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CLASS CERTIFICATION

Three Akin Gump attorneys discuss the Ninth Circuit's ruling in *Sali*, where the court held that a plaintiff's evidence for class certification need not be admissible. The authors examine how this decision bears on whether a district court must ensure that all expert testimony at the class certification stage satisfies *Daubert*.

INSIGHT: The Ninth Circuit's Inadvertent Case For Imposing *Daubert* at Class Certification



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Defense challenges to plaintiffs' expert witnesses under *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579 (1993), are an important tool for defeating class certification, but some courts are reluctant to perform a full *Daubert* analysis at the class certification stage. *See, e.g.*, *In re Zurn Pex Plumbing Prod. Liab. Litig.*, 644 F.3d 604, 612-13 (8th Cir. 2011) (adopting a more lenient ''focused *Daubert*'' inquiry at the class certification stage because ''a court's inquiry on a motion for class certification is tentative, preliminary, and limited'') (internal quotation marks omitted); *Beltran v. InterExchange Inc.*, No. 1:14-cv-03074, 2018 BL 108181 (D. Colo. March 27, 2018) (same); *In re Scotts EZ Seed Litig.*, 304 F.R.D. 397, 412 n.8 (S.D.N.Y. 2015) (analyzing ''whether each of [the expert's] proposed methodologies satisfy *Comcast*'' rather than conducting a full *Daubert* analysis).

On May 3, 2018, the Ninth Circuit in *Sali v. Corona Reg'l Med. Ctr.*, 889 F.3d 623 (9th Cir. 2018), cited those courts as support for its holding that a plaintiff's evidence ''in support of class certification . . . need not be admissible.'' *Id.* at 632.

The Ninth Circuit in *Sali* split with the Fifth Circuit ''on the extent to which admissible evidence is required at the class certification stage.'' 889 F.3d at 632 (citing *Unger v. Amedisys Inc.*, 401 F.3d 316, 319 (5th Cir. 2005)). This split—noteworthy in its own right—raises the temperature on a question that the Supreme Court left open in *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013): in order to ''conduct a rigorous analysis'' of the Rule 23(b) factors, *id.* at 35, must district courts ensure that all expert testimony at the class certification stage satisfies *Daubert*?

This article suggests that—by rejecting an admissibility requirement for lay testimony at the class certification stage—*Sali* inadvertently offers a novel justification for conducting a full *Daubert* inquiry into the admissibility of expert testimony at the class certification stage. The basis for this justification is the difference between lay and expert testimony in class action proceedings.

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The Difference Between Lay and Expert Testimony

Lay and expert testimony is generally admissible if it is reliable and relevant. Expert testimony is reliable if ''the reasoning or methodology underlying the testimony is scientifically valid and [if] that reasoning or methodology properly can be applied to the facts in issue.'' *Daubert*, 509 U.S. at 592–93. Lay testimony is reliable if it is ''rationally based on the perception of the witness'' and ''not based on scientific, technical, or other specialized knowledge[.]'' FED. R. EVID. 701(a), (c). Lay and expert testimony are both relevant if they ''will assist the trier of fact to understand or determine a fact in issue.'' *Daubert*, 509 U.S. at 592; *see also* Fed. R. Evid. 701(b).

In *Sali*, the testimony at issue was the declaration of a paralegal who had ''used Excel spreadsheets to compare'' the times that plaintiffs clocked-in and clocked-out of their worksite, ''using a random sampling of timesheets.'' 889 F.3d at 630. The district court excluded the declaration as improper lay testimony because the paralegal lacked ''personal knowledge to attest to the fact that the data accurately represents [p]laintiffs' employment records,'' and did not explain his method of analysis. *Id*. at 630-31. The Ninth Circuit reversed because the defendant ''did not dispute the authenticity of the payroll data underlying [the paralegal's] analysis, nor did it directly dispute the accuracy of his calculations.'' *Id*. at 633. Most importantly, the Ninth Circuit explained that ''[b]y relying on admissibility alone as a basis to strike the [paralegal's] declaration, the district court rejected evidence that likely *could have been presented in an admissible form at trial*.'' *Id*. (emphasis added).

Sali's reasoning highlights a critical difference between lay and expert testimony: plaintiffs' ability to cure defects in reliability between the class certification stage and trial.

Unlike lay testimony, plaintiffs often cannot cure defects in an expert's reliability under *Daubert* (scientific validity, proper application of methodology to the facts) between the class certification stage and trial. In other words, additional merits discovery after the class certification stage is unlikely to afford plaintiffs' expert an opportunity to revise the expert report in a manner that resolves a court's *Daubert* reliability concerns.

That is because the discovery record at the class certification stage is often sufficiently developed such that it mirrors the final discovery record available at the time of trial. The Supreme Court's decision in *Comcast* requires district courts to conduct a ''rigorous analysis'' of the Rule 23(b) factors at the class certification stage, which will ''frequently entail overlap with the merits of the plaintiff's underlying claim.'' 569 U.S. at 34 (internal quotation marks and citation omitted). This ''rigorous analysis'' of Rule 23(b) factors demands ''a higher standard than reliability under *Daubert*,'' and in many cases involves ''evaluating the conclusions and results of competing experts.'' *See In re Rail Freight Fuel Surcharge Antitrust Litig.*, 292 F. Supp. 3d 14, 91 (D.D.C. 2017); *see also Parko v. Shell Oil Co.*, 739 F.3d 1083, 1085 (7th Cir. 2014); *In re Processed Egg Prod. Antitrust Litig.*, 81 F. Supp. 3d 412, 417 (E.D. Pa. 2015); *In re High-Tech Employee Antitrust Litig.*, 985 F. Supp. 2d 1167, 1187 (N.D. Cal. 2013). Even where merits discovery produces substantial new information unavailable at the class certification stage, that information is highly unlikely to resurrect a scientifically invalid expert opinion or an improper application of the expert's methodology to the facts.

Lay testimony, however, is fundamentally different. As the Ninth Circuit explained in *Sali*, plaintiffs may be able to resolve ''formalistic evidentiary objections'' that defendants raise at the class certification stage by ''present[ing evidence] in an admissible form at trial.'' 889 F.3d at 633. Plaintiffs cure those objections by presenting or introducing lay testimony in a way that, for example, demonstrates first-hand knowledge or removes hearsay. By this logic, *Sali* suggests a novel justification for imposing *Daubert*'s reliability requirements on expert testimony at the class certification stage: the static, fixed character of expert testimony between the class certification stage and trial.

Daubert Is Most Faithful to *Comcast*

Far from the ''evidentiary formalism'' the Ninth Circuit criticized in *Sali*, 889 F.3d at 633, to impose *Daubert*'s reliability requirements on expert testimony at the class certification stage is most faithful to the ''rigorous analysis'' of the Rule 23(b) factors required after *Comcast*. *See* 569 U.S. at 35. Expert testimony failing *Daubert*'s reliability prong necessarily also fails the heightened reliability standard for such a rigorous analysis. Defendants therefore should take comfort that — despite rejecting an admissibility requirement for evidence at the class certification stage — *Sali*'s reasoning tends to support the argument that district courts must conduct a full *Daubert* analysis of expert testimony at the class certification stage.

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