FROM THE

EDITOR

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Use of Expert Testimony at the Class Certification Stage After *Wal-Mart v. Dukes*

by Stephen J. Newman

The United States Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*[1] sent a strong message to federal courts to look skeptically at class certification orders sought by plaintiffs' counsel. Many questions remain, however, as to how the opinion should be applied, and what "rigorous analysis"[2] of the class certification elements entails. In particular, the lower courts have not yet fully resolved how expert testimony and statistical proof should be considered. Further clarity from the Court may yet be required to ensure that lower courts follow the message intended to be sent by the *Wal-Mart* decision: that the lower courts enforce all the requirements of Rule 23, and ensure that competent evidence supports whatever conclusions are drawn during class certification proceedings.

Wal-Mart involved the largest employment class action in history—1.5 million female employees of the national retailer who allegedly were denied equal pay or access to promotions as a result of Wal-Mart's practice of giving individual managers substantial discretion in pay and promotion decisions.[3] According to plaintiffs, even though Wal-Mart prohibited discrimination as a matter of company policy, as a practical matter women were still disadvantaged because statistical evidence showed that women were paid less and were less likely to be promoted, and that "a strong and uniform 'corporate culture' permits bias against women to infect, perhaps subconsciously, the discretionary decisionmaking of each one of Wal-Mart's thousands of managers—thereby making every woman at the company the victim of one common discriminatory practice."[4] The Supreme Court ordered reversal of the class certification order on the grounds that it did not comply with Federal Rule of Civil Procedure 23(b) or Rule 23(a)(2). All Justices agreed that claims for monetary relief may not be certified under the lower standard set forth in Rule 23(b)(2) ("the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole"), on the grounds that whenever individualized monetary relief is sought, the proponent of the class must prove what is required under Rule 23(b)(3): that common issues predominate over individual ones and that class litigation is superior to other forms of dispute resolution.[5]

The Court split 5-4 on the proper standard for analyzing whether the class satisfied the requirement of Rule 23(a)(2) that "there are questions of law or fact common to the class." Writing for the Court, Justice Scalia found that the liability theory was simply too broad to be asserted on a common basis:

> Here respondents wish to sue about literally millions of employment decisions at once. Without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*.[6]

The plaintiffs had relied heavily on both anecdotal evidence and statistics showing that women did not fare as well as men under Wal-Mart's discretionary system, but the Court determined that the evidence did not sufficiently tie the outcome of Wal-Mart's processes to any common source of unfairness.[7] Quoting Judge Alex Kozinski's dissent in the Ninth Circuit, the Supreme Court's opinion noted that Wal-Mart's female employees

> held a multitude of different jobs, at different levels of Wal-Mart's hierarchy, for variable lengths of time, in 3,400 stores, sprinkled across 50 states, with a kaleidoscope of supervisors (male and female), subject to a variety of regional policies that all differed. . . .

> Some thrived while others did poorly. They have little in common but their sex and this lawsuit.[8]

The Supreme Court also criticized the district court's and the Ninth Circuit's uncritical acceptance of plaintiffs' statistical proof without determining whether it met the *Daubert* standard for admissibility of expert or scientific testimony.[9] However, the Supreme Court did not base its decision on the *Daubert* issue and did not explain how competing expert testimony should be evaluated at the class certification stage.[10]

Before *Wal-Mart*, the Third Circuit was a leading proponent of aggressive review of expert testimony presented at the class certification stage.[11] It has continued to follow this approach: "Weighing conflicting expert testimony at the certification stage is not only permissible; it may be integral to the rigorous analysis Rule 23 demands."[12] The Seventh Circuit agrees that careful evaluation of the expert testimony is critically important to protect both sides' rights at the class certification stage.[13] The Ninth Circuit also recognizes now, contrary to its pre-*Wal-Mart* rulings,[14] that at the class certification stage, "[u]nder *Daubert*, the trial court must act as a 'gatekeeper' to exclude junk science that does not meet Federal Rule of Evidence 702's reliability standards by making a preliminary determination that the expert's testimony is reliable."[15] Moreover, the trial court may not cease its analysis after it finds that the class proponent's evidence of commonality (or another certification element) is admissible under *Daubert*.[16] Rather, a fair reading of the Third, Seventh, and Ninth Circuit case law suggests that when both the proponent and the opponent of the class tender admissible expert testimony that is relevant to one of the class certification elements (such as commonality or typicality), the trial court must determine which testimony is more persuasive, recognizing that the proponent of the class has the burden of proof.

The Eighth Circuit, by contrast, approved use of a "tailored" *Daubert* analysis in *In re Zurn Pex Plumbing Product Liability Litigation*.[17] *Zurn* involved a claim that certain plumbing fittings had design defects dooming them to fail before the end of their warranted life, and plaintiffs presented testimony about tests designed to show the rate of deterioration in the fittings as well as the statistical likelihood of failure. Defendants unsuccessfully objected to this testimony as scientifically unpersuasive, and on appeal the Eighth Circuit upheld an order certifying a class consisting of all homeowners who had installed the plumbing fittings, whether or not they had leaked. In permitting a less stringent application of *Daubert*, the Eighth Circuit explained that because the primary goal of *Daubert* is to prevent a jury from being misled by junk science, *Daubert* is less significant in class certification proceedings, where the decision is made solely by the judge.[18] Critically, the *Zurn* defendant did not offer its own experts who performed their own analysis, but merely challenged the data and techniques relied upon by the plaintiffs, and this litigation decision at the district court level may have affected the outcome.[19] The *Zurn* approach, if followed widely, may create a significant escape route from *Wal-Mart*'s directive that all certification elements be subject to rigorous scrutiny.[20]

One example of a district court apparently straining to avoid the implications of *Wal-Mart* is *Gray v. Golden Gate National Recreation Area*, where the Northern District of California certified a single class consisting of those who "use wheelchairs, scooters, crutches, walkers, canes, or similar devices to assist their navigation" and "those who due to a vision impairment use canes or service animals for navigation," to pursue claims under the Federal Rehabilitation Act.[21] Plaintiffs claimed a large number of barriers to access to public facilities, ranging from steep slopes on hillsides, to lack of Braille or audio exhibit descriptions, to lack of wheelchair access to beaches. The district court declined to apply *Wal-Mart*'s warnings about the need to employ rigorous scrutiny to determine whether the litigation may resolve common questions (such as, what does someone who uses a seeing-eye dog because she cannot see have in common with someone who uses a wheelchair because he cannot walk?), and found that *Wal-Mart* had little application beyond the employment context.[22] On reconsideration, the district court found that *Ellis* did not meaningfully change the law or require more careful analysis of the plaintiffs' expert testimony under *Daubert*.[23]

In *Cholakyan v. Mercedes-Benz, USA, LLC,* by contrast, the Central District of California recognized that *Wal-Mart* and *Ellis* did effect a significant change in how expert testimony must be considered at the class certification stage.[24] In *Cholakyan*, the plaintiff attempted to certify a class of Mercedes vehicle owners who suffered water leakage problems. After considering both sides' expert testimony, the district court concluded that there was no single source of potential water leakage common to the proposed class, as there was no single "water management system" in the vehicles in the proposed class. Rather, there were multiple systems that worked differently in different vehicles, and the plaintiff's expert failed to present any reliable evidence of any common flaw leading to leakage similar to what the plaintiff experienced.[25]

The *Daubert* question remains a critical one for practitioners, and specific guidance from appellate courts may be necessary to ensure that trial courts do not evade *Wal-Mart* by failing to address challenges to class proponents' expert testimony. For a defendant to receive due process at a class certification hearing, its evidence must be considered and the district court must not disregard its duty to determine which of the contradictory, but nevertheless admissible, evidence should be credited. (And the Seventh Circuit recognized in *Messner* that this rule also protects plaintiffs when their expert testimony is based on superior science.) The danger still remains in many jurisdictions, in spite of helpful authority from the Supreme Court, that lower courts will permit improper "delegation of judicial power to the plaintiffs, who can obtain class certification just by hiring a competent expert," without fully examining which side's expert presentation adheres more closely to reliable scientific techniques.[26]

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Endnotes

1 131 S. Ct. 2541 (2011).

2 *Id.* at 2551 (quoting General Telephone Co. v. Falcon, 457 U.S. 147, 160 (1982), and Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 (1978)).

3 *Id.* at 2548.

4 *Id.*

5 *Id.* at 2557-61. The Court did not address when certification of monetary relief claims would be appropriate under Rule 23(b)(1), which often is used when monetary claims may exceed a common fund, other than to reference its previous opinion in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 614 (1997). *Wal-Mart*, 131 S. Ct. at 2558 n.11.

6 *Id.* at 2552.

7 *Id.* at 2555.

8 *Id.* at 2557.

9 *Id.* at 2553-54. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), interprets Federal Rule of Evidence 702 and holds that even though scientific theories need not be "generally accepted" by experts in the field before being presented in court, judges nonetheless must exclude expert testimony that is not reliable, taking into account such factors as whether the theory presented is testable and/or has been tested, whether it has been accepted in peer-reviewed publications, and what error rate is associated with any practical applications of the theory.

10 *Wal-Mart*, 131 S. Ct. at 2554; *see also* Boden v. Walsh Group, No. 06 C 4104, 2012 WL 1079893, at *6 (N.D. Ill. Mar. 30, 2012) (expressing uncertainty as to what sort of statistical or anecdotal proof would satisfy the *Wal-Mart* standard; certification denied as to certain classes but granted as to one); Peterson v. Seagate U.S., LLC, 809 F. Supp. 2d 996, 1008-09 (D. Minn. 2011) (noting that Supreme Court in *Wal-Mart* evaluated relevance of expert testimony, and partially excluding expert testimony in connection with decertification motion).

11 *See In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 323 (3d Cir. 2009).

12 Gates v. Rohm & Haas Co., 655 F.3d 255, 269 (3d Cir. 2011) (quoting *Hydrogen Peroxide*, 552 F.3d at 323).

13 *See* Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 812-13 (7th Cir. 2012) (vacating denial of class certification order because district court failed to rule on plaintiffs' *Daubert* challenge); American Honda Motor Co. v. Allen, 600 F.3d 813, 816-17 (2010) (reversing class certification order because district court failed to conduct a proper *Daubert* analysis).

14 *See* Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 602-03 (9th Cir. 2010) ("At the class certification stage, it is enough that Dr. Bielby presented scientifically reliable evidence tending to show that a common question of fact . . . exists with respect to all members of the class."), *rev'd*, 131 S. Ct. 2541 (2011); *see also In re* Static Random Access Memory (SRAM) Antitrust Litig., 264 F.R.D. 603, 616 (N.D. Cal. 2009) ("At the class certification stage of the proceedings, 'robust gatekeeping' of expert evidence is not required . . . .") (internal quotation omitted).

15 Ellis v. Costco Wholesale Corp., 657 F.3d 970, 982 (9th Cir. 2011).

16 *Id.*; *see also* Sher v. Raytheon Co., 419 Fed. Appx. 887, 888 (11th Cir. 2011) (vacating the district court's order granting class certification, and stating that the "district court erred as a matter of law by not sufficiently evaluating and weighing conflicting expert testimony presented by the parties at the class certification stage").

17 644 F.3d 604, 612 (8th Cir. 2011), *pet. for cert. filed*, No. 11-740 (U.S. Dec. 15, 2011).

18 *Id.* at 613-14.

19 *Id.* at 615. The Western District of Washington declined to apply a full *Daubert* analysis in *Fosmire v. Progressive Max Insurance Co.*, 277 F.R.D. 625, 628-29 (W.D. Wash. 2011), noting that the Supreme Court's dicta in *Wal-Mart* left open the possibility of a more lenient approach, such as that described by the Eighth Circuit in *Zurn*. Even so, the *Fosmire* court found that the plaintiff's expert was unreliable under any standard. A similar result was reached in *Bruce v. Harley-Davidson Motor Co.*, No. CV 09-6588 CAS (RZx), 2012 WL 769604, at *4-*5 (C.D. Cal. Jan. 23, 2012), where a class certification motion was denied without prejudice, in part because the plaintiffs' expert report was found not to comply with the *Zurn* standard. The *Bruce* court also noted its belief that *Zurn* is consistent with *Ellis*. *Id.* at *4 n.7 ; *see also* Stone v. Advance Am., 278 F.R.D. 562, 566 n.2 (S.D. Cal. 2011) (conducting a "full" *Daubert* analysis because discovery was complete and expert reports had been exchanged, but noting that *Zurn* might be appropriate in cases at a less "advanced" stage).

20 *See* Lumen v. Anderson, No. 08-0514-CV-W-HFS, 2012 WL 444019, at *9 & n.8 (W.D. Mo. Feb. 10, 2012) (citing *Zurn* in support of decision to deny *Daubert* motion before briefing on it was complete). It is also worth remembering that *Wal-Mart* only binds federal courts, and to the extent removal to federal court under the Class Action Fairness Act is not possible, pre-*Wal-Mart* standards may apply in state-court certification proceedings. *See, e.g.,* Howe v. Microsoft Corp., 656 N.W.2d 285, 295-96 (S.D. 2003) ("As long as the basis of the expert's opinion is not so blatantly flawed that, on its face, it would be inadmissible as a matter of law, the court may consider the expert's evidence in determining whether to certify the class action.").

21 No. C 08–00722 EDL, 2011 WL 7710257 (N.D. Cal. Aug. 30, 2011), *reconsideration denied*, 2011 WL 5573466 (Nov. 15, 2011), *pet. for leave to appeal denied*, No. 11-80287 (9th Cir. Feb. 17, 2012).

22 2011 WL 7710257, at *18-*20.

23 2011 WL 5573466 at *11.

24 No. CV 10–05944 MMM (JCx), 2012 WL 1066755, at *4-*5 (C.D. Cal. Mar. 28, 2012).

25 *Id.* at *13-*15.

26 *See* West v. Prudential Secs., Inc., 282 F.3d 935, 938 (7th Cir. 2002).

Touching on the Merits When Deciding Class Certification Motions: Ohio's Experience

Continued from cover

Of course, state courts do not necessarily follow the U.S. Supreme Court's lead on certification issues, and some have been reluctant to permit defendants to seek to defeat class certification by contesting questions of fact or law that relate directly to the merits of the plaintiff's claims. Ohio is one such state; but an interesting case—in which a petition for review has been filed in the Ohio Supreme Court—provides an opportunity for Ohio to decide whether to bring its class certification rules into conformance with federal rules.

The case involves a claim by an auto insurance policy holder, Michael Cullen, that his insurer should have paid to replace his car windshield rather than to repair it. In general, insurers give their policy holders the right to insist upon replacement of a damaged windshield. However, many insurers (including the defendant, State Farm Mutual Automobile Insurance Co.) attempt to persuade their insureds to agree to repair windshields that have experienced very minor damage, such as small cracks caused by a stone. State Farm persuaded Cullen to opt for windshield repair instead of replacement, by assuring him that repair was as effective as replacement for very small cracks and by agreeing to pay for the repair in full (i.e., it waived the $250 deductible on Cullen's policy). Cullen never complained about the quality of the repair and continued to drive the same car with the same windshield for many years thereafter.

Cullen later sued State Farm, claiming breach of contract, bad faith, and breach of fiduciary duty. He contended that his insurance contract gave him the option to demand a cash payment equal to the cost of replacing his windshield (less his deductible) and then decide for himself whether to repair or replace his windshield or simply to retain the payment. He further contended that State Farm inappropriately failed to inform him of this "cash out" option, and that he would have chosen that option if it had been offered to him. Because replacement of a windshield costs more than repair, he contends that he would have derived a financial benefit (even taking into account his $250 policy deductible) if he had exercised the "cash out" option and paid for the repairs himself.

In September 2010, the trial court granted Cullen's motion to certify a plaintiff class under both Ohio Rule of Civil Procedure 23(B)(2) and Rule 23(B)(3). The 100,000-member certified class comprises all Ohio policy holders insured by State Farm who, at any time after January 1, 1991, submitted a "glass-only" damage claim (i.e., no damage to the car other than to the windshield) that was resolved by payment of the cost of repairing the windshield. In determining that the prerequisites for certification had been met, the trial court relied in several respects on the allegations of the complaint without requiring additional proof from the plaintiff. The Ohio Court of Appeals affirmed the certification order in December 2011.[3] State Farm petitioned for Supreme Court review on March 30, 2012.

The wording of Ohio Rule 23 is substantially identical to the Federal Rule 23. Indeed, the Ohio Supreme Court has repeatedly counseled Ohio courts to look to federal authority for guidance in understanding and applying the Ohio rule.[4] Ohio courts nonetheless have often declined to permit defendants to oppose class certification by introducing evidence that goes to the merits of the plaintiffs' claims, even when the evidence is relevant to whether the prerequisites of Ohio Rule 23 have been met.[5] The appeals court expressed similar reluctance in its opinion affirming class certification.[6] State Farm's petition for review asks the Ohio Supreme Court to reconsider that position in light of the *Wal-Mart* decision.