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Recent Class Certification Decisions Present New Opportunities and Challenges for Defendants

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From a mass tort product liability defense perspective, the trend away from class certification is welcome news and reflects at least in part the almost universal rejection by federal courts of putative classes seeking recovery for personal injuries or medical monitoring in product liability cases. *See, e.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997) ("significant questions, not only of damages but of liability and defenses of liability … affect[] individuals in different ways, making mass torts ordinarily not appropriate for class treatment") (internal quotations omitted); *In re Rezulin Prods. Liab. Litig.*, 210 F.R.D. 61, 65-66 (S.D.N.Y. 2002) (finding it "not surprising that all relevant Court of Appeals and the bulk of relevant district court decisions have rejected class certification in products liability cases"); *see also* Jack B. Weinstein, Preliminary Reflections on Administration of Complex Litigations, *Cardozo L. Rev. de novo* 1, 18 (2009) (noting "the tide has turned against class actions"). One of many reasons certification is often denied in such cases is the stringent proof required by Federal Rule of Civil Procedure 23 itself. Courts in almost every circuit have held that plaintiffs seeking certification must show that they have developed a way to aggregately prove the elements of their claims, such as causation and damages. Mere assurances that they can develop a method of doing so by the time of trial on the merits are not sufficient.

However, any pronouncement of class actions as dead is premature. Putative class actions regarding allegedly defective products, particularly so-called consumer class actions, are arriving in federal courts at increasing rates. Defendants should not assume that the recent trend away from class certification will stop efforts to challenge and change judicial interpretation of Rule 23 in the mass tort or product liability contexts. Because they are in some ways unique to each case, expert and fact discovery are likely to be key battleground areas. In these areas, the same recent cases that reaffirm Rule 23's stringent pre-certification requirements present new challenges for defendants. Regarding expert discovery, because it is now clear that courts must resolve at the certification stage those issues that overlap with the merits, class action defendants in product liability cases should consider raising *Daubert* challenges much earlier than some undertook such efforts in the past. Simultaneously, defendants must seek to limit plaintiffs' requests for expansive (and expensive) merits-related fact discovery at the class certification stage.

There Is an Emerging Role For *Daubert* at the Class Certification Stage

Since its issuance in 1993, courts have reached different conclusions regarding whether *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), should be applied to expert evidence offered at the class certification stage. The split stemmed in part from confusion about what issues should be considered as part of the class certification inquiry, particularly when evaluating issues that also relate to the merits of plaintiffs' claims. For example, before a class may be certified, plaintiffs must show that causation can be proven on an aggregate basis, not a class member-by-class member analysis. However, there is an obvious merits component to causation as well. Where a class certification requirement and a merits issue overlapped, courts were split on their ability to consider the class certification issue at all and, if so, what standard of proof to apply given the general prohibition against deciding merits issues at the class certification stage. *See In re Initial Pub. Offerings Secs. Litig.*, 471 F.3d 24, 33-37 (2d Cir. 2006) (discussing how different panels within the Second Circuit grappled with the issue, resulting in confusing and apparently conflicting standards). If a court believed it could not consider overlapping merits issues at the class certification stage, then it often concluded that the reliability of testimony addressing those issues was also a merits issue, making a review under Federal Rule of Evidence 702 and *Daubert*

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untimely. *See In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 135 (2d Cir. 2001) (expert evidence that is not "fatally flawed" is admissible at the class certification stage; declining to conduct review under *Daubert*/Rule 702), overruled by *In re IPO*, 471 F.3d at 40, 42.

However, nearly every federal circuit court has clarified that although a district court cannot decide all merits issues at the class certification stage, it must decide all class certification issues, even those that overlap with the merits. *See, e.g., Vallario v. Vandeley*, 554 F.3d 1259, 1266 (10th Cir. 2009); *In re IPO* at 41. As the Third Circuit recently noted, "[a] contested requirement is not forfeited in favor of the party seeking certification merely because it is similar or even identical to one normally decided by a trier of fact." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 318 (3d Cir. 2009). Therefore, a plaintiff seeking certification must offer actual evidence that the requirements of Rule 23 are met rather than mere assurances that they can or will be met by the time of trial on the merits. For example, when considering Rule 23(a)(1)'s numerosity requirement, the court must resolve any evidentiary disputes between the parties regarding the number of potential class members, and then make a legal determination of whether that number is sufficient. *In re IPO* at 40. Although there is no universal number of putative class members at which numerosity definitively does (or does not) exist, the inquiry is fact driven and the plaintiffs' class certification proof must be sufficiently detailed to allow the court to make that determination. If it is not, certification must be denied.

In the context of scientific evidence offered in product liability cases, these decisions provide new support for a *Daubert*/Rule 702 review at the class certification stage. Expert evidence is often the primary — and sometimes only — evidence offered by plaintiffs in support of certification, and therefore plays a key role in class certification decisions. Where scientific evidence is at issue, Rule 702 and *Daubert* require that courts base any decisions on only reliable expert evidence. *See, e.g., Rider v. Sandoz Pharms. Corp.*, 295 F.3d 1194, 1202 (11th Cir. 2002) (district court may not make "leaps of faith" to connect the elements of a causal chain in absence of reliable scientific evidence); *Glastetter v. Novartis Pharms. Corp.*, 252 F.3d 986, 989 (8th Cir. 2001) ("district court's gatekeeping role separates expert opinion evidence based on 'good grounds' from subjective speculation that masquerades as scientific knowledge"). Although *Daubert* did not address class certification issues, nothing in the Court's opinion indicates that scientific evidence considered at one stage of the proceedings may be less reliable than scientific evidence considered at another stage. *See Daubert*, 509 U.S. at 589 (holding that Rule 702 applies to "any and all scientific testimony or evidence admitted").

As the number of courts finding that overlapping class and merits issues must be resolved has risen, so has the recognition that expert evidence relating to both a merit and class certification issue may be reviewed under *Daubert* and Rule 702 at the class certification stage to ensure its reliability. The Second, Third, Fifth, Seventh, and Eighth Circuits have either implicitly or explicitly recognized this approach. *See American Honda Motor Co. v. Allen*, — F.3d —, 2010 WL 1332781, at *3 (7th Cir. Apr. 7, 2010) ("when an expert's report or testimony is critical to class certification … the district court must perform a full *Daubert* analysis before certifying the class"); *In re Hydrogen Peroxide* at 315 n.13; *In re IPO*, 471 F.3d at 42; *Unger v. Amedisys, Inc.*, 401 F.3d 316, 323 n.6 (5th Cir. 2005); *Blades v. Monsanto Co.*, 400 F.3d 562, 575 (8th Cir. 2005). The issue is directly before the Ninth and Eleventh Circuits. *See Dukes v. Wal-Mart, Inc.*, Nos. 04-16688 and 04-16720 (9th Cir.) (*en banc* opinion pending); *Sher v. Raytheon Co.*, No. 09-15798 (11th Cir.). Given the court's obligation to resolve disputed overlapping merits and class certification issues and the lack of limits in *Daubert*, this trend should continue.

Some Practical Implications

In practical terms, increasing judicial scrutiny of overlapping merits and class issues through a *Daubert*-focused lens means that defendants in product liability litigation must consider retaining experts to support and/or oppose Rule 702/*Daubert* motions earlier in the litigation than they traditionally have been made. Doing so may impact the outcome of the class certification request. For example, in *Rhodes v. E.I. DuPont Nemours & Co.*, No. 6:06-cv-00530, 2008 WL 2400944 (S.D.W. Va. June 11, 2008), plaintiffs alleged that a chemical substance released from defendant's plant contaminated the drinking water supplied to nearby communities. Plaintiffs relied "exclusively" on the testimony of two expert witnesses to demonstrate that their medical monitoring claims could be "commonly proven." *Id.* at *5. Defendant's opposition to class certification focused in part on the many individual issues inherent in medical monitoring claims, including exposure, alternate causation, and damages issues. Plaintiffs admitted some individual issues existed, but contended that their experts' methodologies accounted for many of these variables. They also urged the court to "assume" that so-called merits issues such as exposure and risk of disease were subject to common proof. *Id.* at *6. Citing much of the case law discussed above, the court found that expert evidence offered at the class certification stage to prove both certification and overlapping merits issues should be subjected to analysis under *Daubert*, *Id.* at *11. After a thorough hearing, the district court held that plaintiffs' expert evidence was insufficient to establish that their medical monitoring claims could be aggregately proven. *Rhodes v. E.I. DuPont Nemours & Co.*, 253 F.R.D. 365, 374-75 (S.D.W. Va. 2008). Given the trend in federal courts

against certification of medical monitoring classes, the defendant in *Rhodes* may have prevailed without the district court's decision to scrutinize the expert evidence offered under *Daubert*. Nevertheless, *Rhodes* is a recent example of how use of *Daubert* and Rule 702 to challenge plaintiffs' scientific evidence at the class certification stage provides an added boost to class certification defense. *Daubert*/Rule 702 challenges highlight specific flaws in an expert's methodology and/or speculation inherent in the expert's analysis, and thereby reinforce the arguments in the class certification opposition brief regarding the individual issues inherent in mass tort and product liability claims.

Consideration of Overlapping Class Certification

Although cases clarifying that courts must resolve overlapping class and merits issues when considering certification have opened the door to increased review of expert evidence under *Daubert* and Rule 702, they have no meaningful impact on the scope of fact discovery — if any — that is allowed by courts before class certification is considered. Overlap between certain class and merits issues does not mean every merits issue is open to pre-certification discovery.

That being said, one tactic that defendants should anticipate in most cases is a request to enlarge fact discovery. Plaintiffs may suggest to the court that because it must resolve any merits issues that overlap with Rule 23 issues, full merits discovery of defendants prior to class certification is required. As many corporate defendants well know, plaintiffs' counsel seek to use discovery (and particularly e-discovery) as litigation weapons, knowing that corporate defendants bear a disproportionate share of discovery costs. Merely meeting the needs of electronic discovery has become a multi-billion-dollar per year industry. Because plaintiffs typically have few if any documents and corporate defendants have thousands or millions, the discovery playing field is decidedly lopsided. Plaintiffs may seek full merits discovery pre-certification to increase their settlement leverage over defendants uninterested in absorbing discovery costs. Fortunately, settlement is not defendants' only way to avoid needlessly expansive and expensive discovery requests at the class certification stage.

Defendants should continue to object to overly broad requests for discovery on non-class related merits issues. For any class certification discovery request, the plaintiffs must be able to identify a specific requirement in Rule 23 to which the requested discovery applies. If plaintiffs cannot do so, the request is impermissible. For example, if the putative class representatives allege that the defendant engaged in fraudulent marketing practices common to all class members, the Rule 23 question involves whether the defendant had one uniformly disseminated marketing program or different programs delivered through different media and directed at different consumers who may or may not have seen those marketing materials. Resolution of those issues may impact all four subparts of Rule 23(a) and several portions of Rule 23(b). At most, that may justify limited written discovery or, depending on the facts of a given case, a Rule 30(b)(6) deposition of a marketing department representative on the narrow topic of how many marketing programs existed. It does not open up to discovery all aspects of the defendant's marketing department, individual sales representatives, or all marketing related documents and e-mail.

In short, nothing in Rule 23 or the cases discussed above supports broad discovery into merits issues unrelated to Rule 23 issues. In its leading opinion on the overlapping merits/class certification issue, the Second Circuit noted that a district court has "considerable discretion to limit both discovery and the extent of the hearing on Rule 23 requirements" in order to avoid turning class certification proceedings into a "protracted mini-trial of substantial portions of the underlying litigation." *In re IPO* at 41. This holding is consistent with Rule 23 itself. Although the 2003 amendment to Rule 23(c) requires that certification be decided "at an early practicable time," rather than "as soon as practicable after commencement of an action," the Advisory Committee made it clear that this change was in part to allow time for "limited discovery" regarding Rule 23's requirements, not a full inquiry into the merits. *See* Fed. R. Civ. P. 23 Adv. Comm. Notes.

Conclusion

The trend against certification of mass tort or product liability cases creates a risk that unwary defendants will be lulled into a false sense of class action security. Although strict pre-certification requirements provide defendants with powerful arguments against certification, the ever-increasing number of class actions, the need for earlier and more significant expert evidence development, and anticipated battles over leverage plaintiffs may seek to gain through expansive discovery requests mean that the class action litigation dust is far from settled.