Waging the Merits War at Class Certification: Does Expert Evidence Streamline the Process?

Michelle Lowery and Jodie Williams

Successfully certifying an antitrust class under Rule 23 can be a battle. There are the well-known tenets of Rule 23(a)—numerosity, commonality, typicality, and adequacy—that must be established. And then there are the Rule 23(b)(3) hurdles—predominance and superiority—where plaintiffs are seeking money damages.

Under Rule 23(b), plaintiffs must prove that liability, causation (or impact), and damages can be resolved through evidence common to the class. Plaintiffs used to be able to meet this burden by describing the type of evidence they intended to submit at trial and that this evidence would be the same if the plaintiffs' several cases were tried separately. Within the last 20 years, however, the Supreme Court and lower courts around the country have changed the game. Courts are now to look forward and determine whether the plaintiffs' claims are capable of being tried en masse: Will the proposed common questions produce answers at trial that will resolve the claims of all class members?

This has led courts to "rigorously analyze" the plaintiffs' class certification submissions, including all evidence, to ensure that all elements of Rule 23 are met.[1] As a result, merits issues may be considered and resolved when intertwined with class issues. Many courts have made it clear that Rule 23 is not a pleading standard. But it is also not an evidentiary standard, and the "rigorous analysis" requirement has blurred the lines between class certification and summary judgment.

Against this backdrop, plaintiffs are often unwilling to assume the risk of an adverse ruling for lack of sufficient evidence. As a result, class certification motions are generally supported by complex economic testimony opining that the structure, conduct, and performance of the industry is consistent with the antitrust violation alleged. Plaintiffs often offer robust econometric models for common impact and estimated aggregate damages. Defendants submit their own economic and econometric reports to rebut the plaintiffs' experts' findings. What used to be a motion made early in the proceedings based on a "some showing" standard—abbreviated evidence and relaxed admissibility—has evolved into a lengthy and expensive process, frequently near the close of discovery.

Because plaintiffs' experts now offer comprehensive reports, defendants have seized the opportunity to attempt to exclude the evidence early on through expert challenges under *Daubert v. Merrill Dow Pharmaceuticals, Inc.*[2] This sort of admissibility challenge was typically reserved for later stages of litigation, such as summary judgment. Whether or not these motions are properly considered at the class certification stage, courts have begun to meet the rigorous analysis requirement by conducting a *Daubert*-like analysis of plaintiffs' proposed models, and, therefore, *Daubert* motions at class certification are becoming the norm.

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[1] *See* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011).

[2] 509 U.S. 579 (1993).

In this article, we consider how *Daubert* motions can be used effectively to streamline litigation. We discuss what rigorous analysis means, and survey recent class certification opinions to see how courts are applying that analysis and reacting to *Daubert* motions at the class certification stage. We conclude with views from the plaintiffs' and defendants' sides about how to work within these litigation realities to streamline the time, money, and effort expended in an antitrust class action. Perhaps it is time for courts to give *Daubert* motions due consideration at class certification and either fast-track the cases to trial where plaintiffs have met their burden, or dispose as early as possible of alleged class actions where plaintiffs have not met their burden of demonstrating that the cases could be tried with common evidence.

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Rigorous Analysis Part I: How We Got Here

Plaintiffs and defense counsel agree that the standard for certifying a class under Rule 23 has become more stringent throughout the last 20 years. Long gone are the days of filing a "stalking horse" opening brief previewing evidence to be submitted later in litigation, followed by a more detailed but still limited reply. Courts are now required to rigorously analyze the plaintiffs' submission, including evidence, sometimes even delving into issues traditionally deferred until the merits stage to determine whether a case can be tried on a class-wide basis. Plaintiffs' submissions have evolved in turn, containing both admissible qualitative and quantitative evidence. Economic and econometric evidence is often introduced, comprising robust models and opinions demonstrating that liability (impact) and damages are issues common to the class. Defendants counter the plaintiffs' evidence with equally robust expert reports and models. The proverbial "battle of the experts" ensues. It is an increasingly expensive war, both in time and money.

To understand how to streamline the process, we must first understand how we got here. To start, *Wal-Mart* requires a "rigorous analysis," which may "entail some overlap with the merits of the plaintiff's underlying claim" to determine whether plaintiffs have met their burden.[3] However, *Amgen Inc. v. Connecticut Retirement Plans & Trust Fund*[4] clarified that "Rule 23 grants courts no license to engage in free-ranging merits inquires at the certification stage. Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied."

Later, the Supreme Court clarified how the required rigorous analysis might apply in antitrust cases and in class actions. In *Comcast v. Behrend*,[5] a rigorous analysis was applied to an antitrust case and the Court determined that damages methodologies must measure only damages that are a result of the alleged wrong. In other words, the damages model and theory of liability must match. In *Tyson Foods Inc. v. Bouaphakeo*,[6] a rigorous analysis was applied to a class action and the Court found that, under certain circumstances, representative statistical evidence or averages may be used to meet plaintiffs' burden.

In a nutshell, "rigorous analysis" requires that plaintiffs' liability theories must be cohesive among class members and correlate with their damages models. Experts cannot rely on "some showing," but rather must submit robust models proving class-wide impact and damages. These robust submissions lead to *Daubert* challenges being brought earlier and earlier. Do early *Daubert*

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[3] 564 U.S. at 351.

[4] 568 U.S. 455 (2013).

[5] 569 U.S. 27 (2013).

[6] 136 S. Ct. 1036 (2016).

challenges increase case efficiency, disposing of expert testimony (and often the case) well in advance of summary judgment? Or does the current class certification regime unnecessarily increase litigation costs and run afoul of Rule 23's principles? Recent opinions interpreting Supreme Court precedent seem to fall somewhere in between.

Rigorous Analysis Part II: Where We Are Now

With class certification subject to a more stringent analysis, courts are delving deeper into the intricacies of economic models before granting class certification. The deeper dive involves a *Daubert*-style analysis, seemingly to satisfy the rigorous analysis standard. Despite the more rigorous analysis, granting class certification remains the norm except in a few outlier cases. And how courts have treated *Daubert* motions at class certification has varied. Most often, courts conclude that if the economist used a reliable methodology, then the model is admissible even if the results seem questionable. Issues such as data choice and reliability are reserved for later stages of litigation. Opinions in the more recent class certification decisions in which economic evidence was underscored range from cursory overviews to stringent analyses. The wide range has left many wondering whether the class certification process could be more streamlined and efficient. In other words, are these robust economic models, counter-models, and depositions worth the cost at this stage of the litigation?

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In *In re Air Cargo Shipping Services Antitrust Litigation*,[7] the court walked through, in dozens of pages, the many details of the plaintiffs' model and the defendants' critiques (expressed in class briefing, not *Daubert* motions). Nonetheless, it ultimately found that the plaintiffs' evidence would not be too individualized and that the offered regression model was sufficient for Rule 23 purposes. Notably, the regression model concluded that 96 percent of customers were impacted in at least one transaction. The percentage of impacted class members, or conversely the percentage of uninjured class members, existing in the model has been used by courts more recently as grounds to reject the model and not certify a class.[8]

In *In re Steel Antitrust Litigation*,[9] the defendants filed formal *Daubert* motions against each of the plaintiffs' proposed experts. The district court held a three-day evidentiary hearing before making a class certification determination. After gaining what it believed to be a thorough understanding of the broad range of products and producers contained within the class definition, the court found that even if steel prices increased, the plaintiffs had not proffered any model that could measure accurately what impact or damages, if any, any member of the class experienced. It denied the *Daubert* motion nonetheless, finding that the plaintiffs' experts applied reliable methodologies and their models were admissible, although it ultimately denied class certification for impact and damages.

In sharp contrast, the Tenth Circuit took a much more surface-level approach to expert evidence in *In re Urethane Antitrust Litigation*.[10] In that case, the circuit court affirmed the district court's decision to both certify the class and deny the defendants' *Daubert* motions. The court

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[7] No. 06-MD-1175, 2014 WL 7882100 (E.D.N.Y. Oct. 15, 2014), *adopted by* 2015 WL 5093503 (E.D.N.Y. July 10, 2015).

[8] For instance, in *In re Asacol Antitrust Litigation*, 907 F.3d 42 (1st Cir. 2018), the First Circuit expressly rejected a damages model that allowed for 10% uninjured class members and reversed the district court's order certifying the class. From that decision, plaintiffs heading toward class certification should be prepared to proceed only with models showing a *de minimis* number of uninjured class members, perhaps 5% or less. *In re Air Cargo Shipping Services Antitrust Litigation*, upholding a 96% impact percentage, remains good law.

[9] No. 08-C-5214, 2015 WL 5304629 (N.D. Ill. Sept. 9, 2015).

[10] 768 F.3d 1245 (10th Cir. 2014).

delved into the plaintiffs' model only enough to determine that it was capable of showing that a conspiracy to price fix polyurethane products could affect all buyers. For the defendants' *Daubert* motions, it looked only at whether the plaintiffs' expert used a reliable methodology.

In re Processed Egg Products Antitrust Litigation,[11] stemming from the Eastern District of Pennsylvania, is consistent with the Tenth Circuit's approach. In *Egg Products*, the district court examined many of the challenges advanced in the defendants' *Daubert* motions, but deferred each of them to summary judgment. It ended up denying the *Daubert* motions and granting class certification. But, unlike Urethane, the district court delved further and criticized the plaintiffs' economic evidence. It explained that because the plaintiffs' expert's model may not have incorporated certain demand factors and also relied on averages, it likely masked any variability in individual class member impact. Nonetheless, the court found the model to be reliable and refused to dispose of it at class certification.[12]

The Northern District of Illinois reached a similar result in *Kleen Products LLC v. International Paper Co.*[13] That court also deferred resolving challenges to the plaintiffs' expert's models until summary judgment. It accepted as sufficient models that predicted price increases for 92 percent of class members and an average overcharge based on the product purchased for class certification purposes. Interestingly, upon a detailed review at summary judgment, the Court noted that the model contained flaws it likely ought to have taken up at class certification.

Conversely, the D.C. Circuit took a more aggressive approach to economic evidence in *In re Rail Freight Fuel Surcharge Antitrust Litigation*.[14] That case is somewhat of an outlier both because class certification was denied and because the court specifically stated that flaws should not be deferred to summary judgment for resolution. There, the plaintiffs' claims hinged on a damages model that predicted overcharges for class members who had contracts negotiated before the alleged conspiracy began and therefore could not have paid higher prices because of the conspiracy. The court took up the flaws at class certification rather than deferring consideration to the summary stage, stating that "if damages models cannot withstand [] scrutiny [at class certification], that is not just a merits issue,"and denied class certification.

The cases above demonstrate that district and circuit courts have taken the rigorous analysis requirement to heart, carefully examining each aspect of the plaintiffs' class certification submission, yet the accompanying *Daubert* motions are rarely granted and certifying a class continues to be the norm. With this framework in mind, what should plaintiffs' and defense attorneys do to streamline the process? Is the best course of action to submit multiple expert reports on both sides of the "v" and corresponding challenges under *Daubert*?

Tips from the Trenches: Streamlining the Battle Ground

Plaintiffs' Perspective.[15] There is no question that the bar to certify a class has been raised significantly in the last 20 years. Classes used to be certified based on briefs summarizing the evidence to be relied on at trial. Expert reports (if any) were short, explaining what methodologies

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[11] 81 F. Supp. 3d 412 (E.D. Pa. 2015).

[12] Later, after denying summary judgment, the court also refused to decertify the class because the model was reliable for the 2004–2008 class period even though the plaintiffs' expert admitted he could not distinguish between legal and illegal behavior predicted by the model post-2008. No. 08-MD-2002, 2017 WL 5177757 (E.D. Pa. Nov. 7, 2017).

[13] 831 F.3d 919 (7th Cir. 2016).

[14] 725 F.3d 244 (D.C. Cir. 2013).

[15] Jodie Williams presents Plaintiffs' Perspective.

could be used to show that impact could be proven with evidence common to the class, and that damages could be estimated.

Opening class certification briefs now must include a detailed explanation of the alleged violation. That explanation must be supported by evidence. Expert reports are required to show that liability questions can be answered through evidence common among class members, with no sign of significant individual factual issues. These reports must also be based on reliable facts and data, supported by widely accepted methodologies fitting the facts of the case. Damages models must produce a sound estimate, also based on evidence common to the class. And, although prepared in many instances while fact discovery is still ongoing, the class certification reports cannot deviate substantially from reports submitted later at the summary judgment phase or beyond. Those that do risk additional exposure to reliability and admissibility challenges.

The question becomes, then, how to convince a court that the class should be certified while not overrunning litigation costs on a global level. The answer lies in preparation. Plaintiffs need expert evidence, particularly to demonstrate predominance. Although, technically, class certification is not an evidentiary motion, plaintiffs also can no longer rest on the plausibility of their allegations. Reliable proof is critical, supported by those qualified to opine on the economic and econometric significance of that proof at trial.

The above opinions demonstrate that courts are not only willing to entertain *Daubert* motions, they believe these motions are required to satisfy their rigorous analysis obligation. The key, then, is to carefully select your experts and do so early in the case. Use those experts to guide your discovery requests to ensure they have the information needed to prepare robust reports at class certification. Undertake efforts to obtain the most reliable dataset available in early phases of litigation. That effort may include trying to agree with defendants on a common dataset. Doing so will allow experts to submit comprehensive reports at class certification that can survive *Daubert* scrutiny. In turn, those reports will only need slight tinkering at the summary judgment and later phases in litigation. With models that have already been found relevant and reliable from qualified experts, summary judgment becomes that much easier and more cost effective to withstand. Although litigation costs may increase in the short term, the latter phases of discovery and pretrial litigation become significantly less costly. And the class certification submission becomes more persuasive.

My co-author Ms. Lowery advocates for more serious consideration to expert methodologies and admissibility challenges at class certification. Many of the opinions above dive deeply into the economics and econometrics of the cases traditionally presented in expert reports. But as she notes, courts are increasingly reluctant to exclude expert testimony at this stage of litigation. Disposing of inadmissible or unreliable expert opinions early on may help reduce litigation costs for all parties. For instance, if defense expert testimony is deemed inadmissible or unreliable at class certification, it is possible that summary judgment is streamlined or forgone altogether, paving the way for trial.

But perhaps the better answer is to follow Justice Ginsburg's opinion in *Amgen* that class certification is not meant to be a vehicle to adjudicate the case and return the proceeding to its procedural motion roots.[16] Rule 23 still dictates that class certification should be determined at "an early practicable time." Some local rules at one point interpreted this to mean within 90 days of

[16] 568 U.S. at 465–66.

filing the complaint. And, in light of *Twombly*,[17] plaintiffs' complaints are supported by ample factual allegations for courts to consider whether common issues can be resolved on a class-wide basis. Rather than incorporate *Daubert* into class certification, courts could reject the notion altogether, require class certification motions to be brought earlier in a case's lifecycle, and then forge ahead to summary judgment and trial. Returning class certification to a procedural motion rather than an evidentiary motion will reduce the volume of the plaintiffs' submissions and, in turn, the defendants' submissions, all of which will lead to reduced litigation costs and increased judicial efficiency. The alternative, full-blown evidentiary hearings at class certification, may result in mini-trials in the middle of the pre-trial litigation with discovery ongoing, and may increase litigation costs rather than streamline.

Defendants' Perspective.[18] Courts should give more serious consideration to expert methodologies at the class certification stage and eliminate before summary judgment or trial those models that cannot work.

Defendants continue to bring *Daubert* challenges at the class certification stage even though they are rarely granted. By the time the *Daubert* motions are filed, defense attorneys have spent months analyzing the plaintiffs' experts' proposed models and finding all of their flaws. Defendants have hired their own experts to analyze the models and form rebuttals to those models. They have spent significant time and money condensing all of the critiques into a short list of the most important flaws, and hours editing the explanations of these models and their flaws into something understandable for non-economists. The conclusion defendants reach, long before a *Daubert* motion is filed, is that the plaintiffs' proposed model cannot work as a common methodology to establish that the class was impacted and by how much. Defendants then file *Daubert* motions to highlight to the court that the model won't do what it is supposed to do.

The prevailing case law gives courts the opportunity and authority to grant *Daubert* challenges at the class certification stage, yet courts, albeit after a rigorous analysis, continue to routinely accept plaintiffs' models as capable of proving impact and damages, deny *Daubert* motions (if filed), and grant class certification. While a properly constructed regression model admittedly may be able to appropriately calculate impact and damages, many courts have never tested the model they ultimately approve. Courts accomplish the rigorous analysis required by discussing many components of the model, but nevertheless ultimately find the model reliable and passable under a *Daubert* challenge. Courts then find that class certification is appropriate because a regression model could potentially serve as a common proof of impact and damages. Courts feel sound making this decision because of the myriad precedential cases that accepted regression models at class certification. But, regression models are widely accepted methodologies and every antitrust case has a well-qualified economist who constructed the model.

In accepting plaintiffs' impact and damages model, particularly where defendants have filed *Daubert* motions, most courts must leave some set of factual disputes for resolution at summary judgment or trial that could have been resolved at class certification. Instead of resolving on the merits conflicts over flaws in the model, courts often deny *Daubert* motions if the economist has some science-backed justification for constructing the model. In other instances, courts simply defer conflicts over flaws in the model by characterizing them as suitable for resolution at sum-

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[17] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555–57 (2007).

[18] Michelle Lowery presents Defendants' Perspective.

mary judgment or at trial as weight or credibility issues. Very rarely do courts delve into the model and the facts of the case to determine whether the model will actually work.

Precedent exists for courts to start excluding unworkable expert models at class certification. As noted above, *Comcast* has been interpreted by some courts as requiring them to consider expert methodologies at class certification regardless of whether a *Daubert* motion is filed. *Wal-Mart* dictates that class certification is not a mere pleading standard; courts must conduct a rigorous analysis, which often entails an overlap with the merits of the case and plaintiffs' underlying claim.[19] The purpose of the rigorous analysis is to determine "the method best suited to adjudication of the controversy fairly and efficiently."[20] Where the model does not work at the class certification stage, class treatment cannot be "the method best suited to adjudication of the controversy."[21]

Courts should grant *Daubert* motions or exclude experts at the class certification stage. A model that *could* work is not necessarily one that actually does work, and courts should take the opportunity at class certification to run the model and apply it to the facts of the case. If understanding the model fully requires an evidentiary hearing, then one should be held. If the model does not actually work, then flaws exist in the methodology of constructing it, and it can be disposed of under *Daubert*. The court already is examining the model, and should not have to continue to analyze it at every additional stage of the case, especially because a model that does not work means the case should never have proceeded as a class action in the first place.

Steel and *Kleen* are excellent examples. In *Steel*, the Court found that the plaintiffs' model did not fit the realities of the industry, but did not grant the pending *Daubert* motions even though *Daubert* requires expert testimony to fit the facts of the case. Excluding the expert testimony would have further streamlined the case, by eliminating the class without the need to reach a full-blown class certification decision. In *Kleen*, the court did not fully engage at class certification with the flaws identified in the plaintiffs' proposed model, although the defendants also did not file *Daubert* motions at that time. But, at summary judgment, the court characterized that same model as "suspect" and unreliable and admitted to having misunderstood it at the class certification stage. By deferring so-called merits issues with the model to summary judgment, the court had to engage with the model twice, when, if the flaws had been enough to deny class certification, the multi-stage review likely led to the case lasting years longer than it otherwise would have. In both *Steel* and *Kleen*, granting *Daubert* motions and resolving flaws in proposed models at the class certification stage could have further streamlined the cases, because without experts to present the flawed methodologies, there is no need for the court to engage in a full class certification analysis.

Excluding expert models at class certification would resolve more cases earlier. In many cases, plaintiffs use the same model at summary judgment and trial as they did at the class certification stage, and defendants must identify the flaws once again. Further, the duration of antitrust class actions alone causes many defendants to settle, even when a case has no merit. Determining at the class certification stage whether plaintiffs have presented an expert whose model works (not just that it has the potential to work) well enough to allow the case to proceed as a class should allow more cases to resolve even before a full analysis of the rest of the class certification elements, and also eliminate substantial expert motion practice at both summary judgment and trial.

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[19] *Wal-Mart*, 564 U.S. at 350–51.

[20] *Amgen*, 568 U.S. at 460.

[21] *Id.*

Conclusion

Rigorous analysis at class certification has made briefing voluminous and expensive. Plaintiffs submit extensive evidence and econometric models to withstand rigorous analysis. Defendants respond with rebuttal experts and by filing *Daubert* motions. Courts have interpreted "rigorous analysis" as requiring resolution of merits issues where there are factual disputes. Since the courts are already looking, perhaps precedent will evolve to streamline evidentiary issues at the class certification stage. Courts are already digging into expert testimony submitted by both sides. And while many fully satisfy the rigorous analysis requirement, few are definitively resolving concerns with reliability, methodology and fit. Those issues are being saved for later stages of litigation and thereby increasing costs. If courts can provide more certainty on these expert issues early in the case, they will pave the way for cases to be resolved early or fast-tracked to trial. ●