

## Class and Derivative Actions Client Service Group

To: Our Clients and Friends

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## Supreme Court Considers Requiring Daubert Hearings For Class Certification Experts

Argument in *Comcast Corp. v. Behrend*, No. 11-864, was heard before the United States

Supreme Court on Monday, November 6, 2012. The issue posed by the Court (substantially tailoring the question originally proposed by Comcast) is "Whether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis." As the reference to "admissible evidence" strongly suggests in the Court's question, it seems the Court anticipated serious dispute as to whether the admissibility of plaintiff's expert damages model should be determined as part of the certification process, and further anticipated that this really presents the issue whether *Daubert* standards apply and must be decided.

The role of *Daubert* in class certification proceedings has been debated for some time, although it was not squarely addressed by the Third Circuit in its *Comcast* decision because Comcast had not invoked *Daubert* as a basis to oppose class certification. While the record does not reveal the reason for Comcast's strategy in addressing the quality of plaintiff's expert model as it did in the district court, there was no clear guidance as to the role of *Daubert* and many practitioners have been skeptical that a full-blown *Daubert* inquiry is required under then-prevailing caselaw. Undue reliance on *Daubert*, it was feared, could permit the reviewing court to reject the argument on formalistic grounds without ever getting to the substance as to whether plaintiffs had really satisfied their burden of proving each element of Rule 23. Comcast's decision not to invoke *Daubert* (or to clearly object to

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the expert on admissibility grounds) resulted in a somewhat messy give and take in briefs of the parties to the Court as to whether Comcast had waived the issue, and no lower court had addressed that question, although a footnote in the Third Circuit decision indicated the majority's view that the issue of whether *Daubert* applied was not properly before it. *Behrend v. Comcast Corp.*, 655 F.3d 182, 204 n. 13 (3d Cir. 2011), *cert. granted*, 2012 WL 113090 (U.S. 2012) (responding to dissent's argument regarding *Daubert* that Comcast had neither raised this issue in the District Court nor before the panel and "it is therefore not properly before us").

There is disagreement in the Circuits regarding the role of *Daubert* under Rule 23. The Seventh, Eleventh, and Ninth require a full *Daubert* analysis in at least some circumstances. The Eighth requires only a "focused Daubert analysis" that appears to be a *Daubert*-lite, but is not entirely sketched out. In *Comcast*, the Third Circuit in a footnote indicated yet another standard: whether it was plausible that the expert's opinion would evolve into admissible evidence.

The Seventh Circuit found that "when an expert's report or testimony is critical to class certification, as it is here ..., a district court must conclusively rule on any challenge to the expert's qualifications or submissions prior to ruling on a class certification motion." *American Honda Motor Co., Inc. v. Allen,* 600 F.3d 813, 815-16 (7th Cir. 2010). The court found that, if the situation warrants, the district court must perform a full *Daubert* analysis before certifying the class. *Id.* at 816; *see also Messner v. Northshore University HealthSystem,* 669 F.3d 802, 812 (7th Cir. 2012) ("When an expert's report or testimony is 'critical to class certification,' we have held that a district court must make a conclusive ruling on any challenge to that expert's qualifications or submissions before it may rule on a motion for class certification.").

In *Sher v. Raytheon Co.*, 419 F.App'x 887, 890 (11th Cir. 2011), the Eleventh Circuit followed *American Honda* and held that it was reversible error to refuse to perform a *Daubert* analysis on an expert who sought to testify regarding class certification. *Id.* at 890-91 ("Here the district court refused to conduct a *Daubert*-like critique of the proffered experts's qualifications. This was error.")

The Ninth Circuit also has indicated that a full *Daubert* analysis is necessary to determine admissibility of expert testimony at the class certification stage. *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011) ("However, the district court seems to have confused the *Daubert* standard it correctly applied to Costco's motions to strike with the 'rigorous analysis' standard to be

applied when analyzing commonality. Instead of judging the persuasiveness of the evidence presented, the district court seemed to end its analysis of the plaintiffs' evidence after determining such evidence was merely admissible.").

The Eighth Circuit, however, rejected an "exhaustive and conclusive *Daubert* inquiry" in favor of a "focused *Daubert* analysis." *In re Zurn Pex Plumbing Prod. Liab. Lit.*, 644 F.3d 604, 614 (8th Cir. 2011) ("Zurn's desire for an exhaustive and conclusive *Daubert* inquiry before the completion of merits discovery cannot be reconciled with the inherently preliminary nature of pretrial evidentiary and class certification rulings. ... We conclude that the district court did not err by conducting a focused *Daubert* analysis which scrutinized the reliability of the expert testimony in light of the criteria for class certification and the current state of the evidence."). The court left the precise parameters of that focused inquiry to the district courts.

In *Comcast*, the Third Circuit approved a lesser standard of whether it was plausible that the evidence would evolve into admissible evidence. *Comcast*, 655 F.3d at 204 n. 13 ("We understand the Court's observation to require a district court to evaluate whether an expert is presenting a model which could evolve to become admissible evidence, and not requiring a district court to determine if a model is perfect at the certification stage. This is consistent with our jurisprudence which requires that at class certification stage, we evaluate expert models to determine whether the theory of proof is plausible."). The Third Circuit justified its less than rigorous assessment of the admissibility of plaintiff's expert model on the basis that it was more a merits question, and thus formulated an approach that appeared to conflict with the requirement of *Wal-Mart Stores, Inc. v. Dukes,* -- U.S. --, 131 S.Ct. 2541, 2551, 180 L.Ed.2d 374 (2011) that the court decide class certification addressing all of the elements of Rule 23, even if that involves merits issues — and it was this seemingly stark conflict between *Dukes* and the Third Circuit's decision that *Comcast* relied on principally in seeking certiorari in the first place.

The tenor of the oral argument, not unexpectedly, gives clues but no concrete guidance as to likely outcome. The parties and those Justices expressing views on the subject generally seemed to accept that some form of assessment of plaintiffs' damages evidence should be made as a condition to class certification, although their formulations seemed somewhat amorphous and left several Justices skeptical how best to articulate a standard useful in giving meaningful guidance. Comcast struggled to

explain why it was entitled to invoke *Daubert*-like standards, despite not having mentioned *Daubert* below; plaintiffs tried to avoid the question by claiming that Comcast had simply waived the point, and there was nothing for the Court to decide. Chief Justice Roberts suggested at one point that the Court could usefully enunciate a standard for lower courts to follow, and then remand for decision below as to whether Comcast had waived a right to invoke that standard.

For those practicing in this area and have struggled to decide how best to challenge certification due to the frailties of plaintiffs' damages models which are often untested and rather theoretical, an answer by the Court as to whether defense counsel may invoke *Daubert* and related F. R. Evid. 702 standards for admissibility in opposing class certification, and whether the district court has a duty to apply those standards before a class may be certified, would be a substantial contribution to class action jurisprudence. We will all await an answer in the Spring.

For further questions, please speak to your Bryan Cave contact or any member of the Class and Derivative Actions Client Service Group.