New York Law Journal

A NEW YORK LAW JOURNAL SPECIAL SECTION

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LITIGATION

Web address: http://www.nylj.com

MONDAY, AUGUST 20, 2007

Bring in the Experts

Greater role for specialists – and 'Daubert' – in Second Circuit class certifications.

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EXPERT TESTIMONY is common in class certification disputes. Among other things, it is used to evaluate whether the conduct at issue would have affected putative class members in a generally uniform manner, an important fact in evaluating whether the case should proceed as a class action under Federal Rule of Civil Procedure 23. How courts weigh such testimony is thus central to the resolution of many class certification motions.

Until recently, the Second Circuit took a relatively class-friendly approach to this issue, as it did generally toward class certification. The Circuit barred district courts from considering facts that went to the merits of the plaintiffs' claims at the certification stage, even if those facts were also relevant to Rule 23's requirements.

Mainly for that reason, district judges refused to weigh competing expert testimony at this stage of the case, viewing such competing opinions as "dueling" on the merits. Courts instead deferred to the plaintiff expert's views unless they were deemed "fatally flawed" under a truncated version of the test for the admissibility of expert testimony under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[1]

Two recent Second Circuit opinions should change all of this. *Heerwagen v. Clear Channel* and *In re Initial Public Offering Securities Litigation* (*In re IPO*) now direct district courts to weigh all facts relevant to Rule 23's requirements in deciding a motion for class certification, even if those facts overlap with facts relevant to the merits of plaintiff's claims.[2] However, district courts are supposed to use their discretion to control discovery and the extent of any class certification hearing to prevent the certification process from becoming a partial trial on the merits.

These principles should affect how district courts deal with expert testimony at class certification.

By eliminating the "merits"/"class certification" distinction, *Heerwagen* and *In re IPO* should expand *Daubert*'s reach to permit review of merits questions addressed in an expert's opinion at the certification stage, to the extent relevant to certification issues. But because district courts retain the discretion to limit the scope of discovery and the certification hearing, they presumably are able to limit the *Daubert* analysis and related underlying discovery in order to prevent class certification from becoming a partial trial on the merits. The tradeoffs district judges make in exercising this discretion necessarily will vary case by case.

The Prior Law

The basic model for resolving claims is individual adjudication. Class resolution of claims is an exception in cases of alleged harm to a sufficiently large number of people so as to justify departure from the norm of individual adjudication.

To apply this exception, the court must determine whether one or a few claimants (the class representatives) can stand in for numerous others (the absent class members) on a given set of facts as a matter of fairness,

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efficiency and basic due process.[3] Rule 23 thus requires, among other things, that the putative class be sufficiently numerous; that the representative's claims be typical of those of the putative class; that the putative class share at least one common issue; and that, in cases seeking monetary damages, common issues predominate over issues specific to individual class members.[4]

Expert testimony can be helpful in this context in understanding how many people may have been affected by the challenged conduct, and the extent to which, if at all, they would have been affected in a sufficiently uniform manner to permit class certification.

For instance, an economist might testify on whether higher prices in a price fixing case could fairly be assumed to have affected all customers who bought a given product, or whether a given securities market is "efficient" in a manner that permits class certification; a geologist might testify about the extent of environmental contamination in a given community; or a statistician might testify about the extent of race or gender discrimination in a given company. A court would use such testimony to evaluate whether the nature of the proof at trial would be specific to an individual or capable of being extrapolated to absent class members.

Before *Heerwagen* and *In re IPO*, two other cases, *Caridad v. Metro-North Commuter Railroad* and *In re Visa Check/ MasterMoney Antitrust Litigation*, controlled the use of such testimony on class certification in the Second Circuit.[5] These cases in turn relied heavily on an interpretation—later deemed a misinterpretation—of the Supreme Court's opinion in *Eisen v. Carlisle & Jacquelin*.[6]

There, the Supreme Court reversed a district court that had conducted a preliminary inquiry into the merits to decide who should pay for notice to the class, on the theory that the defendant should not bear those costs if the claims had little merit. The High Court held that the merits were irrelevant to this issue, stating that "[w]e find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."[7]

The Second Circuit interpreted *Eisen* in *Caridad* and *Visa Check* to preclude any consideration of the merits in connection with class certification. All that was necessary was "some showing" by plaintiffs that the criteria of Rule 23 were met.

> The continued need for 'Daubert' review at the class certification stage follows from the fairness and efficiency goals of Rule 23. It would be unfair in the extreme to certify a class—and thereby expose defendants to the risk of class-wide liability—based on an expert's opinion that ultimately would be inadmissible at trial.

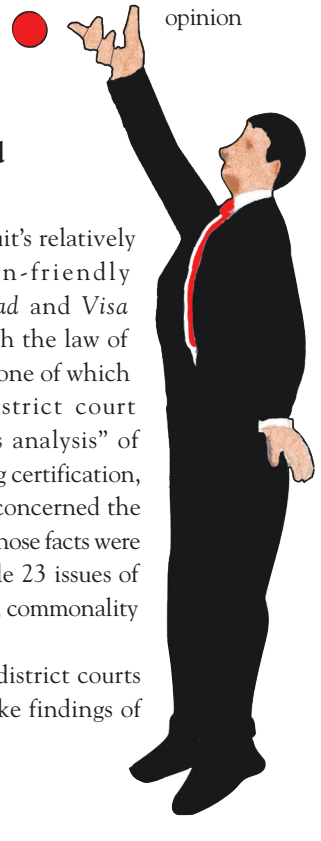
This wall between "merits" and class certification issues further affected how district courts dealt with expert analysis on certification. To avoid running afoul of *Eisen*, the Circuit precluded district courts from resolving "statistical duels" between experts, on the theory that such disagreements went to the merits and thus should be resolved by the ultimate fact-finder.[8] Instead of resolving such disputes at the certification stage, the Circuit looked only to whether the plaintiffs' experts had made "some showing" of common questions to justify certification, regardless of the defendant experts' critiques of the opposing expert's analysis.[9]

However, district courts in this Circuit did provide some protection from flawed expert testimony at this stage. Many applied the requirements for the admissibility of an expert opinion in Federal Rule of Evidence 702 and *Daubert*, albeit in truncated form. Rule 702 and *Daubert* establish district courts as the "gatekeepers" in excluding "junk science" from the courtroom.

Toward that end, Rule 702 and *Daubert* require that, before being admissible, an expert opinion "assist the trier of fact to understand the evidence at issue," the expert be sufficiently qualified, and the opinion must "rest[] on a reliable foundation."[10] *Daubert* provides a non-exhaustive list of factors to be considered in this regard, such as whether the theory has been tested, subject to peer review, has a known and/or potential error rate, and/or is generally accepted.[11]

The clearest picture of how *Daubert* has been applied at the class certification stage is in the district court opinion in *Visa Check*.[12] There, Judge John Gleeson held that a plaintiff's expert opinion submitted on class certification must not be "fatally flawed" under *Daubert*'s criteria, although the nature of the *Daubert* analysis was "a limited one" as compared to such an analysis at trial. Mainly, this approach was because *Eisen* forbade the court from making "a preliminary inquiry into the merits," which required that "a court at the class certification stage should not delve into the merits of an expert's opinion, or indulge in 'dueling' between opposing experts."

As a result, "[t]he question is not…whether a jury at trial should be permitted to rely on [plaintiff expert's] report to find facts as to liability, but rather whether [the court] may utilize it in deciding whether the requisites of Rule 23 have been met."[13] Applying this standard, Judge Gleeson held that the plaintiff expert's report in *Visa Check* was not inadmissible at the class certification stage, despite defendants' critique of it, which he deemed went to whether the opinion would be admissible at trial.



'Heerwagen' and w'In re IPO'

The Second Circuit's relatively class-certification-friendly approach in *Caridad* and *Visa Check* conflicted with the law of other circuits, every one of which required that a district court conduct a "rigorous analysis" of the facts in evaluating certification, including facts that concerned the merits, to the extent those facts were also pertinent to Rule 23 issues of numerosity, typicality, commonality and the like.

In these circuits, district courts were required to make findings of

fact and definitive determinations that the Rule 23 criteria had been met. These courts did not read *Eisen* to preclude a merits inquiry, but rather merely to preclude resting the decision to certify a class on an evaluation of the likelihood of success on the merits, which is not a factor listed under Rule 23 as relevant to certification.

As a result, courts outside the Second Circuit were more likely to resolve fact disputes with respect to expert testimony, so long as those disputes, while possibly relevant to the merits, were also pertinent to Rule 23's requirements.[14]

The Second Circuit began to move in the direction of these other circuits in *Heerwagen*. That case involved a claim that Clear Channel had monopolized a national market for concert tickets.

Plaintiffs and defendants submitted expert testimony on whether the market for concert tickets in fact was national or local, in order to address whether it was possible to certify a national class. The district court held three days of hearings and credited the testimony of defendants' expert that the markets were local based on a "preponderance of the evidence."

In light of that fact, the court refused to certify a nationwide class, because injury would have to be evaluated separately for the class members in each local market. The Second Circuit affirmed, holding that the district court's weighing of expert testimony and making findings of fact using a preponderance of the evidence standard was appropriate.

In addition, the Circuit moderated the ban on examining facts that went to the merits of a case, although it still struggled to retain some part of the "merits"/"class certification" distinction. The Circuit distinguished cases, like *Caridad*, in which the merits and certification criteria were said to have overlapped completely, from cases, like *Heerwagen*, in which they did not. In the later sort of case, the Circuit held that it was proper to inquire into facts relevant to the merits to the extent that those facts, like market definition, also were relevant to certification under Rule 23.[15] The Circuit offered no guidance on how district courts were supposed to draw this version of the "merits"/"class certification" line.

Fortunately, in *In re IPO*, the Second Circuit abandoned this distinction entirely. The court "decline[d] to follow the dictum in *Heerwagen* suggesting that a district judge may not weigh conflicting evidence and determine the existence of a Rule 23 requirement just because that requirement is identical to an issue on the merits." Instead, the district court "may not grant class certification without making a determination that all of the Rule 23 requirements are met."

To the extent this analysis required the court to delve into facts that were also relevant to the merits, so be it. And in evaluating such facts, any disputes should be resolved, findings made on a preponderance of the evidence, and the law applied to those findings.

Finally, following from these broader holdings, the Circuit "disavow[ed] the suggestion in *Visa Check* that an expert's testimony may establish a component of a Rule 23 requirement simply by being not fatally flawed. A district judge is to assess all of the relevant evidence admitted at the class certification stage and determine whether each Rule 23 requirement has been met."[16] The only limit on this analysis—as with any other of the factual analyses required by *In re IPO*—was the district court's discretion to limit discovery and the extent of the hearing to prevent class certification from becoming a "partial trial on the merits."[17]

What Are Cases' Implications?

While neither case directly addresses *Daubert*, there is an argument that *Heerwagen* and *In re IPO* render *Daubert* less significant at the class stage.

If district courts previously applied *Daubert* because they were barred from weighing the evidence but needed some way of protecting defendants from improvident class certification motions, then the protection of *Daubert* is arguably less necessary now that courts are free to weigh competing expert opinions. But, in fact, *Daubert* remains just as relevant to the certification stage as it was before, and *Heerwagen* and *In re IPO* indeed have enhanced its usefulness at class certification by giving it broader scope.

The continued need for *Daubert* review at this stage follows from the fairness and efficiency goals of Rule 23. It would be unfair in the extreme to certify a class—and thereby expose defendants to the risk of class-wide liability—based on an expert's opinion that ultimately would be inadmissible at trial.

Such an improvident grant of class certification would risk creating the sort of "extortionate" pressure to settle that a number of courts have cited with concern.[18] (Arguably, that may be what happened in the context of *Visa Check*, in which the district court refused to examine the plaintiff expert's opinion to the extent it touched upon the merits, and certified the class. Defendants settled the case soon thereafter.)

Nor would it be efficient to base class certification on an inadmissible opinion. Once a class is certified, discovery typically becomes much broader and more burdensome than it otherwise would have been in adjudicating the claim of just one or a few claimants. Those added costs make no sense unless the court is reasonably confident that the underlying expert opinion would not later be deemed inadmissible. (The application of *Daubert* also enhances appellate review of class certification decisions under Rule 23(f). It provides a rule of law that may be reviewed de novo in place of less-reviewable discretion.)

So the logic of Rule 23 makes *Daubert* of continued relevance at the class certification stage. *Heerwagen* and *In re IPO* give *Daubert* broader reach. As Judge Gleeson observed in *Visa Check*, under prior law, the district court had to draw a line somewhere between the "merits" part of an expert's opinion and the "class certification" part, even when, in truth, the two overlapped. At the class certification stage, *Daubert* applied only on the "class certification" side of this artificial line.

But now that this line-drawing has been eliminated, all of an expert's proof is now subject to scrutiny to the extent relevant to class certification, even if such proof overlaps with the merits. This necessarily makes *Daubert* more useful at the class certification stage in weeding out junk science at the earliest possible point in the case.

The potential impact of this broader application of *Daubert* is illustrated by *Visa Check*. There, Judge Gleeson permitted class certification based on a plaintiff expert's opinion that was largely theoretical, at least according to the defense expert. According to the court's summary, the plaintiff expert's opinion evidently was not supported by

extensive empirical analysis. The court nonetheless accepted the plaintiff expert's opinion as providing a sufficient rationale for certification of that antitrust case, regardless of whether it would ultimately be admissible at trial. This approach would no longer be acceptable under *Heerwagen* and *In re IPO*.

With that said, under *In re IPO*, district courts retain discretion to shape discovery and the extent of the hearing to ensure that class certification does not become a partial trial on the merits. This in turn suggests that district courts retain discretion in how they apply *Daubert* at the certification stage, consistent with the prevailing view that the Federal Rules of Evidence are not technically controlling at that point.[19]

For instance, in cases where the district court limits pre-certification discovery so as to deny an expert the full data necessary with which to make a *Daubert*-admissible report, then *Daubert* presumably would apply differently than if the expert had access to a larger body of data—although presumably also only to that extent. Any other result would risk certifying the class based on an inadmissible methodology.

Practical Considerations

These developments suggest some practical considerations for counsel and the court in a putative class action:

1. The parties will need to begin consulting with experts on merits-oriented issues earlier in the case than ever. Given the likely relationship between the scope of discovery and the extent of *Daubert* review, experts should be consulted in the threshold stages of discovery, in order to provide advice about what facts they need to perform their analysis.

2. The parties and the court will have to balance Rule 23's requirement that class certification be decided at an "early practicable time" with the need for sufficient information for experts to perform the analysis required by Rule 23. In many cases—*Heerwagen* is an example—this will not be difficult, as most of the data the experts need may already be publicly available.

When that is not the case, the parties and the court presumably should consider whether it is appropriate to limit discovery to a minimum sample necessary for the expert to perform a preliminary analysis, in order to prevent class certification from becoming a preliminary partial trial on the merits. The experts themselves may need to be consulted in crafting such a discovery plan.

3. Now that courts are free to weigh competing expert testimony using traditional criteria for evaluating evidence, there will be an even greater premium on using experts that convey credibility and can withstand cross-examination at the certification stage. Experts frequently would be the only speaking witnesses at a certification hearing, so the weight riding on their testimony will be greater than ever.

4.The increased focus on the merits early in class certification may justify discovery against absent class members more readily than before, in order to gather the information for an expert to perform his or her analysis. While such discovery has been available before, the accelerated timetable for considering merits-related issues may persuade courts to permit it more often than in the past.[20]

No doubt, other implications will follow from *Heerwagen* and *In re IPO* for the use of experts at class certification. But, on any view, expert testimony is sure to be more central than ever at this stage.

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1. See *In re Visa Check/MasterMoney Antitrust Litig.*, 192 F.R.D. 68, 76-79 (E.D.N.Y. 2000), citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592-594 (1993).

2. See *Heerwagen v. Clear Channel Communications*, 435 F.3d 219, 232 (2d. Cir. 2006); *In re Initial Public Offering Securities Litigation*, 471 F.3d 24, 42 (2d. Cir. 2006).

3. *Amchem Products, Inc. v. Windsor et al.*, 521 U.S. 591, 621-623 (1997), (stating that Rule 23 serves to "focus court attention on whether a proposed class has sufficient unity so that absent members can fairly be bound by decisions of class representatives" and to test "whether proposed classes are sufficiently cohesive to warrant adjudication by representation.").

4. Fed. R. Civ. P. 23.

5. *Caridad v. Metro-North Commuter Railroad*, 191 F.3d 283 (2d Cir. 1999); *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124 (2d Cir. 2001).

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

7. Id. at 177.

8. *Caridad*, 191 F.3d at 292 ("Accordingly, this sort of statistical dueling is not relevant to the certification determination."); Id. at 293 ("In deciding a class certification motion, district courts must not consider or resolve the merits of the claims of the purported class."). Indeed, the courts' preclusion of inquiry into the merits may have been motivated in part by a view that to permit preliminary inquiries into the merits might infringe on the parties' Seventh Amendment right to a jury trial. Hopefully, the Supreme Court's recent decision in *Tellabs* will assuage any such concern. See *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S.Ct. 2499 (2007) (holding that a court's comparative assessment of plausible inferences, while constantly assuming plaintiff's allegations to be true, does not impinge upon Seventh Amendment right to jury trial.)

9. *Caridad*, 191 F.3d at 292 ("Of course, class certification would not be warranted absent some showing that the challenged practice is causally related to a pattern of disparate treatment…Regardless of their ultimate persuasiveness on the issue of liability, the statistical report and anecdotal evidence submitted by the Class Plaintiffs are sufficient to demonstrate common questions of fact…. Though [defendant's] critique of the Class Plaintiffs' evidence may prove fatal at the merits stage, the Class Plaintiffs need not demonstrate at this stage that they will prevail on the merits.").

10. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 580 (1993).

11. Id.

12. See *In re Visa Check/MasterMoney Antitrust Litig.*, 192 F.R.D. 68, (E.D.N.Y. 2000).

13. Id. at 77.

14. See e.g., *Newton v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 259 F.3d 154, 168 (3d Cir. 2001) ("In reviewing a motion for class certification, a preliminary inquiry into the merits is sometimes necessary to determine whether the alleged claims can be properly resolved as a class action."); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 676 (7th Cir. 2001) ("[I]f some of the considerations under Rule 23(b)(3)***overlap with the merits—as they do in this case***the judge must make a preliminary enquiry into the merits."); *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208, F.3d 288, 298 (1st Cir. 2000) ("[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.").

15. *Heerwagen v. Clear Channel Communications*, 435 F.3d 219, 232 (2d. Cir. 2006) ("[W]hether [defendant] is liable for monopolization on the one hand, and whether issues common to the class are likely to predominate, on the other hand, are sufficiently distinct that the court did not prematurely rule on the merits by weighing the experts' testimony…. Some overlap with the ultimate review of the merits is an acceptable collateral consequence of the 'rigorous analysis' that courts must perform when determining whether Rule 23's requirements have been met").

16. *In re Initial Public Offering Securities Litigation*, 471 F.3d 24, 42 (2d. Cir. 2006).

17. Id. at 41.

18. See e.g., *Rutstein v. Avis Rent-A-Car Sys.*, 211 F.3d 1228, 1241 n. 21 (11th Cir. 2000) (referring to "the blackmail value of a class certification that can aid the plaintiffs in coercing the defendant into a settlement"); *In re Rhone-Poulenc Rorer*, 51 F.3d 1293, 1298-1299 (7th Cir. 1995) (Posner, J.) (commenting that Judge Friendly "called settlements induced by a small probability of an immense judgment in a class action blackmail settlements," and noting the court's "concern with forcing these defendants to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability").

19. See, e.g., *In re Hartford Sales Practices Litigation*, 192 F.R.D. 592, 597 (D.Minn.1999) ("On a motion for class certification, the evidentiary rules are not strictly applied and courts will consider evidence that may not be admissible at trial."); *Rockey v. Courtesy Motors, Inc.*, 199 F.R.D. 578, 582 (W.D.Mich.2001) (same); *Thompson v. Board of Ed. of Romeo Community Schools*, 71 F.R.D. 398, 402 n. 2 (W.D.Mich.1976) (rules of evidence "need not be viewed as binding during a hearing on such preliminary matters as class certification"); *Fisher v. Ciba Specialty Chemicals Corp.*, 238 F.R.D. 273 (S.D.Ala.2006); Cf., *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974) (a class action hearing "of necessity***is not accompanied by the traditional rules and procedures applicable to civil trials"); but see *Mars Steel Corp. v. Cont'l Bank, N.A.*, 880 F.2d 928 (7th Cir.1989) (stating in dicta that the Federal Rules of Evidence should control proceedings at class certification under Federal Rule of Evidence 1101). Indeed, in expressly authorizing district courts to consider affidavit testimony on class certification, the Second Circuit in *In re IPO* implicitly seems to have adopted this prevailing view. Affidavits are normally considered hearsay under the Federal Rules of Evidence.

20. See e.g., *Enterprise Wall Paper Mfg. Co. v. Bodman*, 85 F.R.D. 325, 327 (S.D.N .Y.1980) ("[A] strong showing should be required before discovery of absent class members is compelled"); *Krueger v. New York Telephone Co.*, 163 F.R.D. 446, 450-51 (S.D.N.Y.1995) (holding that discovery of absent class members was permitted because the defendant demonstrated a clear need for the information, the discovery requests were not undertaken to harass absent class members, and the discovery requests were narrowly tailored).