and the other cases discussed above, things have changed. Courts are now required to subject expert testimony to a more rigorous scrutiny at the class certification stage. The question remains, however, how rigorous that scrutiny must be and what criteria ought to be applied to test an expert's opinion.

Courts are not writing on a blank slate in this area. The Supreme Court, in *Daubert*, has already supplied a framework for evaluating the reliability of scientific evidence on the merits.[49] Expert testimony is

---

[44] Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011).

[45] *Id.* (internal quotation marks omitted); *see also* Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1195 (2013) ("Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied.").

[46] *Dukes*, 131 S. Ct. at 2551–52 & n.6.

[47] *See, e.g.*, *In re* Linerboard Antitrust Litig., 203 F.R.D. 197, 214 (E.D. Pa. 2001).

[48] *See, e.g.*, *In re* TFT-LCD (Flat Panel) Antitrust Litig., 267 F.R.D. 291, 311–13 (N.D. Cal. 2010), *abrogated by In re* ATM Fee Antitrust Litig., 686 F.3d 741 (9th Cir. 2012).

[49] Prior to *Daubert*, courts applied a "general acceptance" test adopted in *Frye v.*

admissible only if (1) the expert testifies to valid technical, scientific, or other specialized knowledge and (2) that testimony will assist the fact finder.[50] *Daubert* also established the role of the judge as a "gatekeeper" of expert evidence, requiring trial courts to scrutinize the reliability of any such evidence that is offered by the parties.[51] The Court listed a nonexhaustive list of factors to guide district courts in this role, advising courts to consider "whether a theory or technique . . . can be (and has been) tested," "whether the theory or technique has been subjected to peer review and publication," "the known or potential rate of error," and "general acceptance."[52] Courts now have over twenty years of experience applying and refining the *Daubert* test in various types of cases.

Currently, there is a split amongst the lower courts on whether *Daubert* should be applied at the class certification stage and, if so, to what extent. Courts seem to fall into one of three categories on this issue: (1) courts holding that *Daubert* does not apply at the class certification stage (a shrinking group),[53] (2) courts subjecting expert testimony related to class certification to a full *Daubert* analysis,[54] and (3) courts applying a modified or relaxed *Daubert* analysis.[55] Even courts that refused to apply *Daubert* at class certification, prior to *Dukes*, were willing to test expert testimony more rigorously. For example, in *In re Katrina Canal Breaches Consolidated Litigation*,[56] the court declined to undertake a full *Daubert* examination at the class certification stage,[57] but conducted a "vigorous" review under Rule 702 "limited to the opinion's reliability and relevance to

United States, 293 F. 1013, 1014 (D.C. Cir. 1923), but the Supreme Court in *Daubert* rejected this test, holding that it "was superseded by the adoption of the Federal Rules of Evidence." Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 587 (1993); *see also* FED. R. EVID. 702 ("A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if . . . the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue . . . .").

[50] *Daubert*, 509 U.S. at 589–91 & n.8.

[51] *Id.* at 597.

[52] *Id.* at 593–94.

[53] *See, e.g.*, Serrano v. Cintas Corp., Nos. 04-40132, 06-12311, 2009 WL 910702, at *2 (E.D. Mich. Mar. 31, 2009).

[54] *See, e.g.*, Am. Honda Motor Co. v. Allen, 600 F.3d 813, 815–16 (7th Cir. 2010) (per curiam).

[55] *See, e.g.*, *In re* Wholesale Grocery Prods. Antitrust Litig., No. 09-MD-2090 ADM/AJB, 2012 WL 3031085, at *6 (D. Minn. July 25, 2012).

[56] *In re* Katrina Canal Breaches Consol. Litig., No. 05-4182, 2007 WL 3245438 (E.D. La. Nov. 1, 2007).

[57] *Id.* at *11.

the requirements of class certification under Rule 23."[58]

Plaintiffs in *Katrina Canal Breaches* sought certification of several classes and subclasses of plaintiffs who suffered damages as a result of Hurricane Katrina in the Greater New Orleans area.[59] Defendants sought, among other things, to exclude the report and testimony of plaintiffs' damages expert.[60] In denying this motion, the court emphasized that "comprehensive expert reports as will be required on the merits are not feasible at the Rule 23 stage," and thus limited its inquiry to whether "the expert testimony has sufficient reliability to be presented at the class certification hearing."[61] Specifically, the court focused on whether the expert's approach was "sufficiently trustworthy to assist the Court in determining the requirements of commonality with respect to damages."[62] Finding that the expert was qualified and that his proposed methodology—mass appraisal—was a reliable, generally accepted method for calculating damages, the court denied defendants' motion to exclude even though the expert had not yet engaged in an empirical analysis to test his theory.[63] Ultimately, the court relied on the expert's promise that—when the time comes and data are available—his methodology will account for the multitude of factors that caused damages to plaintiffs.[64]

Similarly, in *Serrano v. Cintas Corp.*,[65] the court rejected the applicability of *Daubert* at class certification, but nevertheless subjected the plaintiffs' expert evidence to a rigorous review and ultimately refused to give that evidence much weight.[66] The court explained the need to scrutinize the plaintiffs' expert evidence "carefully" and stated that it "will give it as much weight as is appropriate under the circumstances."[67] The court ultimately discounted that evidence and denied plaintiffs' motion for class certification.[68]

Specifically, the *Serrano* plaintiffs filed a discrimination case and

---

58 *Id.* at *12.

59 *Id.* at *1.

60 *Id.* at *3.

61 *Id.* at *12.

62 *Id.*

63 *Id.* at *13.

64 *Id.*; *see also id.* at *14 (noting that the expert's report will have to "encompass all the empirical data necessary to create a model to demonstrate damages" if the "matter goes to trial on the merits").

65 Serrano v. Cintas Corp., Nos. 04-40132, 06-12311, 2009 WL 910702 (E.D. Mich. Mar. 31, 2009).

66 *Id.* at *2, *6–*7.

67 *Id.* at *2.

68 *Id.* at *6–*7.

introduced expert evidence in an attempt to show a classwide discriminatory impact.[69] The court concluded that plaintiffs' statistical experts' conclusions were unpersuasive, failing to account for differences in hiring practices across various locations and timeframes.[70] "These discrepancies undermine a conclusion that the statistics are sufficient to demonstrate that there is a common, class-wide discriminatory impact against the putative class members."[71] The court also discounted the conclusions of plaintiffs' sociologist expert, noting that "the Court is skeptical of the scientific reliability of [the expert's] report."[72] Accordingly, even though *Serrano* expressly rejected the application of *Daubert* at class certification, the reliability of plaintiffs' expert evidence—a central tenet of *Daubert*—played a meaningful role in the court's denial of class certification.

The Supreme Court in *Dukes* did not decide whether a district court *must* resolve a *Daubert* challenge before ruling on class certification, but it suggested that at least some form of *Daubert* analysis is proper. In *Dukes*, plaintiffs brought a putative class action alleging that Wal-Mart engaged in gender discrimination.[73] Plaintiffs offered testimony from fact and expert witnesses to demonstrate a common policy of discrimination.[74] Wal-Mart argued that the plaintiffs' expert testimony should be stricken under *Daubert* because the expert's conclusions were vague and imprecise.[75] The district court determined "that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings."[76]

The Supreme Court expressed "doubt" about this conclusion.[77] Although the Court did not address the *Daubert* issue directly, it rejected the efforts of the plaintiffs' expert to characterize discretionary decisions by local Wal-Mart supervisors as common policy, emphasizing that "[i]n a company of Wal-Mart's size and geographical scope, it is quite unbelievable that all managers would exercise their discretion in a common way without some common direction."[78] In so holding, the Court

---

69 *Id.* at *6.

70 *Id.* (noting that defendant "has its own statistical experts who contest the methods, statistical models, and relevant applicant pools used by Plaintiffs' experts in interpreting the data").

71 *Id.*

72 *Id.*

73 Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2547 (2011).

74 *Id.* at 2553.

75 *Id.*

76 *Id.* at 2553–54.

77 *Id.* at 2554.

78 *Id.* at 2555.

suggested that even at the class certification stage courts may need to subject proffered expert testimony to some form of scrutiny under *Daubert*.

The Court's decision in *Comcast* is consistent with this view. In *Comcast*, the Court held that the class was improperly certified because the expert's "model failed to measure damages resulting from the particular antitrust injury on which petitioners' liability in this action is premised."[79] Although the Court did not decide whether a *Daubert* analysis is required at class certification, it engaged in a rigorous analysis of the expert report, suggesting that courts must not only determine whether an expert's methodology is acceptable, but also whether the methodology fits the facts and theories of the case.[80] In essence, then, the Court implied that a *Daubert*, or at least a *Daubert*-like, inquiry was appropriate and perhaps necessary at the class certification stage.

Meanwhile, two courts of appeals—the Seventh and Eleventh Circuits—have held explicitly that a full *Daubert* analysis is appropriate at the class certification stage, and a third—the Fifth Circuit—suggested that full *Daubert* review is necessary in dicta. The Seventh Circuit in *American Honda Motor Co. v. Allen*[81] declared that a "district court must perform a full *Daubert* analysis before certifying the class" "when an expert's report or testimony is critical to class certification."[82] In *American Honda*, plaintiffs—purchasers of Honda's Gold Wing GL1800 motorcycle—brought a purported class action alleging that the motorcycle had a "design defect that prevent[ed] the adequate dampening of 'wobble,' that is, side-to-side oscillation of the front steering assembly about the steering axis."[83] In attempting to demonstrate predominance of common issues, plaintiffs relied heavily on expert testimony—specifically, the "wobble decay standard" developed by their expert.[84] Honda moved to strike this expert report under *Daubert* arguing that the "wobble decay standard was unreliable."[85] The district court purported to undertake a *Daubert* analysis, and appeared to agree with many of Honda's concerns, but ultimately, without an explanation, the court "decline[d] to exclude the [expert] report

---

79 Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1433 (2013).

80 *Id.* at 1434.

81 Am. Honda Motor Co. v. Allen, 600 F.3d 813 (7th Cir. 2010) (per curiam).

82 *Id.* at 815–16; *see also* Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 812 (7th Cir. 2012) (holding that "a district court must make a conclusive ruling on any challenge to [the] expert's qualifications or submissions before it may rule on a motion for class certification" "when [the] expert's report or testimony is 'critical to class certification'" (quoting *Am. Honda*, 600 F.3d at 815–16)).

83 *Am. Honda*, 600 F.3d at 814.

84 *Id.*

85 *Id.*

in its entirety at this early stage of the proceedings."[86] On appeal, the Seventh Circuit vacated the district court's denial of Honda's motion to strike and the court's order certifying the class, holding that the court must perform a full *Daubert* analysis before certifying the class because plaintiffs' expert's testimony was critical to establishing the predominance requirement of Rule 23.[87]

The Eleventh Circuit in *Sher v. Raytheon Co.*[88] followed the Seventh Circuit's reasoning in its entirety and held that the district court must conduct a full *Daubert* analysis when the expert's report or testimony is critical to class certification.[89] This purported toxic tort class action presented a classic battle of the experts that, among other things, required the district court to determine whether plaintiffs' damages expert's regression model was adequate to determine diminution in value to properties in the proposed class area on a classwide basis.[90] The Eleventh Circuit reversed a grant of class certification, concluding that the district court erred in "refus[ing] to conduct a *Daubert*-like critique of the proffered experts's [sic] qualifications."[91] Similarly, the Fifth Circuit in *Unger v. Amedisys Inc.*,[92] while not speaking to Rule 702 or *Daubert* directly, recognized that, "[i]n many cases, it makes sense to consider the admissibility" of expert testimony at the Rule 23 certification 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."[93]

Several district courts also have conducted full *Daubert* analyses in the context of ruling on class certification motions. For example, in *Reed v. Advocate Health Care*,[94] the court found that a *Daubert* analysis was necessary to determine whether plaintiffs had properly supported their motion for class certification.[95] The court conducted lengthy hearings on class certification and analyzed extensively the reliability of plaintiffs'

---

86 Allen v. Am. Honda Motor Co., 264 F.R.D. 412, 425–28 (N.D. Ill. 2009), *vacated*, 600 F.3d 813 (7th Cir. 2010).

87 *Am. Honda*, 600 F.3d at 815–16, 819.

88 Sher v. Raytheon Co., 419 F. App'x 887 (11th Cir. 2011).

89 *Id.* at 890.

90 *Id.* at 889.

91 *Id.* at 890–91.

92 Unger v. Amedisys Inc., 401 F.3d 316 (5th Cir. 2005).

93 *Id.* at 323 n.6 (internal quotation marks omitted).

94 Reed v. Advocate Health Care, 268 F.R.D. 573 (N.D. Ill. 2009).

95 *Id.* at 594 n.20. The court reached this conclusion prior to having the benefit of the Seventh Circuit's guidance in *American Honda*.

expert's method of proving antitrust impact and damages on a classwide basis.[96] Notably, the court held that the "critical issue is not whether [the expert's] techniques are generally accepted," but "whether they are appropriate when applied to the facts and data *in this case*."[97] After a thorough analysis, the court concluded that plaintiffs' expert's methodology did not meet this standard.[98]

Specifically, the *Reed* court concluded that the expert "ha[d] not applied econometric principles and methods reliably to the facts of this case."[99] First, the court determined that there was a "critical[] flaw" in the expert's econometric model because he relied on average wages to calculate common impact, which "unacceptably mask[ed] the significant variation" in wages of the individual members of the class.[100] The court also noted that the expert's multiple regression model was "imprecise" and left "up to half of the causes of the differences in real-world wages unexplained."[101] Moreover, the model was inadequate in calculating impact and damages for twenty percent of the putative class members.[102] As a result of these deficiencies, the *Reed* court regarded plaintiffs' expert's testimony as "essentially inadmissible" under *Daubert*.[103] In addition, because the plaintiffs could not demonstrate a method of proving individual impact using proof common to the class, the court refused to certify the proposed class.[104] A number of other district courts across multiple jurisdictions have applied *Daubert* at the class certification stage

---

96 *Id.* at 582–89.

97 *Id.* at 594.

98 *Id.*

99 *Id.*

100 *Id.* at 590–92.

101 *Id.* at 592–93. The court also noted that

> [p]erhaps this rate is sufficient for the 'economics literature,' but it falls far short of satisfying plaintiffs' legal burden to establish a means of demonstrating by common proof that the members of the putative class were injured, and if so, by how much. [Plaintiffs' expert's] regression is plainly too imprecise to avoid the need for individualized hearings on impact and damages.

Id. at 593.

102 *Id.* at 593.

103 *Id.* at 594.

104 *Id.* at 595–96. Notwithstanding the court's finding that the plaintiff's expert testimony was unreliable, the court denied the defendants' *Daubert* motion. *Id.* The court's rationale for this curious result was that its rigorous analysis of the expert evidence required it "to examine the weight of [the expert's] analysis to the same extent we would have had we ruled it to be admissible." *Id.* at 594. Thus, the court held "against plaintiffs on the substance of [the expert's] analysis" and in effect did not reach "the question of whether it passes muster under *Daubert*." *Id.*

both on initial and renewed motions for class certification.[105]

Moreover, even courts that have been hesitant to engage in a full *Daubert* examination at the class certification stage generally perform a limited *Daubert* review. The Eighth and Ninth Circuits have accepted this approach explicitly, and the Third Circuit in dicta suggested that it would do so. In *Ellis v. Costco Wholesale Corp.*,[106] for instance, the district court concluded that a full *Daubert* review was not required at the class certification stage, but that a tailored *Daubert* review is often necessary.[107] Specifically, the court held that the "requirements of relevance and reliability set forth in [*Daubert*] serve as useful guideposts but the court retains discretion in determining how to test reliability as well as which expert's testimony is both relevant and reliable."[108] The court did not explain how specifically it would tailor *Daubert* for the purposes of Rule 23 analysis, but the court seemingly did so by focusing on whether the expert's methodology was generally accepted rather than on whether it was appropriate when applied to the facts of the case.[109] The Ninth Circuit affirmed the district court's analysis, holding that the court "correctly applied the evidentiary standard set forth in *Daubert*."[110]

---

105 *See, e.g.*, Duling v. Gristede's Operating Corp., 267 F.R.D. 86, 94–95 (S.D.N.Y. 2010) (reviewing the admissibility of plaintiffs' expert report under *Daubert* prior to determining whether a class should be certified); Columbus Drywall & Insulation, Inc. v. Masco Corp., No. 1:04-CV-3066-JEC, 2009 WL 856306, at *2–*5 (N.D. Ga. Feb. 9, 2009) (conducting a *Daubert* analysis prior to considering plaintiffs' renewed motion for class certification); Rhodes v. E.I. DuPont de Nemours & Co., No. 6:06-cv-00530, 2008 WL 2400944, at *10–*12 (S.D.W. Va. June 11, 2008) (discussing the historical application of *Daubert* at the class certification stage and holding that expert opinions must be reliable and relevant under *Daubert*); Srail v. Vill. of Lisle, 249 F.R.D. 544, 557–64 (N.D. Ill. 2008) (applying *Daubert* to assess the admissibility of plaintiffs' experts at the class certification stage, but denying *Daubert* motion).

106 Ellis v. Costco Wholesale Corp., 240 F.R.D. 627 (N.D. Cal. 2007), *aff'd in part, vacated in part*, 657 F.3d 970 (9th Cir. 2011).

107 *Id.* at 635.

108 *Id.* at 635–36 (internal citation omitted).

109 *See id.* at 650 (noting that defendant had not shown that the expert's "research methodology deviates from similar research methodology accepted by courts in Title VII cases or is otherwise 'junk science.' Therefore, as a threshold matter, the court finds [the expert's] qualifications sufficient and her research methodology reliable for Rule 23 purposes." (internal citation omitted)). Notably, this standard differs substantially from the analysis in *Reed*, 268 F.R.D. at 594 (holding that the "critical issue is not whether [the expert's] techniques are generally accepted," but "whether they are appropriate when applied to the facts and data *in this case*").

110 *See* Ellis v. Costco Wholesale Corp., 657 F.3d 970, 982 (9th Cir. 2011); *see also* Tait v. BSH Home Appliances Corp., 289 F.R.D. 466, 490 (C.D. Cal. 2012) (holding that the Ninth Circuit in *Costco* endorsed the use of a tailored *Daubert* analysis at class certification).

The Eighth Circuit also endorsed a limited *Daubert* review. In *In re Zurn Pex Plumbing Products Liability Litigation*,[111] the court noted, "we are not convinced that the approach of *American Honda* would be the most workable in complex litigation or that it would serve case management better than" the tailored *Daubert* analysis followed by the district court.[112] In tailoring its *Daubert* analysis, the district court in *In re Zurn Pex Plumbing Products Liability Litigation*[113] gave weight to the limited discovery that had been performed at the class certification stage of the litigation, concluding that, "[b]ased on the available information for class certification purposes, [the] expert opinion . . . will not be stricken."[114] Specifically, defendants in *Zurn Pex* moved, among other things, to exclude the testimony of plaintiffs' statistician, arguing that he used certain assumptions rather than actual calculations to arrive at his conclusions.[115] The district court emphasized that the expert's "analysis was circumscribed by the availability of [relevant] data" and held that "*at this stage of the litigation*" "[d]efendants' challenges are insufficient to exclude [the expert's] testimony."[116]

The Third Circuit has not had to confront directly the question of whether a full *Daubert* analysis is required at class certification. In *Behrend v. Comcast Corp.*,[117] however, the court suggested that some form of *Daubert* analysis is appropriate.[118] The court interpreted the Supreme Court's *Dukes* decision as "requir[ing] 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 certification stage."[119] The Third Circuit in *Behrend* thus seemingly endorsed at least a tailored *Daubert* review at the class certification stage.[120] The Supreme Court did not address this issue on

---

111 *In re* Zurn Pex Plumbing Prods. Liab. Litig., 644 F.3d 604 (8th Cir. 2011), *cert. dismissed sub nom.* Zurn Pex, Inc. v. Cox, 133 S. Ct. 1752 (2013) (mem.).

112 *Id.* at 612.

113 *In re* Zurn Pex Plumbing Prods. Liab. Litig., 267 F.R.D. 549 (D. Minn. 2010), *aff'd*, 644 F.3d 604 (8th Cir. 2011), *cert. dismissed sub nom. Zurn Pex*, 133 S. Ct. 1752.

114 *Id.* at 556.

115 *Id.*

116 *Id.* (emphasis added).

117 Behrend v. Comcast Corp., 655 F.3d 182 (3d Cir. 2011), *rev'd on other grounds*, 133 S. Ct. 1426 (2013).

118 *See id.* at 204 n.13.

119 *Id.* (citing Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2553–54 (2011)).

120 The *Behrend* court did not decide the issue of whether a *Daubert* analysis is required at class certification because it concluded that Comcast had not raised the issue in a timely manner and therefore it was not properly before the court. *Id.*

appeal.[121]

Following *Behrend*, one district court within the Third Circuit—in *In re Chocolate Confectionary Antitrust Litigation*[122]—concluded that "a thorough *Daubert* analysis is appropriate at the class certification stage of this MDL [multidistrict litigation] in light of the court's responsibility to apply a 'rigorous analysis' to determine if the putative class has satisfied the requirements of Rule 23."[123] *Chocolate Confectionary* was an antitrust MDL brought by direct purchasers of chocolate confectionary products alleging price fixing.[124] The court decided that a full *Daubert* analysis was required to meet *Hydrogen Peroxide*'s directive of performing a "rigorous analysis" to determine whether the requirements of Rule 23 had been satisfied.[125] Because expert testimony was "integral to the court's determination of whether the Direct Purchasers can both prove and quantify their antitrust injury with evidence common to the class," the court concluded that it "must evaluate the reliability and fitness of the proffered testimony."[126]

After performing a thorough *Daubert* analysis, the court held that the expert testimony was imperfect but admissible.[127] The class was certified because plaintiffs met their burden of, among other things, producing sufficient evidence for each element of their claim to show that it was "'*capable of proof at trial* through evidence that is common to the class.'"[128] Notably, in subjecting plaintiffs' experts to full *Daubert* scrutiny, the court was "particularly persuaded by Judge Jordan's concurring and dissenting opinion in *Behrend*," emphasizing that

> "a court may consider the admissibility of expert testimony at least when considering predominance. A court should be hard pressed to conclude that the elements of a claim are capable of proof through evidence common to the class if the only evidence proffered would not be admissible as proof of anything."[129]

---

121 Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1431 n.4 (2013).

122 *In re* Chocolate Confectionary Antitrust Litig., 289 F.R.D. 200 (M.D. Pa. 2012).

123 *Id.* at 208.

124 *Id.* at 205.

125 *Id.* at 208.

126 *Id.*

127 *Id.* at 209–13.

128 *Id.* at 220, 222 (quoting *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311–12 (3d Cir. 2008)).

129 *Id.* at 208 (quoting Behrend v. Comcast Corp., 655 F.3d 182, 215 n.18 (3d Cir. 2011) (Jordan, J., concurring in part and dissenting in part), *rev'd*, 133 S. Ct. 1426 (2013)).

Similarly in *In re Flonase Antitrust Litigation*,[130] the court decided—citing *Dukes* and *Behrend*—to conduct a full *Daubert* analysis at the class certification stage.[131] *Flonase* was an antitrust case where plaintiffs accused GlaxoSmithKline ("GSK") of engaging in improper conduct to delay approval of competing generic versions of the company's brand name drug.[132] GSK challenged plaintiffs' expert's ability to offer a method for showing classwide impact through common proof, arguing that—among other things—differences in transaction prices by location, payment method, and insurance type meant that many proposed class members would not have been injured.[133] Defendants emphasized that plaintiffs' expert's "but-for" world analysis could not account for these uninjured class members because the model relied on aggregated data that masked individual differences.[134] After a full *Daubert* analysis, the court dismissed defendants' challenge, noting that plaintiffs' expert "did much more than simply compare a monthly average . . . price in the actual and 'but-for' worlds . . . . He conducted a sensitivity analysis to test whether his methodology was robust in assessing impact for all . . . types of class members."[135] The court certified a limited class of indirect purchasers.[136]

Unlike in *Chocolate Confectionary* and *Flonase*, many courts in jurisdictions where a full *Daubert* review is not yet required have performed a "relaxed" *Daubert* analysis. In *In re Wholesale Grocery*

---

130 *In re* Flonase Antitrust Litig., 284 F.R.D. 207 (E.D. Pa. 2012).

131 *Id.* at 235 (noting that "the Supreme Court [in *Dukes*] has strongly suggested that a full *Daubert* examination may be necessary at class certification"); *see also id.* (citing Judge Jordan's opinion in *Behrend* for the proposition that a court's ability to exclude expert testimony under *Daubert* is inherent in the rigorous analysis required at class certification).

132 *Id.* at 210–11.

133 *Id.* at 225–30.

134 *Id.* at 225, 227 n.22 (internal quotation marks omitted).

135 *Id.* at 229. *But see* Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, PLC, No. 04-5898, 2010 WL 3855552, at *2, *26–*31 (E.D. Pa. Sept. 30, 2010) (denying class certification in antitrust action alleging GSK filed sham patent infringement litigation to prevent generic entry after thoroughly scrutinizing plaintiffs' expert evidence—without making an explicit reference to *Daubert*—and finding that the expert's analysis failed to show that impact is capable of proof through common evidence because it did not account for "a great number of uninjured class members"); *id.* at *30 (concluding that plaintiffs' expert's yardstick approach was "insufficient because the calculations were made using *average* prices. This evidence says nothing about the actual price paid by each purported class member"). In *Sheet Metal Workers*, the court cited *Reed* with approval for the proposition that the "fundamental issue" in antitrust cases "is not whether the techniques are generally accepted; it is whether they are appropriate when applied to the facts and data *in this case*." *Id.* (citing Reed v. Advocate Health Care, 268 F.R.D. 573, 594 (N.D. Ill. 2009)) (internal quotation marks and alterations omitted).

136 *In re Flonase Antitrust Litig.*, 284 F.R.D. at 237.

Products Antitrust Litigation,[137] for example, the court relied on *Zurn Pex* to perform a tailored *Daubert* analysis.[138] Specifically, the court noted that because "[a]t the class certification stage, the Court, not a jury, is the decision maker, . . . a less stringent analysis is required," and the "*Daubert* inquiry . . . only scrutinizes the reliability of expert testimony in light of the criteria for class certification and the current state of the evidence."[139] In this antitrust action, the battle of the experts predictably focused on the predominance requirement of Rule 23—whether plaintiffs could show impact on a classwide basis.[140] Plaintiffs produced expert testimony to attempt to prove impact.[141] The court concluded that a full *Daubert* analysis was not necessary in this case because, even assuming reliability, plaintiffs' expert's methods could not be used to show common impact through common evidence.[142] Specifically, the expert relied on economic theory to presume that all purchasers in the affected areas paid supracompetitive prices, but failed to *actually prove* that any retailer had actually charged supracompetitive prices.[143] Because plaintiffs failed to meet their burden in showing that impact can be proven through common evidence, the court denied their motion for class certification.[144]

Other courts analyzing the reliability of an expert's methodology under a tailored *Daubert* review concentrate on whether that methodology is widely accepted rather than whether it is appropriate when applied to the facts and data in the particular case. In *Schafer v. State Farm & Fire Casualty Co.*,[145] for instance, the court held that "the review of an expert's proffered evidence at class certification should be vigorous but limited to the opinion's reliability and relevance to the requirements of class certification under Rule 23."[146] Accordingly, the expert's "methodology must show some hallmarks of reliability whether though peer review or use

---

137 *In re* Wholesale Grocery Prods. Antitrust Litig., No. 09-MD-2090 ADM/AJB, 2012 WL 3031085 (D. Minn. July 25, 2012), *aff'd*, 752 F.3d 728 (8th Cir. 2014).

138 *Id.* at *6.

139 *Id.*

140 *Id.* at *6–*7.

141 *Id.* at *7.

142 *Id.*

143 *See, e.g.*, *id.* at *10–*11.

144 *Id.* at *17.

145 Schafer v. State Farm & Fire Cas. Co., No. 06-8262, 2009 WL 799978 (E.D. La. Mar. 25, 2009).

146 *Id.* at *3 (internal quotation marks omitted). As discussed above, the Fifth Circuit in *Unger* suggested in dicta that a full *Daubert* analysis may be required at the class certification stage. *See* Unger v. Amedisys Inc., 401 F.3d 316, 323 n.6 (5th Cir. 2005). Should the Fifth Circuit be faced with this issue directly, therefore, the *Schafer* standard may be deemed inadequate.

of generally-accepted standards or methods."[147] Under this standard, expert testimony is struck if it is "neither relevant nor useful."[148]

In sum, recent caselaw indicates that there is little meaningful debate as to whether *Daubert* principles have a role in class certification analysis—the split amongst the courts instead focuses on *how Daubert* should be applied. Although some courts require a full *Daubert* analysis prior to certifying the class, others advocate a narrower inquiry tailored to the issues raised in the particular case.

REFLECTIONS AND CONCLUSIONS

The Supreme Court in *Comcast* and in *Dukes* made it clear that district courts have an obligation to rigorously analyze the evidence in support of class certification—including expert testimony—in deciding whether to certify a class. The question that continues to confound the courts is the proper analysis to apply when examining expert evidence offered in support of class certification. Recent caselaw suggests that district courts should apply *Daubert* at the class certification stage absent compelling reasons not to do so. The *Dukes* Court emphasized that it is "not the raising of common questions" that is significant to class certification, "but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation."[149] In *Daubert*, the Court developed a framework for analyzing whether or not expert evidence will reliably assist in generating such "common answers," and there is no reason courts should not make use of that framework at the class certification stage. Indeed, if an expert's opinion does not satisfy *Daubert*'s admissibility requirements, it cannot be used at trial and, therefore, should not be considered an appropriate basis for class certification.

In scrutinizing expert evidence for class certification purposes, therefore, courts should adopt the *American Honda* approach and conduct a full *Daubert* analysis where the expert testimony is critical to class certification. That approach is not only consistent with the caselaw, but also would allow for predictability and uniformity of outcomes. The *Daubert* framework has been in place for twenty years, and has been thoroughly refined and further developed over those years. Trying to apply a modified *Daubert* framework—whatever that means in practice—would

---

147 *Schafer*, 2009 WL 799978, at *3 (internal quotation marks omitted).

148 *In re* First Am. Corp. ERISA Litig., Nos. SACV 07-01357-JVS (RNBx), CV 07-07602; CV 07-07585, SACV 08-00110, 2009 WL 928294, at *4 (C.D. Cal. Apr. 2, 2009).

149 Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011) (internal quotation marks omitted).

inject uncertainty into the class certification process and lead to inconsistent results and forum shopping.

One of the interesting—though unanswered—issues raised by the parties in *Comcast* was whether the district court should engage in a *Daubert* analysis when considering a class certification motion even if a defendant has not asserted an affirmative *Daubert* challenge to an expert's opinion. The Third Circuit held that the district court need not apply *Daubert* where the defendant had not raised such a challenge.[150] The Supreme Court did not address this question in reversing the Third Circuit's judgment.[151] Recent caselaw, however, suggests that district courts may indeed have an affirmative duty to evaluate expert testimony under *Daubert*, even where defense counsel did not bring a *Daubert* challenge.[152]

Where expert testimony is integral to one or more of the elements of Rule 23, it would seem appropriate for the court to conduct a *Daubert* review even in the event that a *Daubert* motion had not been filed. Such scrutiny is part of the court's obligation to undertake a "rigorous analysis" of the evidence in support of class certification, and a court cannot avoid that responsibility simply because of a litigation decision by defense counsel not to file a *Daubert* challenge. Courts have, in fact, recognized that even where expert testimony passes the *Daubert* test, a further analysis is required to ensure that the evidence is persuasive in establishing the relevant Rule 23 requirement.

In *Hydrogen Peroxide*, for example, the Third Circuit emphasized that expert "opinion testimony should not be uncritically accepted as

---

150 Behrend v. Comcast Corp., 655 F.3d 182, 204 n.13 (3d Cir. 2011), *rev'd on other grounds*, 133 S. Ct. 1426 (2013).

151 Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1435–36 (2013).

152 Indeed, Judge Jordan's opinion below—concurring in part and dissenting in part—suggests that the Court should resolve a *Daubert* challenge sua sponte when necessary to resolve a challenge to class certification. Judge Jordan recognized that Comcast did not bring a *Daubert* challenge, but emphasized that "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," and concluding that plaintiffs cannot meet their burden of showing that their "theory . . . is capable of common proof" "[i]f the only common proof offered is inadmissible expert testimony." *Behrend*, 655 F.3d at 215 n.18 (Jordan, J., concurring in part and dissenting in part); *see also id.* at 213 n.17 ("Pointing out analytical problems central to the certification question is no frolic and detour. It is our obligation."); *see also* Kermit Roosevelt III, *Defeating Class Certification in Securities Fraud Actions*, 22 REV. LITIG. 405, 425 (2003) ("An expert who testifies . . . that every plaintiff has suffered injury is in effect testifying that injury may be established by common proof. However, the decision as to whether the elements of a claim are susceptible to common proof is for the judge and may not be handed off to experts.").

establishing a Rule 23 requirement merely because the court holds the testimony should not be excluded, under *Daubert* or for any other reason."[153] Ultimately, the district court must be persuaded by expert testimony, and testimony that is unreliable or that is not grounded in the facts of the case is, by definition, not persuasive. Where expert testimony is integral to the class certification inquiry, therefore, *Daubert* is a *necessary* starting point to the court's analysis, and plaintiffs bear the burden of demonstrating that the expert's methodology is reliable and consistent with the facts at issue in the case.[154]

That said, in applying *Daubert* at class certification, there may be cases in which courts should be permitted to give due consideration to the fact that, at this stage of the case, the discovery record may be incomplete. For certain issues the absence of a complete discovery record ought not to matter. For example, whether an expert's proposed methodology is generally accepted and reliable is not dependent on the completeness of the record evidence and should be evaluated thoroughly by the district court in making the class certification decision. With respect to other elements of the *Daubert* analysis, however, the incomplete discovery record might—in rare cases—make it necessary to tailor the analysis.

The facts of *Zurn Pex* are illustrative on this point. There, plaintiffs brought a products liability action and moved for class certification.[155] To support the predominance prong of Rule 23, plaintiffs offered expert testimony.[156] Defendants moved to, among other things, exclude the testimony of plaintiffs' statistician, arguing that he used certain assumptions rather than actual calculations to arrive at his conclusions.[157] The district court held that "*at this stage of the litigation*" "[d]efendants'

---

153 *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 323 (3d Cir. 2008); *see also* Behrend v. Comcast Corp., 264 F.R.D. 150, 155 (E.D. Pa. 2010) ("A district court must not uncritically accept expert opinion testimony as establishing a Rule 23 requirement merely because it holds the testimony should not be excluded, under *Daubert* or any reason." (internal quotation marks and alteration omitted)), *aff'd*, 655 F.3d 182 (3d Cir. 2011), *rev'd on other grounds*, 133 S. Ct. 1426 (2013).

154 *See, e.g.*, Rhodes v. E.I. DuPont de Nemours & Co., No. 6:06-cv-00530, 2008 WL 2400944, at *12 (S.D.W. Va. June 11, 2008) (concluding that the court did not have sufficient information to determine whether plaintiffs met their burden under Rule 23 because plaintiffs' experts' methodology must be tested under *Daubert* and thus a *Daubert* hearing was required).

155 *In re* Zurn Pex Plumbing Prods. Liab. Litig., 267 F.R.D. 549, 554 (D. Minn. 2010), *aff'd*, 644 F.3d 604 (8th Cir. 2011), *cert. dismissed sub nom.* Zurn Pex, Inc. v. Cox, 133 S. Ct. 1752 (2013) (mem.).

156 *Id.* at 555.

157 *Id.* at 556.

challenges are insufficient to exclude [the expert's] testimony."[158] The court emphasized that the expert's "analysis was circumscribed by the availability of [relevant] data," noting that "as merits discovery unfolds and more information becomes available," the expert's conclusions would have to be reevaluated and may ultimately "not be admissible."[159]

There may be situations, such as that in *Zurn Pex*, in which a tailored *Daubert* review is appropriate under the circumstances. Experience suggests, however, that—particularly given the amendments to Rule 23—the parties are likely to have developed a robust discovery record, at least with respect to the information material to the class determination, by the time the class motion is litigated. Moreover, if the absence of a complete record is to be used as a basis for applying a tailored *Daubert* analysis, the plaintiff should have to show, at a minimum, that (1) it did not have the opportunity to obtain the missing evidence through no fault of its own and (2) that there are good reasons to believe that it will be able to do so as discovery proceeds. Otherwise, the class motion should be denied based on a failure of proof. As a result, our view is that there should be a strong presumption in favor of applying *Daubert* at the class certification stage, with a recognition that in certain cases there may be a need to apply a more tailored *Daubert* analysis if there is a sufficiently strong showing that the circumstances require it.

Finally, it is important to note that not only must courts be careful in tailoring their *Daubert* analyses in cases where the expert testimony is affected by an incomplete record, but also *the defendants* ought to carefully tailor their *Daubert* arguments in such cases. Specifically, defendants face certain risks in making a full-blown *Daubert* attack at the class certification stage. If, for example, a defendant attacks the methodology, the data, and the manner in which the data are being used in the face of an incomplete record, it might—depending on the circumstances—foreclose a later attack at a point in time when the complete record might make such an attack more powerful. Once the court has concluded that the expert's methodology is reliable and admissible, there will be at least a de facto presumption against the *Daubert* challenge at the merits stage. Accordingly, defendants should consider limiting any *Daubert* attack to

---

158 *Id.* (emphasis added).

159 *Id.* The court's analysis in *Katrina Canal Breaches* is based on a similar rationale even though the court declined to undertake an official *Daubert* review at the class certification stage. *See In re* Katrina Canal Breaches Consol. Litig., No. 05-4182, 2007 WL 3245438, at *11–*13 (E.D. La. Nov. 1, 2007). The court scrutinized the expert's methodology, but refused to exclude the testimony based on a lack of empirical analysis because the expert did not yet have the necessary data to engage in such analysis. *Id.* at *13.

avoid the risk of creating unfavorable law of the case that would constrain them in the future should the class in fact be certified.