

BETWEEN “MERIT INQUIRY” AND “RIGOROUS  
ANALYSIS”: USING *DAUBERT* TO NAVIGATE THE  
GRAY AREAS OF FEDERAL CLASS ACTION  
CERTIFICATION

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I. INTRODUCTION

In recent years, the class action certification hearing has become the latest forum for disputes over the reliability of expert testimony.<sup>1</sup>

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Since these hearings may involve complex technical matters, litigants frequently try to introduce expert testimony to either establish or challenge the basic requirements for class certification.<sup>2</sup> Yet most courts do not conduct a *Daubert* analysis before admitting expert testimony during certification,<sup>3</sup> evaluate the evidence according to a uniform standard, or adequately weigh opposing expert opinions.<sup>4</sup>

Even though the Federal Rules of Evidence codify procedures designed to ensure the reliability of expert testimony,<sup>5</sup> courts have been reluctant to employ those procedures during class certification.<sup>6</sup> This hesitation arises primarily from a fear of moving into the substantive merits of the case.<sup>7</sup> Certifying a class based on unreliable expert testimony may force courts to decertify the class later in the process, encourage frivolous suits that strong-arm risk-averse defendants into settlement,<sup>8</sup> waste judicial resources, and undermine the legitimate purposes of the class action mechanism. Ideally, to make a fair and informed decision on certification, judges should use the wide latitude afforded by the current gray area between the *Eisen v. Carlisle & Jacquelin*<sup>9</sup> prohibition on an inquiry into the case's merits and the *General Telephone Co. v. Falcon*<sup>10</sup> rigorous analysis requirement to: (1) routinely apply *Daubert* as a precursor to admitting expert evidence; (2) adequately weigh opposing expert opinions and other evidence; and (3) employ a preponderance of the evidence standard to determine the sufficiency of the plaintiff's proof. The court could then resolve ambiguities in favor of the plaintiffs and err on the side of certification.<sup>11</sup>

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1. See Cari K. Dawson, *Combating Class Certification Experts: Potential Strategies for Defendants*, 72 U.S.L.W. 2051, 2051 (Aug. 5, 2003); Alice A. Kelly & Joy L. Holley, *Using Daubert to Oppose Class Action Certification*, 4 ANDREWS DIET DRUGS LITIG. REP. 6, 6 (2001).

2. See Kelly & Holley, *supra* note 1, at 6.

3. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

4. Courts have an independent obligation to conduct their own inquiry into whether the plaintiff met the requirements of Rule 23 of the Federal Rules of Civil Procedure. *Valley Drug Co. v. Geneva Pharms., Inc.*, 350 F.3d 1181, 1188 (11th Cir. 2003); *Martinez-Mendoza v. Champion Int'l Corp.*, 340 F.3d 1200, 1216 n.37 (11th Cir. 2003) (quoting *McGowan v. Faulkner Concrete Pipe Co.*, 659 F.2d 554, 559 (5th Cir. 1981)).

5. See FED. R. EVID. 702, 703.

6. See *infra* Part IV.B.

7. See *id.*; *Eisen v. Carlisle & Jacquelin* prohibits courts from evaluating the substantive merits of a case during class certification. 417 U.S. 155, 178 (1974).

8. See *infra* Part VI.A.

9. 417 U.S. at 178. Part II.A. further explains the merit inquiry.

10. 457 U.S. 146, 161 (1982). The Supreme Court's requirement that courts conduct a rigorous analysis to determine whether evidence satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure is further discussed *infra* Part II.A.

11. The burden of proof during class certification has not been adequately addressed in case law. However, since the typical burden of proof in civil cases is a "preponderance of the evidence," courts should require plaintiffs to prove by a preponderance of the evidence

This Comment takes a closer look at the judicial handling of experts in federal class certification hearings, the amount of proof required for certification, and the means courts employ to evaluate the sufficiency of evidence. This Comment ultimately argues that courts should admit expert affidavits and reports only if they survive an initial *Daubert* analysis.<sup>12</sup> Part II begins by briefly outlining the prerequisites for certifying a class under Rule 23 of the Federal Rules of Civil Procedure, and analyzes the variations in Supreme Court decisions that have led to confusion during certification. Part II also discusses the ambiguous threshold of proof courts use to weigh the sufficiency of the evidence offered to satisfy Rule 23. Part III then explains the *Daubert* analysis and remarks on the ways in which parties rely on experts to prove or disprove the Rule 23 certification requirements. Part IV examines the misinterpretation of Federal Rule of Evidence 1101 as a possible root cause for the failure of courts to apply the Federal Rules of Evidence during certification. It also discusses how the judiciary has responded to *Daubert* challenges and how seriously courts examine expert evidence once it is admitted.

Part V of this Comment focuses on ways to institute a principled approach to expert evidence in class certification. Courts admit expert evidence via affidavits in both summary judgment and class certification hearings. In summary judgment hearings, courts employ the Federal Rules of Evidence. Part V.A suggests that the application of the Federal Rules of Evidence in the summary judgment process provides a viable starting point for discussion on the implementation of evidentiary rules in class certification proceedings. Part V.B then

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that they have met the requirements of Rule 23 of the Federal Rules of Civil Procedure. See *infra* Part II.B.

12. Courts should use *Daubert* when evaluating whether the class meets the certification requirements of Rule 23 of the Federal Rules of Civil Procedure; however, different concerns arise in class settlement. Under the amendments to Rule 23(e), which entered into effect on December 1, 2003, courts are required to approve "any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class." FED. R. CIV. P. 23(e) (as amended). Consequently, if the court employs a *Daubert* analysis prior to certification, then it will be a non-issue in settlement proceedings.

For information about the courts' role in class action settlements prior to the amendments, see BERNARD J. BONN III & ANDREW J. HATCHEY, CONTRIBUTION, INDEMNITY AND SETTLEMENT ISSUES IN SECURITIES CLASS ACTION LITIGATION (1993); Fred Misko, Jr. & Frank E. Goodrich, *Managing Complex Litigation: Class Actions and Mass Torts*, 48 BAYLOR L. REV. 1001, 1046-54 (1996); Vince Morabito, *Judicial Supervision of Individual Settlements with Class Members in Australia, Canada, and the United States*, 38 TEX. INT'L. L.J. 663, 717-23 (2003); Mollie A. Murphy, *The Intersystem Class Settlement: Of Comity, Consent, and Collusion*, 47 U. KAN. L. REV. 413, 436 (1999); Joseph F. Rice & Nancy Worth Davis, *The Future of Mass Tort Claims: Comparison of Settlement Class Action to Bankruptcy Treatment of Mass Tort Claims*, 50 S.C. L. REV. 405, 418 (1999); Tower C. Snow, Jr. et al., *Defending Securities Class Actions*, in ALL-ABA COURSE OF STUDY; SECURITIES LITIGATION: PLANNING AND STRATEGIES 177, 248 (May 8-9, 2003); Mark C. Weber, *A Consent-Based Approach to Class Action Settlement: Improving Amchem Products, Inc. v. Windsor*, 59 OHIO ST. L.J. 1155 (1998).

elaborates on a potential framework and a rationale for the use of *Daubert* in class certification, taking into account the summary judgment process, the Federal Rules of Civil Procedure, and the Federal Rules of Evidence.

Part VI addresses two important changes in the landscape of class action certification: the use of certification to blackmail defendants into settlement, and the possibility that Congress will pass a “class action fairness act.” Part VI.A explains how courts could use *Daubert* to fulfill their duty to independently evaluate the evidence and to minimize the potential for coercion in the event of weak class certification claims. Part VI.B anticipates the possibility that Congress may pass a class action fairness act, and proposes that federal courts could lessen the potential additional burden on the judiciary if they weighed the evidence offered for certification and utilized *Daubert* before admitting expert testimony.

Finally, Part VII outlines the broad discretion given to the district courts through both Rule 23(d) and the abuse of discretion standard of review. Part VII argues that courts should use their discretion to conduct a *Daubert* analysis and to sufficiently weigh the proof offered for Rule 23 before ruling on certification.

## II. CLASS CERTIFICATION REQUIREMENTS OF RULE 23

To understand how and why *Daubert* should apply during class certification, it is helpful to first review both the functions and the certification requirements of Rule 23 of the Federal Rules of Civil Procedure.<sup>13</sup> Class actions serve two primary functions: (1) promoting judicial economy through the efficient resolution of multiple claims in one case, and (2) providing an opportunity for persons with small claims to assert their rights.<sup>14</sup> Since the decision to certify a class lies within the trial court’s “considered discretion,” the trial judge should be ever mindful of these two functions.<sup>15</sup>

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13. The amendments to Federal Rule of Civil Procedure 23, which became effective on December 1, 2003, do not affect this Comment’s analysis. FED. R. CIV. P. 23 (see material appended to Rule 23 for amendment); *see also supra* note 12. The amendments relate to Rule 23(c), (e), (g), and (h) which govern the appointment of class counsel, settlement, notice requirements, and attorneys’ fees.

14. *See O’Connor v. Boeing N. Am., Inc.*, 184 F.R.D. 311, 318 (C.D. Cal. 1998).

15. *Doninger v. Pac. N.W. Bell, Inc.*, 564 F.2d 1304, 1309 (9th Cir. 1977) (quoting *Price v. Lucky Stores, Inc.*, 501 F.2d 1177, 1179 (9th Cir. 1974)); *O’Connor*, 184 F.R.D. at 318 (“In certifying a class, the court should keep in mind the dual purposes of Rule 23: (1) to promote judicial economy through the efficient resolution of multiple claims in a single action; and (2) to provide persons with smaller claims, who would otherwise be economically precluded from doing so, the opportunity to assert their rights.”); 7A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1754, at 49 n.1 (2d ed. 1986).

### A. Terms and Conditions of Rule 23

Before the court considers the requirements of Rule 23, it should determine the existence of an “identifiable class.”<sup>16</sup> This means that the plaintiffs should provide the court with a precise description of who is included in the class and who would be bound by the class judgment.<sup>17</sup> This common law requirement allows the court to determine the suitability of a case for certification and ensures that those allegedly harmed by the defendant will actually receive any relief granted.<sup>18</sup> After adequately defining the class, the party seeking class certification bears the burden of proving that the putative class action satisfies the four requirements of Rule 23(a):<sup>19</sup>

(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact in common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.<sup>20</sup>

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16. Jerold S. Solovy et al., *Class Action Controversies*, in 2 CURRENT PROBLEMS IN FEDERAL CIVIL PRACTICE 7, 44 (PLI Litig. & Admin. Practice Course Handbook Series No. 431, 1992), available at WL 431 PLI/Lit 7; see also Linda S. Mullenix, *Complex Litigation: Certification Burdens*, NAT'L L.J., July 3, 2000, at A14.

17. Solovy et al., *supra* note 16, at 44; see also Mullenix, *supra* note 16, at A14. This requirement is tied to former Federal Rule of Civil Procedure 23(c)(3) (this changed when the amendments to Rule 23 went into effect on December 1, 2003). See Solovy et al., *supra* note 16, at 39. Certification of overly broad or vague classes is improper. *Id.*; see also David Crump, *What Really Happens During Class Certification? A Primer for the First-Time Defense Attorney*, 10 REV. LITIG. 1, 12 (1990). The definition of the class cannot be vague or difficult to apply and should instead use objective terms “capable of present ascertainment.” MANUAL FOR COMPLEX LITIGATION (SECOND) § 30.14 (1985).

18. *Simer v. Rios*, 661 F.2d 655, 670 (7th Cir. 1981); Solovy et al., *supra* note 16, at 37. If a court certifies a class that is “too narrowly defined,” it cannot adjudicate and vindicate the rights of those who were injured. *Id.* at 45.

19. See *Valley Drug Co. v. Geneva Pharms., Inc.*, 350 F.3d 1181, 1187 (11th Cir. 2003) (“The burden of proof to establish the propriety of class certification rests with the advocate of the class.”); *Heaven v. Trust Co. Bank*, 118 F.3d 735, 737 (11th Cir. 1997) (stating that the burden of satisfying the requirements of Rule 23 is on the plaintiff); *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 486 (5th Cir. 1982) (stating that the plaintiff bears the burden of proof that the class prerequisites have been satisfied); *Jones v. Diamond*, 519 F.2d 1090, 1099 (5th Cir. 1975).

20. FED. R. CIV. P. 23(a). The 1966 revision of this rule adopted a pragmatic approach to class treatment and listed four functional reasons for the class action: (1) preventing serious litigation-related unfairness for both defendants and class members, (2) ensuring remedial efficacy, (3) promoting law enforcement, and (4) facilitating litigation efficiency. Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1259-60 (2002). Adequacy of class representation has also developed into a heavily litigated area. The analysis determining whether class representation is adequate asks, first, “whether any substantial conflicts of interest exist between the representatives and the class,” and second, “whether the representatives will adequately prosecute the action.” *In re Healthsouth Corp. Sec. Litig.*, 213 F.R.D. 447, 460-61 (N.D. Ala. 2003). To defeat a party’s claim to class certification, the conflict must be “fundamental” and targeted at the specific issues in controversy. *Valley Drug Co.*, 350 F.3d at 1189; WRIGHT ET AL., *supra*

After meeting the prerequisites of Rule 23(a), the putative class must qualify under one of the three subdivisions of Rule 23(b).<sup>21</sup> Plaintiffs may opt to use Rule 23(b)(1) where a multitude of individual plaintiffs might create inconsistent standards or impair the interests of nonparties.<sup>22</sup> A court may certify a class action under Rule 23(b)(2) if “the party opposing the class has acted or refused to act on grounds generally applicable to the class,” which makes injunctive or declaratory relief applicable to the entire class.<sup>23</sup> Plaintiffs should not employ a Rule 23(b)(2) action if they seek monetary damages since the drafters envisioned this section as a suitable means for adjudicating civil rights, consumer rights, and patent rights.<sup>24</sup> Rule 23(b)(3) applies when questions of law or fact common to the entire class predominate over questions affecting individual class members and class resolution provides the superior method for adjudication.<sup>25</sup>

To determine the superiority of a class action under Rule 23(b)(3), the court must make specific findings to determine:

(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; [and] (D) the difficulties likely to be encountered in the management of a class action.<sup>26</sup>

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note 15, § 1768, at 326-27. When some party members' claims have been harmed by the same conduct that benefited other members of the class, a fundamental conflict exists. *Valley Drug Co.*, 350 F.3d at 1189.

21. FED. R. CIV. P. 23(b). A court may also certify a class as a “hybrid action” under Rule 23(b)(2) and (b)(3). *See, e.g.*, *Midwestern Mach. v. N.W. Airlines, Inc.*, 211 F.R.D. 562, 570 (D. Minn. 2001). Where there is a hybrid class, the court first resolves issues of liability under 23(b)(2), and then the damages issue using the “opt-out” procedures of Rule 23(b)(3). *See id.*; *see also* *Shores v. Publix Super Mkts., Inc.*, No. 95-1162-CIV-T-25(E), 1996 WL 407850, at \*9 (M.D. Fla. Mar. 12, 1996). Ordinarily, judges have broad discretion in determining whether the requirements of Rule 23(a) and one of the requirements of Rule 23(b) have been met. *See* *Williams v. Weinberger*, 360 F. Supp. 1349, 1352 (N.D. Ga. 1973); *Southern v. Bd. of Transp. for Dallas Indep. Sch. Dist.*, 318 F. Supp. 355, 359-60 (N.D. Tex. 1970). If a class that is not certifiable under the rule can be redefined to meet the prerequisites, then the court does not have to dismiss it. *See* *Geraghty v. United States Parole Comm'n*, 719 F.2d 1199, 1205 (3d Cir. 1983); *see also* *DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970); *Shivelhood v. Davis*, 336 F. Supp. 1111, 1113 (D. Vt. 1971).

22. FED. R. CIV. P. 23(b)(1).

23. *Id.* at (b)(2).

24. FED. R. CIV. P. 23 advisory committee's note; Solovy et al., *supra* note 16, at 38.

25. FED. R. CIV. P. 23(b)(3); Dwight J. Davis & Karen R. Kowalski, *Use and Misuse of Expert Opinions at the Class Certification Stage*, 69 DEF. COUNS. J. 285, 286 (2002); Solovy et al., *supra* note 16, at 39.

26. FED. R. CIV. P. 23(b)(3).

The plaintiff must also choose a member of the class as the class representative.<sup>27</sup> For purposes of certification, the court asks whether the plaintiffs provided sufficient proof to satisfy the prerequisites of Rule 23, not whether the stated cause of action will prevail on the merits.<sup>28</sup>

Although the certification requirements appear straightforward, several Supreme Court decisions provide judges with somewhat inconsistent guidelines for conducting the certification analysis. In *Eisen v. Carlisle & Jacquelin*, the Court prohibited judges from conducting a “preliminary inquiry into the merits of a proposed class action” at the certification stage.<sup>29</sup> The Court reasoned that Rule 23 did not authorize an inquiry into the merits,<sup>30</sup> and worried that a merits determination would “color the subsequent proceedings and place an unfair burden on the defendant” without trial safeguards.<sup>31</sup> An inquiry into the merits would give plaintiffs the benefits of a class action prior to certification.

Yet, in *Coopers & Lybrand v. Livesay*, the Court observed that an “[e]valuation of many of the questions entering into [the] determination of class action questions is intimately involved with the merits of the claims.”<sup>32</sup> Finally, without ever directly questioning its previous decisions, the Court, in *General Telephone Co. v. Falcon*, stated that district courts may certify class actions only if they are satisfied after a “rigorous analysis” that the case meets each of the prerequisites of Rule 23(a).<sup>33</sup> Since this decision, courts have struggled to conduct *Falcon*’s “rigorous analysis” while avoiding *Eisen*’s prohibition of a preliminary inquiry into the merits.<sup>34</sup>

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27. This requirement is generally known as the “standing” or “adequacy” requirement. Mullenix, *supra* note 16, at A14. A named plaintiff cannot assert claims on behalf of a putative class when he or she was not personally injured. *Vuyanich v. Republic Nat’l Bank*, 723 F.2d 1195, 1200 (5th Cir. 1984).

28. See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 154, 178 (1974) (prohibiting a preliminary inquiry into the merits of the case).

29. *Id.* at 178. Other courts have argued that a court cannot make a Rule 23 determination “without at least a preliminary exploration of the merits.” *Sanders v. Robinson Humphrey/Am. Express, Inc.*, 634 F. Supp. 1048, 1055 n.8 (N.D. Ga. 1986) (citing ARTHUR MILLER, AN OVERVIEW OF FEDERAL CLASS ACTIONS: PAST, PRESENT, AND FUTURE 15 (2d ed. 1977)).

30. *Eisen*, 417 U.S. at 178.

31. *Id.* at 178-79 (stating that part of the plaintiffs’ burden is paying for the costs of the litigation).

32. 437 U.S. 463, 469 n.12 (1978) (quoting 15 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3911, at 485 n.45 (1976)).

33. 457 U.S. 147, 161 (1982).

34. *Bone & Evans*, *supra* note 20, at 1268. Some commentators advocate conducting class certification on the merits of the claim. See Geoffrey C. Hazard, Jr., *Class Certification Based on Merits of the Claims*, 69 TENN. L. REV. 1 (2001).

*B. Proving the Rule 23 Requirements: How Much Proof Constitutes Sufficient Evidence?*

This struggle between conducting a rigorous analysis and avoiding the merits inquiry is caused, in part, by a lack of guidance on the quantum of proof needed to satisfy the Rule 23 requirements. When litigants offer expert affidavits or statistics to prove the requisites of Rule 23, the court must make two distinct determinations. First, the court must decide whether to admit the expert evidence. Although courts have traditionally employed a low threshold for admissibility during class certification, they should use a higher standard to filter unreliable evidence.<sup>35</sup>

Second, the court must determine how much weight to give to that expert evidence as it decides whether the totality of the plaintiffs' evidence provides sufficient proof of the Rule 23 requirements. Rule 23 is silent on the standard of proof;<sup>36</sup> however, the typical burden of proof in a civil suit is a "preponderance of the evidence."<sup>37</sup> Most court opinions simply ask whether the plaintiffs' evidence, expert or otherwise, sufficiently demonstrates the requirements of Rule 23.<sup>38</sup> Certification opinions provide surprisingly little elaboration or guidance on what constitutes "sufficient" evidence. Even though a preponderance of the evidence standard makes the most sense in this type of civil proceeding, without a clear mandate for its use, the standard changes on an ad hoc, case-by-case basis.<sup>39</sup>

On one end of the spectrum, the Eleventh Circuit held that when plaintiffs choose not to proffer any evidence at all in support of a Rule 23 requirement, they fail to meet their burden of providing suf-

35. Certifying a class with unreliable evidence may increase the possibility of coercing the defendants into settlement. *See infra* Part VI.A.

36. *See* FED. R. CIV. P. 23.

37. *See* *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387 (1983); Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 870 (1992).

38. *See In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 135 (2d Cir. 2001) (asking whether the plaintiffs' evidence is sufficient); *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 292 (2d Cir. 1999) (concluding that the plaintiffs' statistical evidence supported a finding of commonality); *Bacon v. Honda of Am. Mfg., Inc.*, 205 F.R.D. 466, 470 (S.D. Ohio 2001) ("The appropriate inquiry is whether the statistics 'are sufficient to show . . . the existence of common questions.'" (quoting *Hopewell v. Univ. of Pitt.*, 79 F.R.D. 689, 693 (W.D. Pa. 1978)); *Reid v. Lockheed Martin Aeronautics Co.*, 205 F.R.D. 655, 667 n.14 (N.D. Ga. 2001) (denying class certification because plaintiffs made "little effort to show how proving the elements of their individual claims [would] also prove the claims of the absent class members," but not stating what constitutes sufficient evidence to prove these claims); *In re Polypropylene Carpet Antitrust Litig.*, 996 F. Supp. 18, 24 (N.D. Ga. 1997) (finding that the plaintiff offered "sufficient evidence," but failing to indicate what standard the court used to determine sufficiency).

39. *See generally* Part IV.B.2. For additional information on minimizing the rate of error in the preponderance of the evidence standard, *see* Vern R. Walker, *Preponderance, Probability and Warranted Factfinding*, 62 BROOK. L. REV. 1075, 1099-1104 (1996).

ficient evidence.<sup>40</sup> When other courts evaluate expert evidence, they have certified classes where the methodologies show a “reasonable probability” of establishing the plaintiffs’ claims,<sup>41</sup> when plaintiffs demonstrate a “colorable method” of proof,<sup>42</sup> and even where the proposed methods are not “so insubstantial as to amount to no method at all.”<sup>43</sup> The Eleventh Circuit held that courts have a duty to conduct an independent inquiry into whether the plaintiffs’ evidence satisfies Rule 23 regardless of whether defendants contest the issue.<sup>44</sup> Yet, many courts fail to weigh contested evidence, much less conduct their own inquiry.<sup>45</sup>

Contrary to these relaxed evidentiary thresholds, the Supreme Court noted that absent clear proof, “significant proof” of the Rule 23 requirements could justify certifying a class.<sup>46</sup> Although the certification process contains some flexibility to enhance the usefulness of the class action device, the Court stated that “actual, not presumed, conformance with Rule 23(a) remains, however, indispensable.”<sup>47</sup> The Court emphasized that a trial court may certify a class only if it concludes, “after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.”<sup>48</sup> Consequently, it seems that the Court requires at least a preponderance of the evidence standard. When lower courts certify classes based on expert evidence that demonstrates only a “colorable method” of proof,<sup>49</sup> or where the method is not “so insubstantial as to amount to no method at all,”<sup>50</sup> it may *not* be more likely than not that the plaintiffs satisfied Rule 23(a).

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40. *Valley Drug Co. v. Geneva Pharms., Inc.*, 350 F.3d 1181, 1196 (11th Cir. 2003).

41. *In re Sumitomo Copper Litig.*, 182 F.R.D. 85, 91 (S.D.N.Y. 1998).

42. *In re Disposable Contact Lens Antitrust Litig.*, 170 F.R.D. 524, 531 (M.D. Fla. 1996).

43. *In re Potash Antitrust Litig.*, 159 F.R.D. 682, 697 (D. Minn. 1995).

44. *Valley Drug Co.*, 350 F.3d at 1188.

45. *See, e.g., In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 135 (2d Cir. 2001) (refusing to weigh opposing expert evidence that offered conflicting opinions on whether the plaintiffs could establish common questions of fact for certification).

46. *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 159 n.15 (1982).

47. *Id.* at 160.

48. *Id.*

49. *See In re Disposable Contact Lens Antitrust Litig.*, 170 F.R.D. 524, 531 (M.D. Fla. 1996). In this case, replacement contact lens purchasers brought an antitrust action against Johnson & Johnson Vision Products, Inc., Bausch & Lomb, Inc. and CIBA Vision Corporation, the largest contact lens manufacturers in the United States, *id.* at 527. The plaintiffs alleged that these manufacturers conspired among themselves, along with two trade organizations, to “restrict the supply of replacement contact lenses.” *Id.* As such, the contact lenses were marked-up at “supracompetitive” prices. *Id.* The district court granted the plaintiffs’ motion for class certification. *Id.* at 533. In doing so, the court stated that the “[p]laintiffs have demonstrated at least a ‘colorable method’ of proving impact at trial . . . . That Defendants’ expert disagrees with the methodology and conclusions propounded by [the plaintiffs’ expert] is not reason to deny class certification.” *Id.* at 531 (internal citations omitted).

50. *In re Potash Antitrust Litig.*, 159 F.R.D. 682, 697 (D. Minn. 1995). Potash is “a mineral typically mined from land deposits,” and is used in the United States for fertilizer

Without a uniform threshold of proof, the amount of proof that constitutes “sufficient evidence” may continue to reflect the personal preferences of the court rather than the adequacy of the plaintiffs’ proof. Courts should affirmatively adopt a preponderance of the evidence standard and determine, after considering all of the evidence, whether the plaintiff supplied sufficient proof to satisfy Rule 23(a).

Weighing the evidence forces judges to envision how the class action might develop, and thus forms an almost inseparable relationship between the prerequisites of a class action and the substantive merits.<sup>51</sup> Even though a court should not decide the merits of the case during certification, it “can and should consider the merits of the case to the degree necessary to determine whether the requirements of Rule 23 will be satisfied.”<sup>52</sup> The post-*Eisen* decisions demonstrate that the rigorous application of Rule 23 requires the court to analyze the evidence even if the scrutiny overlaps the merits of the case.<sup>53</sup> Despite the court’s duty to determine whether the plaintiffs satisfied Rule 23(a), even in the event that the inquiry touches the merits,<sup>54</sup> judges often err on the side of caution by giving evidence remotely related to the merits a wide berth.<sup>55</sup> As a result, the chances of a court certifying a class that, more likely than not, does not meet the Rule 23 requirements increases.

Three general practices hinder the court in making informed and fair certification decisions: (1) most courts do not regularly employ *Daubert* standards before admitting expert evidence and can certify a class based on flawed evidence, (2) courts do not seriously weigh the evidence offered or apply a uniform standard to judge whether the plaintiffs produced sufficient proof to satisfy Rule 23, and (3) courts

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production. *Id.* at 686 n.1. In *Potash*, fertilizer producers in the United States alleged that the potash producers violated the Sherman Act by “conspiring to raise, fix, maintain, and stabilize the wholesale price of potash.” *Id.* at 686. The fertilizer producer plaintiffs alleged that they were injured by having to pay artificially high prices. *Id.* The district court granted their motion. *Id.* at 700. In its decision to certify the class, the court stated:

In assessing whether to certify a class, the Court’s inquiry is limited to whether or not the proposed methods are so insubstantial as to amount to no method at all. This relaxed standard flows from the equitable notion that the wrongdoer should not be able to profit by insistence on an unattainable standard of proof.

*Id.* at 697 (citations omitted).

51. Bone & Evans, *supra* note 20, at 1268.

52. Valley Drug Co. v. Geneva Pharms., Inc., 350 F.3d 1181, 1188 n.15 (11th Cir. 2003).

53. See *Falcon*, 457 U.S. at 160; *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.12 (1978); *Disposable Contact Lens*, 170 F.R.D. at 528 (observing that the principle requiring courts not to consider the merits of the plaintiffs’ claims should not be invoked so rigidly so as “to artificially limit a trial court’s examination of the factors necessary to make a reasoned determination of whether Rule 23 has been satisfied”); Brief of Amici Curiae Am. Bankers Assoc. et al. at 13, *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124 (2d Cir. 2001); Bone & Evans, *supra* note 20, at 1276-77.

54. Valley Drug Co., 350 F.3d at 1188 n.15.

55. See, e.g., *O’Connor v. Boeing N. Am., Inc.*, 184 F.R.D. 311, 321 (C.D. Cal. 1998).

resolve ambiguities in favor of plaintiffs and err on the side of certifying the class.<sup>56</sup> Ideally, to make a reasonable and informed decision on certification, courts should apply *Daubert* as the standard for admissibility of expert evidence, weigh opposing expert opinions as well as the totality of the evidence, and employ a preponderance of the evidence standard to determine the sufficiency of the evidence. The court could then resolve ambiguities in favor of the plaintiffs and err on the side of certification.

### III. THE USE OF EXPERT TESTIMONY TO SATISFY RULE 23

In negotiating the unpredictable area of class certification, litigants present the courts with numerous expert opinions in the form of affidavits and reports.<sup>57</sup> These reports may aid the judge in determining whether the plaintiffs established the requirements in Rule 23.<sup>58</sup> Traditionally, before admitting expert testimony, the testimony must survive scrutiny under Rules 702 and 703 of the Federal Rules of Evidence.<sup>59</sup> The rules advisory committee drafted the Rules of Evidence to “secure fairness in administration, eliminat[e] unjustifiable expense and delay, and promot[e] growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.”<sup>60</sup>

#### A. Federal Rule of Evidence 702: Daubert & Kumho Tire

Rule 702 of the Federal Rules of Evidence allows experts to testify, so long as they base their testimony on “sufficient facts or data,” use “reliable principles and methods,” and apply those principles and methods “reliably to the facts of the case.”<sup>61</sup> Two Supreme Court decisions, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>62</sup> and *Kumho Tire Co. v. Carmichael*,<sup>63</sup> provide the foundation for the rule. In

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56. See *In re Sumitomo Copper Litig.*, 182 F.R.D. 85, 88 (S.D.N.Y. 1998). The court in *Sumitomo* noted that “[t]he Second Circuit has directed district courts to apply Rule 23 according to a liberal rather than a restrictive interpretation.” The court then quoted *Green v. Wolf Corp.*, 406 F.2d 291, 298 (2d Cir. 1968), which stated “if there is to be an error made, let it be in favor and not against the maintenance of the class action, for it is always subject to modification should later developments during the course of the trial so require.” *Id.* While this statement complies with the flexibility in Rule 23, the Supreme Court has cautioned that “actual, not presumed, conformance with Rule 23(a) remains, however, indispensable.” *Falcon*, 457 U.S. at 160.

57. Mandi L. Williams, Note, *The History of Daubert and Its Effect on Toxic Tort Class Action Certification*, 22 REV. LITIG. 181, 202 (2003).

58. See Nancy J. Moore, *Class Action Experts Discuss Key Decisions, New Rules, and Litigation Strategies*, 4 Class Action Litig. Rep. (BNA) 818 (Nov. 14, 2003).

59. FED. R. EVID. 702, 703.

60. FED. R. EVID. 102.

61. FED. R. EVID. 702.

62. 509 U.S. 579 (1993).

63. 526 U.S. 137 (1999).

*Daubert*, the Court required trial judges to act as “gatekeepers” by excluding unreliable and irrelevant *scientific* testimony.<sup>64</sup> In *Kumho Tire*, the question before the Court was whether *Daubert*’s fundamental gatekeeping obligation applied to only scientific testimony, or if it applied to *all* expert testimony.<sup>65</sup> In holding that the gatekeeping obligation applied to all expert testimony, the Court reiterated that Rules 702 and 703 of the Federal Rules of Evidence give experts testimonial latitude “on the ‘assumption that the expert’s opinion will have a reliable basis in the knowledge and experience of his discipline.’”<sup>66</sup> The *Kumho* Court expressed a fundamental concern with expert reliability.<sup>67</sup> As such, Rule 702 requires “a valid . . . connection to the pertinent inquiry as a precondition to admissibility.”<sup>68</sup>

To aid the courts in their gatekeeping function, the Supreme Court suggested a non-exclusive checklist to use in assessing expert reliability.<sup>69</sup> These factors may include: (1) whether the expert’s methods or theories can be tested; (2) whether the technique has been published and subjected to peer review; (3) the known or potential rate of error; (4) the existence of standards and controls; and (5) whether the method has been generally accepted in the scientific community.<sup>70</sup>

In addition to looking at any relevant factors, Rule 702 of the Federal Rules of Evidence requires the trial court to determine whether the expert properly applied the scientifically valid methods and principles to the facts of the case.<sup>71</sup> This prevents a situation where a party would, for example, call a NASA aeronautical engineer to give a medical analysis of an asbestos plaintiff.<sup>72</sup> Under Rule 702, the expert must demonstrate a proper basis for any assumptions made

64. 509 U.S. at 589.

65. *Kumho Tire*, 526 U.S. at 147.

66. *Id.* at 148 (quoting *Daubert*, 509 U.S. at 592); see also JOHN W. STRONG, MCCORMICK ON EVIDENCE § 13, at 59-60 (5th ed. 1999).

67. *Kumho Tire*, 526 U.S. at 149.

68. *Id.* (quoting *Daubert*, 509 U.S. at 592).

69. See FED. R. EVID. 702 advisory committee’s note concerning the 2000 amendment.

70. *Id.* The last factor stems from the “general acceptance test” articulated in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

71. FED. R. EVID. 702. For information on the methodology used in toxic tort cases, see Michael C. McCarthy, Note, “Helpful” or “Reasonably Reliable”? *Analyzing the Expert Witness’s Methodology Under Federal Rules of Evidence 702 and 703*, 77 CORNELL L. REV. 350 (1992).

72. In *Daubert*, the Supreme Court used phases of the moon to give an example on relevancy, stating:

The study of the phases of the moon, for example, may provide valid scientific “knowledge” about whether a certain night was dark, and if darkness is a fact in issue, the knowledge will assist the trier of fact. However (absent creditable grounds supporting such a link), evidence that the moon was full on a certain night will not assist the trier of fact in determining whether an individual was unusually likely to have behaved irrationally on that night.

*Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 591 (1993).

about the facts of the case if he or she wants to give an opinion based on those facts.<sup>73</sup>

To decide whether Rule 702 applies to expert testimony, the court must ascertain “pursuant to [Federal Rule of Evidence] 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.”<sup>74</sup> The court must make this determination in all cases where the “testimony reflects scientific, technical, or other specialized knowledge.”<sup>75</sup> Despite the Supreme Court’s all-inclusive language, most courts determining whether a class meets the requirements of Rule 23 do not apply the Federal Rules of Evidence or perform their gatekeeping function during certification.<sup>76</sup>

The changing role of the class certification hearing may partially explain why judges refuse to act as gatekeepers during the certification process. Traditionally, the court acted as a guardian for the interests of the absent class members and assumed a responsibility to adequately protect those interests.<sup>77</sup> The entire class action resembled a “quasi-administrative” action rather than a traditional lawsuit with clearly defined roles for the litigants.<sup>78</sup> Today, however, the class certification hearing resembles a trial where parties vigorously attack and defend their positions on certification.

Litigants commonly use expert testimony to support or oppose motions for class certification.<sup>79</sup> Yet, the court’s approach to certification retains the trappings of traditional administrative procedure and has not adjusted to the increased use of expert witnesses. Although this Comment will further develop the ways in which courts should adapt to the proliferation of experts in Part V, it is first helpful to understand how plaintiffs and defendants use expert opinions during certification. In general, plaintiffs may rely on an expert to demonstrate

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73. STRONG, *supra* note 66, § 13, at 64-65. The fact in issue during class certification is whether the class satisfies Rule 23.

74. *Daubert*, 509 U.S. at 592 (footnote omitted).

75. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149 (1999).

76. *See infra* Part IV.B.

77. Solovy et al., *supra* note 16, at 43. Today the court should still act as a guardian for absent class members; however, it should exercise this duty in a slightly different way. In light of the changing environment of class actions, the court should act as a guardian for the class by conducting an independent inquiry into whether the plaintiffs sufficiently proved the requirements of Rule 23. *See Valley Drug Co. v. Geneva Pharms., Inc.*, 350 F.3d 1181, 1188, 1196 (11th Cir. 2003). In light of the recent charges of blackmail, the court need not only to protect the interests of the absent class members, but also the interests of the defendants. *See infra* Part VI.A.

78. Solovy et al., *supra* note 16, at 43.

79. Steven Glickstein et al., *Does Daubert Apply to Class Certification Hearings?*, in CLASS ACTION LITIGATION: PROSECUTION & DEFENSE STRATEGIES 423, 425 (PLI Litig. Course & Admin. Practice Handbook Series No. H-695, 2003), available at WL 695 PLI/Lit 425.

numerosity, commonality, predominance, and manageability.<sup>80</sup> Conversely, defendants typically hire experts to counter those of the plaintiffs and to opine that the class would be unmanageable if certified.<sup>81</sup>

### B. Numerosity

Although in many cases the number of plaintiffs in a putative class may be clear-cut, in complex cases expert evidence may substantially impact the size of a class action and demonstrate the necessary causal chain to establish the class representative's standing as a member of the class.<sup>82</sup> No "bright line" test for numerosity exists, and courts have certified classes with as few as thirteen members.<sup>83</sup> The plaintiff must provide some evidence or reasonable estimate of the number of purported class members to satisfy the numerosity analysis.<sup>84</sup> To provide evidence of numerosity in complex litigation, plaintiffs may use statisticians, hydrologists, engineering geologists, economic experts, or even atmospheric experts.<sup>85</sup>

The classic toxic tort case provides a helpful illustration since the plaintiff may find it difficult to ascertain the number of potential class members without expert testimony on the substance's geographical reach.<sup>86</sup> First, a toxic tort plaintiff may hire a professional chemist with expertise in the particular substance to examine the activities surrounding the alleged release as well as the amount, tim-

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

81. See, e.g., *In re Bridgestone/Firestone, Inc., Tires Prod. Liab. Litig.*, 288 F.3d 1012 (7th Cir. 2002), *rev'g in part* 205 F.R.D. 503, *cert. denied sub nom.* *Gustafson v. Bridgestone/Firestone, Inc.*, 537 U.S. 1105 (2003); Sherrie R. Savett, *Trial and Preparation of a Securities Class Action Fraud Case from a Plaintiff's Standpoint*, in SECURITIES LITIGATION 11, 14 (PLI Litig. Course Handbook & Admin. Practice Series No. H-509, 1994), available at WL 501 PLI/Lit 11 (stating that defendants have abundant financial resources that allow them to hire the most impressive and high-quality experts to defeat certification); see also *infra* Part III.D.

82. Williams, *supra* note 57, at 183.

83. See *Dale Elecs., Inc. v. R.C.L. Elecs., Inc.*, 53 F.R.D. 531, 534-36 (D.N.H. 1971). *But see* *Ashe v. Bd. of Elections*, 124 F.R.D. 45, 52 (E.D.N.Y. 1989) (holding that eleven class members were not numerous enough to merit subclass certification).

84. Expert witnesses are often necessary to determine numerosity in toxic tort cases. See LeAnn Mercer et al., *Applicability of Daubert Principles in Toxic Tort Cases*, in ALI-ABA COURSE OF STUDY; HAZARDOUS SUBSTANCES, SITE REMEDIATION, AND NEW AGE ENFORCEMENT 551, 564 (Oct 25-26, 2001).

85. See generally Williams, *supra* note 57, at 198-200 (discussing the use of chemists, toxicologists, and medical experts in establishing causation).

86. Geographic distribution may play a considerable role when a small number of class members exist and numerosity alone cannot establish the impracticability of joinder. Solovy et al., *supra* note 16, at 80-81; see also *Kilgo v. Bowman Transp., Inc.*, 789 F.2d 859, 878 (11th Cir. 1986); *Coca-Cola Bottling Co. v. Coca-Cola Co.*, 95 F.R.D. 168, 175 (D. Del. 1982). For a transcript of a speech on toxic tort cases and the role of science, see Christopher H. Buckley, Jr., *Toxic Tort Cases: Risk Assessment and Junk Science*, 9 KAN. J.L. & PUB. POL'Y 487 (2000).

ing, and method of release.<sup>87</sup> In the case of contaminated air, the expert would assess the number of plaintiffs in a contaminated area by taking into account things such as wind and weather; in water contamination cases, a hydrologist might assess the number of people in proximity to the affected sources.<sup>88</sup> Experts may submit evidence in the form of toxic dispersion maps of contaminated areas.<sup>89</sup> For example, in *O'Connor v. Boeing North American, Inc.*, the engineering geologist and hydrologist used this type of map to demonstrate how chemicals dispersed from a lab through groundwater, migrated into the surrounding neighborhoods, and exposed the community to toxic substances.<sup>90</sup>

In addition to using experts to establish the extent of the chemical release, the plaintiffs, and particularly the class representative, may submit blood or urine to a doctor or technician to determine the individual's toxic exposure through laboratory testing.<sup>91</sup> The plaintiff may then hire an atmospheric chemist to decide whether environmental factors altered the contaminant or whether it remained in its original form once it entered the atmosphere.<sup>92</sup> Finally, plaintiffs may bring in yet another expert to conduct a "plume study" that defines where and in what concentration the toxic materials traveled.<sup>93</sup> This study may help determine the geographical distance traveled by the chemical and, consequently, the number of people affected.

Although defendants do not typically dispute numerosity,<sup>94</sup> the size of the class often directly influences the costs of the verdict or settlement. Toxic tort claims, in particular, can involve entire communities, and may impact individuals differently according to the time the individual spent in the community, the proximity to the source of toxins, the length of exposure, and the amount of exposure.<sup>95</sup> Consequently, the expert's analysis may directly affect the number of plaintiffs included in the class action. Plaintiff and de-

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87. Williams, *supra* note 57, at 198-99.

88. *Id.*; see Christopher H. Buckley, Jr. & Charles H. Haake, *Separating the Scientist's Wheat from the Charlatan's Chaff: Daubert's Role in Toxic Tort Litigation*, 28 ENVTL. L. REP. NEWS & ANALYSIS 10293, 10298 (1998).

89. See *O'Connor v. Boeing N. Am., Inc.*, 184 F.R.D. 311, 320 (C.D. Cal. 1998).

90. *Id.* at 320. In *O'Connor*, residents who lived near a nuclear testing facility brought a motion for class certification against the owner and operators of the facility based on an alleged release of radioactive contaminants. *Id.* at 316-18. The district court certified the class. *Id.* at 342.

91. Williams, *supra* note 57, at 199.

92. *Id.*

93. *Id.*

94. The Eleventh Circuit has held that courts have an independent duty to inquire into the evidence, even if the defendants do not contest its validity. *Valley Drug Co. v. Geneva Pharms., Inc.*, 350 F.3d 1181, 1188, 1196 (11th Cir. 2003).

95. See Ellen Relkin, *Some Implications of Daubert and Its Potential for Misuse: Misapplication to Environmental Toxic Tort Cases and Abuse of Rule 706(a) Court-Appointed Experts*, 15 CARDOZO L. REV. 2255, 2260 (1994).

fense counsel may want to vary the numbers depending on the litigation goals.<sup>96</sup> Using the *Daubert* analysis to examine the validity of each side's expert may help the judge reach a more accurate number.

Conducting a *Daubert* analysis before admitting expert affidavits would act as a barrier to unreliable evidence and prevent the court from having to revisit the issue of standing or numerosity.<sup>97</sup> Yet, courts view *Daubert* with reluctance during certification.<sup>98</sup> Although the court in *O'Connor* devoted eight pages of its opinion to expert testimony establishing numerosity, it rejected a motion for a *Daubert* hearing by claiming that the motion went to the merits of the case.<sup>99</sup>

### C. Common Issues

In addition to proving numerosity, to certify a class, the plaintiffs must enumerate specific questions of law or fact common to the class.<sup>100</sup> This commonality requirement in Rule 23(a)(2) often intertwines with the predominance evaluation of Rule 23(b)(3) and "tend[s] to merge" with the typicality requirement.<sup>101</sup> Although the following two sections treat commonality and predominance separately, expert testimony on commonality may establish the foundation for predominance. If the plaintiffs establish predominance, commonality will always be present.

#### 1. Commonality of Rule 23(a)(2)

The court must decide the threshold issue of commonality in Rule 23(a)(2) before it can further examine the predominance and superiority of commonality under Rule 23(b)(3).<sup>102</sup> Commonality exists if the plaintiffs "share at least one question of fact or law with the grievances of the prospective class."<sup>103</sup> The class members need not share all questions of law or fact,<sup>104</sup> and plaintiffs can establish com-

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96. Donald C. Arbitblit & William Bernstein, *Effective Use of Class Action Procedures in California Toxic Tort Litigation*, 3 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 435, 444 (1996). Defendants often want to keep the numbers to a minimum for purposes of damages; however, they may want to expand the size of the class for settlement purposes.

97. See Williams, *supra* note 57, at 201.

98. See *O'Connor v. Boeing N. Am., Inc.*, 184 F.R.D. 311, 321 n.7 (C.D. Cal. 1998).

99. *Id.*

100. FED R. CIV. P. 23(a); see also *Gen. Tel. Co. v. Falcon*, 457 U.S. 147 (1982). Note that when a class is too large, numerosity alone may establish impracticability and the court need not look to any additional factors before refusing to certify the class. See, e.g., *Finnan v. L.F. Rothschild & Co.*, 726 F. Supp. 460, 465 (S.D.N.Y. 1989) (finding joinder of 127 plaintiffs impracticable).

101. *Falcon*, 457 U.S. at 157 n.13; Solovy et al., *supra* note 16, at 59.

102. Solovy et al., *supra* note 16, at 59.

103. *Baby Neal v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994).

104. *Midwestern Mach. v. N.W. Airlines, Inc.*, 211 F.R.D. 562, 569 (D. Minn. 2001) (citing *Lockwood Motors, Inc. v. Gen. Motors Corp.*, 162 F.R.D. 569, 575 (D. Minn. 1995)).

monality regardless of individual differences in damages.<sup>105</sup> Since commonality asks whether the issues are susceptible to classwide proof, courts may refrain from closely scrutinizing the proof for fear of venturing into the merits of the case.<sup>106</sup>

Some plaintiffs hire experts to develop a technique for implementing a common method of proof. In an antitrust suit by airline customers, for example, an economist might testify to whether a merger caused a “substantial lessening” of competition within relevant markets, whether all of the class members suffered a common antitrust injury, and whether the court could calculate damages using a common method.<sup>107</sup> These expert reports might contend that an airline’s airport market share rose significantly, that the airline’s airfares and yields increased since the merger, and that entry barriers to a particular airport were too high.<sup>108</sup> The economist could then conclude that the increased airfares impacted all the passengers of a particular airport, thereby establishing commonality.<sup>109</sup> Yet, if the economist uses a flawed method for gathering information about the markets, such as informally surveying ten airport passengers, then the economist’s opinion on common proof would amount to little more than conjecture and speculation.

## 2. *Predominance of Common Issues in Rule 23(b)(3)*

Although a plaintiff meets the commonality requirement “when there is at least one issue, the resolution of which will affect all or a significant number of the putative class members,”<sup>110</sup> Rule 23(b)(3) calls for the additional twin requirements of predominance and superiority.<sup>111</sup> To predominate, these common issues must constitute a “significant part” of individual cases,<sup>112</sup> and the proposed class must be “sufficiently cohesive.”<sup>113</sup> The plaintiff must further prove that the

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105. *Id.*

106. *Reid v. Lockheed Martin Aeronautics Co.*, 205 F.R.D. 655, 666 (N.D. Ga. 2001); *see infra* Part V.B.

107. *See Midwestern Mach.*, 211 F.R.D. at 569. In *Midwestern Machinery*, airline passengers brought a suit against Northwest Airlines, Inc. alleging that Northwest’s merger with Republic Airlines caused “a substantial lessening of competition in violation of” the Clayton Act as well as a systemic practice of overcharging its customers. *Id.* at 564-65. In response to a motion for class certification the judge admitted expert reports by an economist and a professor of civil procedure to help determine whether to certify the action. *Id.* at 566-69. The judge certified the action as a Rule 23(b)(3) action and held that injunctive class relief was not appropriate. *Id.* at 572.

108. *See id.* at 566.

109. *See id.*

110. *Payne v. Don Bhon Ford, Inc.*, 1998 WL 131737, at \*8 (E.D. La. March 20, 1998) (quoting *Lightbourn v. County of El Paso*, 118 F.3d 421, 426 (5th Cir. 1997)).

111. FED. R. CIV. P. 23(b)(3).

112. *Jenkins v. Raymark Ind., Inc.*, 782 F.2d 468, 472 (5th Cir. 1986); *Payne*, 1998 WL 131737, at \*8.

113. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997).

issues in the class action “are subject to generalized proof, and thus applicable to the class as a whole,” and that these collective issues predominate over issues that require individualized proof.<sup>114</sup>

To establish superiority, the plaintiff must prove that a class action is the best method of achieving a “fair and efficient adjudication of the controversy.”<sup>115</sup> The element of superiority reflects the main purposes of the class action: preserving judicial resources and guarding against inconsistent results.<sup>116</sup> Proving that one fundamental set of facts predominates over particularized facts relevant to individual claims often presents one of the main obstacles for plaintiffs seeking Rule 23(b)(3) certification.<sup>117</sup> To overcome this hurdle, plaintiffs use experts to explain how the basic facts pertain to each plaintiff.<sup>118</sup>

For example, in *Sanneman v. Chrysler Corp.*, the plaintiff tried to use an expert to establish a common cause of paint delamination and apply it to each putative class representative.<sup>119</sup> Since the case turned on whether Chrysler fraudulently concealed a paint defect, the expert attempted to establish a sole cause for that defect.<sup>120</sup> The expert declared that “the cause for Ecoat basecoat delamination is *always* ultraviolet rays,” but then hedged that “other causes may contribute to or exacerbate the problem.”<sup>121</sup> Notably, the court decided, without explanation, that the expert’s testimony survived the *Daubert* analysis.<sup>122</sup> However, the court denied certification because “the experts [did] not agree that ultraviolet rays [were] always the root cause of delamination, or that they ever [were] the only cause.”<sup>123</sup> Since proof of injury would require a “vehicle-by-vehicle” assessment,

114. *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 136 (2d Cir. 2001) (quoting *Rutstein v. Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1228, 1233 (11th Cir. 2000)).

115. FED. R. CIV. P. 23(b)(3).

116. *See* *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983); *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974); *First Fed. v. Barrow*, 878 F.2d 912, 919 (6th Cir. 1989). Ironically, when courts do not use a standard burden of proof, such as a preponderance of the evidence, this undermines the principle of guarding against inconsistent results, not between similar plaintiffs, but on a broad scale.

117. *Davis & Kowalski*, *supra* note 25, at 287.

118. *Id.*

119. 191 F.R.D. 441, 451 (E.D. Pa. 2000). In *Sanneman*, the class representative, Christina Sanneman, brought a putative class action against Chrysler Corporation “on behalf of Illinois owners and former owners” of certain makes and models of cars for damages allegedly incurred as a result of painting the vehicles with a defective prime coat. *Id.* at 443-44. On a motion for class certification, the judge held that although the plaintiff established numerosity, commonality and typicality, Christina Sanneman was not an adequate class representative of new car owners, and individual issues would predominate over common issues. *Id.* at 456. Consequently, the court ruled that the class action did not provide the superior method for resolving the claims. *Id.* at 456-57.

120. *Id.* at 451.

121. *Id.* (emphasis added).

122. *Id.* at 451 n.16.

123. *Id.* at 451.

the generalized causation and proof did not predominate over individualized proof.<sup>124</sup>

Some courts provide a more hospitable environment for plaintiffs' experts by relaxing the amount of proof needed to satisfy the Rule 23 requirements and by resolving ambiguities in favor of the plaintiff.<sup>125</sup> In *In re Visa Check/MasterMoney Antitrust Litigation*, both parties proffered reports by economists that gave competing opinions on whether the plaintiffs could litigate their complex antitrust claims as a class action.<sup>126</sup> Even though the economists' testimony offered opposing views on generalized proof, the district court admitted the plaintiffs' expert testimony for the purpose of supporting class certification because it was not "so flawed that it would be inadmissible as a matter of law."<sup>127</sup> The district court refused to inquire into the experts' disagreement over conclusions of generalized proof even though the disagreement raised the issue of whether the plaintiffs actually met the Rule 23(b)(3) requirement.<sup>128</sup> After refusing to address the difference of opinion, the court claimed that an evidentiary dispute over the proof was not a valid reason to deny class certification.<sup>129</sup> Although a dispute in and of itself is not a valid reason to deny certification, if a court considers the disagreement, it could find that the plaintiffs did not establish common proof, which is a valid reason to deny certification.

On appeal, the Second Circuit agreed with the district court and stated that at the certification stage a trial court need ask only "whether plaintiffs' expert evidence is sufficient to demonstrate common questions of fact warranting certification of the proposed class, not whether the evidence will ultimately be persuasive."<sup>130</sup> As such, the court admitted the plaintiffs' expert testimony and refused to consider the opposing expert's opinion when evaluating the evidence.<sup>131</sup> The Second Circuit did not furnish a standard for its district

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124. *Id.* The court also denied certification because the class representative could not adequately represent all the interests of the class. *Id.* at 456.

125. *See, e.g., In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 134 (2d Cir. 2001).

126. *Id.* In *Visa Check/MasterMoney*, large commercial retailers, retail associations, and smaller merchants joined forces to bring an antitrust action that challenged the credit card association's rules requiring stores that accepted the association's credit cards to also accept their debit cards. Judge John Gleeson certified the class, and the credit card associations appealed to the Second Circuit. On appeal, the court affirmed the district court's certification. *Id.* at 129-32, 147.

127. *Id.* at 135.

128. *See id.*

129. *See id.*

130. *Id.*

131. The court noted that it would not engage in the "statistical dueling" of experts. *Id.*; *see also In re Linerboard Antitrust Litig.*, 203 F.R.D. 197, 217 n.13 (E.D. Pa. 2001) ("To the extent that this discussion involves a battle of experts, it [sic] not appropriate for the Court to determine which expert is more credible at this time."). *But see West v. Prudential Sec.*,

courts to use in evaluating the sufficiency of the evidence, but judging from the Circuit's other preferences and instructions, sufficiency appears to be a fluid requirement with little protection for defendants. This Circuit openly favors a liberal application of the requirements of Rule 23,<sup>132</sup> encourages courts to err on the side of certifying classes,<sup>133</sup> does not require plaintiffs to state a cause of action,<sup>134</sup> and generally deems methodology that is not "fatally flawed" a sufficiently credible basis for certification.<sup>135</sup>

By refusing to "weigh conflicting expert evidence or engage in 'statistical dueling' of experts,"<sup>136</sup> the Second Circuit appears to accept the plaintiffs' expert evidence as true for purposes of proof. The Supreme Court, however, requires "actual, not presumed conformance" with Rule 23(a), and insists that courts conduct a "rigorous analysis" to determine compliance.<sup>137</sup> Although the Second Circuit employed a limited *Daubert* analysis to determine whether the plaintiffs' expert testimony was fatally flawed,<sup>138</sup> it should have applied a full *Daubert* analysis given its subsequent weak scrutiny of proof and bias in favor of certification.

Unlike the Second Circuit, the Third,<sup>139</sup> Fifth,<sup>140</sup> Seventh,<sup>141</sup> and Eleventh<sup>142</sup> Circuits recognize that the court is not required to accept

Inc., 282 F.3d 935, 938 (7th Cir. 2002) (requiring the district courts to hold evidentiary hearings to choose between competing expert perspectives if necessary).

132. See *Green v. Wolf Corp.*, 406 F.2d 291, 298 (2d Cir. 1968); see also *Korn v. Franchard Corp.*, 456 F.2d 1206, 1208-09 (2d Cir. 1972); *In re Sumitomo Copper Litig.*, 182 F.R.D. 85, 88 (S.D.N.Y. 1998).

133. *Green*, 406 F.2d at 298; *Sumitomo*, 182 F.R.D. at 88.

134. The Supreme Court has stated that "the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 160 (1982) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978)).

135. *Visa Check/MasterMoney*, 280 F.3d at 135.

136. *Id.* Since the court did not take the defense expert's testimony into account, no "dueling" occurred and the court seemed to use the appearance of experts on both sides as an excuse to certify the plaintiff. *Davis & Kowalski*, *supra* note 25, at 291. Rather than performing its judicial function, the court basically gave "judicial power to the plaintiffs, who can obtain certification just by hiring a competent expert." *West*, 282 F.3d at 938. Since courts allow defendants to submit evidence on their behalf, courts do not openly treat the defendants as passive, dispassionate observers. Yet, when the court refuses to consider the defendant's opposing expert's testimony and rejects *Daubert* challenges, the court seems to relegate the defendant to a less active position.

137. *Falcon*, 457 U.S. at 160.

138. *Visa Check/MasterMoney*, 280 F.3d at 132 n.4.

139. See, e.g., *Johnston v. HBO Film Mgmt., Inc.*, 265 F.3d 178, 186 (3d Cir. 2001). On Rule 23(f) review, the Third Circuit has never allowed a class to stand. Jennifer K. Fardy, *Disciplining the Class: Interlocutory Review of Class Action Certification Decisions Under Rule 23(f)*, 2003 A.B.A. SEC. LITIG. CLASS ACTIONS & DERIVATIVE SUITS REP. 3, 9, available at <http://www.seyfarth.com/db30/cgi-bin/pubs/fardy.PDF> (last visited Feb. 8, 2004).

140. See, e.g., *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996).

141. But see *In re Hartford Sales Practices Litig.*, 192 F.R.D. 592, 602 (D. Minn. 1999) ("In determining whether class certification is appropriate under Rule 23, the court must accept as true the allegations in the complaint.").

expert allegations in the complaint as true, but rather may make the necessary factual and legal inquiries to verify that the plaintiff provided sufficient proof of the certification requirements.<sup>143</sup> In accordance with the reading of *General Telephone Co. v. Falcon*,<sup>144</sup> after admitting the evidence, these courts weigh expert opinions offered by both parties even if their inquiry into the underlying considerations of Rule 23 overlaps the merits of the case.<sup>145</sup>

In *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, a securities fraud case, the Third Circuit carefully evaluated the offered proof and discounted the plaintiffs' expert evidence as an attempt to "gloss over" the individual proof of injury requirement.<sup>146</sup> The plaintiffs contended that their expert could present a mathematical formula to measure classwide damages,<sup>147</sup> and could construct an allocation plan from this formula.<sup>148</sup> Although the *Newton* court did not conduct, or even mention, a *Daubert* analysis, it held that the expert's plan was not an acceptable means to measure classwide damages.<sup>149</sup> The court indicated that it would accept the proposed technique "when dealing with a misrepresentation or omission affecting the securities market uniformly," but the method could not be used "as a means to arrive at some figure which can then be allocated among the proposed class members, regardless of whether each member suffered actual loss."<sup>150</sup> Translated into the terminology of Rule 702 of the Federal Rules of Evidence, the expert did not reliably apply the technique to the facts of the case.<sup>151</sup>

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142. *Valley Drug Co. v. Geneva Pharms., Inc.*, 350 F.3d 1181, 1188 (11th Cir. 2003) (requiring the court to conduct an independent inquiry into whether the plaintiffs met the Rule 23 requirements even if the requirement is uncontested by defendants).

143. *See, e.g.*, *West v. Prudential Sec., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 676 (7th Cir. 2001). The court in *Szabo* rejected the *Eisen* rule as a bar to the "merits inquiry" when a look at the merits was relevant to one of the Rule 23 requirements. Courts do not specify the burden of proof as a preponderance of the evidence. However, since courts generally use this standard in civil cases and no cases provide otherwise, it will be the presumed standard for purposes of this Comment.

144. 457 U.S. 147, 160 (1982).

145. *Szabo*, 249 F.3d at 676. Courts should perform a full *Daubert* admissibility test for the experts of both the plaintiff and defendant then decide whether a preponderance of the evidence meets the requirements of Rule 23.

146. 259 F.3d 154, 188 (3d Cir. 2001). In *Newton*, investors wanted to certify a class against their broker-dealers at Merrill Lynch for breaching their duty of best execution. *Id.* at 162. The Third Circuit took the case on an interlocutory appeal, and held that although the class met the requirements in Rule 23(a), it did not pass the superiority and predominance requirements of Rule 23(b)(3) so it could not be maintained as a class action. *Id.* at 193.

147. *Id.* at 188.

148. *In re Merrill Lynch*, 191 F.R.D. 391, 397 (D.N.J. 1999); *see also Newton*, 259 F.3d at 188.

149. *Merrill Lynch*, 191 F.R.D. at 397.

150. *Id.*

151. FED. R. EVID. 702. At least one of the district courts in the Third Circuit retreated from this truth-finding approach to adopt the reasoning of the Second Circuit. *See Nichols*

#### D. Manageability Problems

Although experts opining about numerosity and commonality typically rely on scientific or technical data, experts employed to establish manageability rely on statutes and cases to give legal opinions on matters such as choice-of-law issues.<sup>152</sup> In certifying a Rule 23(b)(3) class action, the court should consider, under Rule 23(b)(3)(D), the “difficulties likely to be encountered in the management of a class action.”<sup>153</sup> Commonly known as “manageability,” this factor often prevents the court from certifying putative nationwide class actions that would require it to apply numerous state laws to differing claims.<sup>154</sup> Doing so would defeat the superiority of the class action mechanism for resolving disputes.<sup>155</sup>

Defendants may claim that divergent state laws present “insuperable obstacles” by requiring the court to apply numerous states’ laws as well as instruct jurors on each state’s law and the corresponding class action claim.<sup>156</sup> Plaintiffs typically respond by employing experts, usually law school professors or experienced attorneys, to produce methodology and reports contending that the variation among the laws fails to predominate over common legal issues.<sup>157</sup> The plaintiffs’ experts then conclude that legal difficulties are either non-existent or negligible.<sup>158</sup>

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v. SmithKline Beecham Corp., No. CIV.A. 00-6222, 2003 WL 302352 (E.D. Pa. Jan. 29, 2003). In *Nichols*, the court held that the expert’s opinion did not need to satisfy the *Daubert* requirements to be admissible at the class certification stage. *Id.* at \*4. Instead, the court quoted the Second Circuit as saying that the court, at the class certification stage, “may not weigh conflicting expert evidence or engage in statistical dueling of experts.” *Id.* at \*6.

152. See, e.g., *In re Bridgestone/Firestone, Inc., Tires Prod. Liab. Litig.*, 288 F.3d 1012 (7th Cir. 2002), *rev’g in part* 205 F.R.D. 503, *cert. denied sub nom.* Gustafson v. Bridgestone/Firestone, Inc., 537 U.S. 1105 (2003).

153. FED. R. CIV. P. 23(b)(3)(D).

154. See, e.g., *Bridgestone/Firestone*, 288 F.3d at 1012.

155. See, e.g., *id.* (decertifying a class action because the court would have to apply the laws of all fifty states, thereby making the class unmanageable).

156. See, e.g., *id.*; Davis & Kowalski, *supra* note 25, at 286.

157. See *Midwestern Mach. v. N.W. Airlines, Inc.*, 211 F.R.D. 562 (D. Minn. 2001).

158. Joel S. Feldman et al., *Expert Witnesses in Insurance Class Actions and Individual Classes—Defense Perspective*, in ALI-ABA COURSE OF STUDY; CONFERENCE ON LIFE AND HEALTH INSURANCE LITIGATION 249, 271-72 (May 11-12, 2000); Davis & Kowalski, *supra* note 25, at 286. Judges are increasingly less hospitable to this type of “hired gun” expert. One court noted that:

[F]ar too frequently in the current legal system the use of professional expert witnesses has become rampant. That is to say, that instead of utilizing professionals that work in a specific field to comment and give learned opinions on certain subjects, attorneys turn to “guns for hire” whose main job or means of living is generated from giving expert testimony. The Court fears that this trend will result, if it has not already resulted, in supposed experts not utilizing scientific methods to render an opinion but rather by twisting scientific methods to produce a result that will support the case of those footing the bill.

*Rivera Pomales v. Bridgestone Firestone, Inc.*, 217 F.R.D. 290, 295 (D.P.R. 2003).

The Third Circuit grants its district courts' evaluation of manageability "a wide range of discretion" since a district court "generally has a greater degree of expertise and familiarity [with manageability] than does the appellate court."<sup>159</sup> Despite this deference, the Third Circuit hesitated to rely on the plaintiffs' expert's "formulaic nostrum" due to the consequences of certifying an unmanageable class.<sup>160</sup> Certifying an unmanageable class wastes judicial resources, precludes efficient adjudication, and undermines the function of the class action mechanism.

Other courts, however, welcome the aid of legal scholars on legal issues.<sup>161</sup> The court, in *Midwestern Machinery v. Northwest Airlines, Inc.*, accepted an affidavit from a dean and professor of civil procedure from the Hastings College of Law in spite of the plaintiffs' claim that the affidavit constituted an inadmissible legal opinion.<sup>162</sup> To admit the affidavit, the court reasoned that the affidavit was not "pure legal opinion" because it discussed the facts of the case and applied the law.<sup>163</sup>

In *In re Bridgestone/Firestone Inc. Tires Products Liability Litigation*, a putative nationwide class action with plaintiffs that resided in twenty-seven different states, the court welcomed relevant facts regarding the choice-of-law analysis.<sup>164</sup> Choice-of-law usually bears directly on a class's manageability.<sup>165</sup> In *Bridgestone/Firestone*, one of

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159. *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 191 (3d Cir. 2001) (quoting *Link v. Mercedes Benz of N. Am., Inc.*, 550 F.2d 860, 864 (3d Cir. 1977)); *In re Sch. Asbestos Litig.*, 789 F.2d 996, 1011 (3d Cir. 1986). However, not all appellate courts are this permissive with regards to manageability. See, e.g., *Bridgestone/Firestone*, 288 F.3d at 1012.

160. *Newton*, 259 F.3d at 191. For a brief synopsis of the *Newton* case, see *supra* note 146.

161. See *Midwestern Mach.*, 211 F.R.D. at 568-69.

162. *Id.* For a brief synopsis of the *Midwestern Machinery* case, see *supra* note 107.

163. *Midwestern Mach.*, 211 F.R.D. at 568.

164. 205 F.R.D. 503 (S.D. Ind. 2001). In the *Bridgestone/Firestone* case, buyers and lessees of Ford Explorer SUVs equipped with Firestone tires brought prospective class action complaints against both Bridgestone/Firestone, Inc. and Ford Motor Company. Although the district court certified the class, Judge Easterbrook, on appeal, held that the proposed class was not manageable either as a nationwide class action or as an action with classes certified for each of the fifty states. *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1018 (7th Cir. 2002), *rev'g in part* 205 F.R.D. 503, *cert. denied sub nom.* *Gustafson v. Bridgestone/Firestone, Inc.*, 537 U.S. 1105 (2003).

165. Many plaintiffs attempt to simplify the legal framework for prosecuting state law-based claims in nationwide class actions by simplifying the choice-of-law analysis. See Elizabeth J. Cabraser, *Class-Certification of Non-Federal Question Claims: Strategies for Plaintiffs*, in NON-FEDERAL QUESTION CLASS ACTIONS IN FEDERAL COURTS: PROSECUTION & DEFENSE STRATEGIES 25, 33-35 (PLI Litig. Course & Admin. Practice Handbook Series No. H-660, 2001), available at WL 660 PLI/Lit 25. Federal courts must apply the procedural laws of the forum state. The conflict-of-laws analysis is considered procedural, and federal courts apply the forum state's rules. See *Bridgestone/Firestone*, 288 F.3d at 1015. States use various methods to determine what law will apply to tort causes of action. Methods for determining the choice-of-law include: the "interest analysis," which applies

the plaintiffs' experts on legal matters claimed there was sufficient uniformity across the states to try the class claims in a singular proceeding.<sup>166</sup> The defendants maintained that it was "improper to offer 'expert' opinions on legal issues relevant to class certification."<sup>167</sup> The district court disagreed. For purposes of proffered experts' opinions, the judge established "sufficient boundaries" around those opinions to preclude the affidavits from "imping[ing] on [the court's] judgment or usurp[ing] [the court's] own application of legal principles to the facts and the issues."<sup>168</sup> On appeal, however, the Seventh Circuit held that a court could not manage the litigation as a nationwide or a statewide class action.<sup>169</sup> Consequently, it reversed the district court's decision to certify the class.<sup>170</sup>

Courts generally apply Federal Rule of Evidence 704 when admitting expert testimony relating to legal opinions.<sup>171</sup> This rule expressly permits testimony or opinions on the ultimate issue to be decided.<sup>172</sup> However, the opinion must be helpful to the trier of fact, and Rule 704 "does not lower the bars so as to admit all opinions."<sup>173</sup> Tradi-

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the law of the state whose interests would be more impaired if the court did not apply its own state law; the doctrine of *lex loci delicti*, which applies the law of the place of the injury or wrong; the "significant relationship" test, which uses the RESTATEMENT (SECOND) OF CONFLICT OF LAWS to determine which state has a most significant relationship to both the occurrence and the parties; the combined modern method, which applies the law of the state whose policies would be most seriously impaired if its law were not applied to the issue; the *lex fori* rule, which applies the law of the forum state; and the balancing test, which applies the sounder rule of law. *See* Bates v. Superior Court, 749 P.2d 1367, 1369 (Ariz. 1988) (applying the RESTATEMENT (SECOND) OF CONFLICT OF LAWS); Washington Mut. Bank, FA v. Superior Court, 15 P.3d 1071, 1078 (Cal. 2001) (applying an interest analysis); Wardell v. Richmond Screw Anchor Co., 210 S.E.2d 854, 857 (Ga. Ct. App. 1974) (applying the law of the place of the injury or wrong); Keeton v. Hustler Magazine, Inc., 549 A.2d 1187, 1191-92 (N.H. 1988) (applying a balancing test); Cooney v. Osgood Mach., Inc., 612 N.E.2d 277, 284 (N.Y. 1993) (applying the combined modern method). Generally, within each state's conflict-of-law provision, courts treat the choice-of-laws issue the same for different types of torts. Courts that employ a balancing test may weigh some factors more heavily depending on the type of tort claim. *See* Judge v. Am. Motors Corp., 908 F.2d 1565, 1568 (11th Cir. 1990).

166. *In re* Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig., 205 F.R.D. 503 (S.D. Ind. 2001), *order rev'd in part*, 288 F.3d 1012 (7th Cir. 2002), *cert denied sub nom.* Gustafson v. Bridgestone/Firestone, Inc., 537 U.S. 1105 (2003).

167. Memorandum of Law In Support of Defendants' Motion to Strike the Declarations of Samuel Issacharoff & E. Hunter Taylor at 1, *In Re* Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig., 205 F.R.D. 503 (S.D. Ind. 2001) (No. IP 00-9373-C-B/S, MDL No. 1373).

168. Transcript of Hearing on Plaintiffs Motion for Class Certification, at 7-8, *In re* Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 205 F.R.D. 503 (S.D. Ind. 2001) (No. IP 00-9373-C-B/S, MDL No. 1373). The district court certified the class. Subsequently, the Seventh Circuit decertified the class. *Bridgestone/Firestone*, 288 F.3d at 1021.

169. *Bridgestone/Firestone*, 288 F.3d at 1018. The Seventh Circuit held that the nationwide class was not manageable because claims would need to be adjudicated under the laws of many different states. *Id.*

170. *Id.* at 1021.

171. FED. R. EVID. 704 advisory committee's note.

172. *Id.*

173. FED. R. EVID. 704 advisory committee's note.

tionally, to use expert testimony the proponent must establish that (1) the subject of the inference is so integrally “related to a science, profession, business, or occupation” that it is beyond the knowledge of the lay person and (2) that the witness has sufficient skill or knowledge in the field about which he or she will testify.<sup>174</sup> Although judges retain some discretion in administering this rule,<sup>175</sup> the danger in the class certification setting is that the judge will not apply the rules at all. Thus far, courts have not strictly applied the Rules of Evidence during class certification. Consequently, the court may admit expert legal opinions on manageability without employing the evidentiary safeguards of Rule 702 or 704.

#### IV. THE USE OF THE FEDERAL RULES OF EVIDENCE IN CLASS CERTIFICATION

Unquestionably, expert opinions on manageability and other certification requirements may help the judge rule on complex certification issues. As far back as 1901, Judge Learned Hand remarked, “[n]o one will deny that the law should in some way effectively use expert knowledge wherever it will aid in settling disputes. The only question is as to how it can do so best.”<sup>176</sup> In today’s technology filled world, litigants increasingly rely on expert evidence.<sup>177</sup> Yet, judging from the courts’ inconsistent approaches to admitting expert affidavits, courts still grapple with how best to handle them.<sup>178</sup> In deciding how to address expert opinions during certification, courts should first return to the goals and purposes of both the class action and the Federal Rules of Evidence. The Federal Rules of Evidence aim to secure fairness by promoting the growth and development of the laws of evidence.<sup>179</sup> Likewise, class actions seek to increase fairness by eliminating inconsistent results.<sup>180</sup>

##### A. *The Applicability of the Federal Rules of Evidence: Pre-Daubert*

Despite the straightforward aims of the class action and the Federal Rules of Evidence, the judiciary’s current refusal to apply the rules in class certification hearings began with one judge’s misinterpretation of the rules.<sup>181</sup> Federal Rules of Evidence 101 and 1101 gov-

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174. STRONG, *supra* note 66, § 13, at 58-59.

175. *Id.*

176. Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 40 (1901).

177. Dawson, *supra* note 1, at 2051; Kelly & Holley, *supra* note 1, at 6.

178. *See infra* Part IV.B.

179. FED. R. EVID. 102.

180. *See* First Fed. v. Barrow, 878 F.2d 912, 919 (6th Cir. 1989).

181. *See* Thompson v. Bd. of Educ., 71 F.R.D. 398, 401 n.2 (S.D. Mich. 1976), *rev’d on other grounds*, 709 F.2d 1200 (6th Cir. 1983).

ern the applicability of the rules, and apply them generally to civil actions and proceedings.<sup>182</sup> Rule 1101 contains specific exceptions for things such as proceedings before grand juries.<sup>183</sup> Even though Rule 1101 contains no exception for class certification hearings, a district court judge decided that the evidence rules did not apply during certification.<sup>184</sup>

This judge presided over the case of *Thompson v. Board of Education*, in which the defendants objected that the plaintiffs' evidence did not meet certain foundational requirements.<sup>185</sup> In denying the motion to strike the evidence, the judge observed that Rule 1101(b) states that the Rules of Evidence "apply generally to civil actions and proceedings," but decided that the rules "need not be viewed as binding during a hearing on such preliminary matters as class certification when a full scale evidentiary hearing may not be absolutely necessary."<sup>186</sup> The judge then quoted *Eisen v. Carlisle & Jacquelin* out of context and said:

In *Eisen*, the Court said that a class action hearing 'of necessity . . . is not accompanied by the traditional rules and procedures applicable to civil trials.' . . . Such a view of the Rules is consistent with Rule 102's mandate to construe the Rules in a manner so as to avoid unjustifiable expense and delay without negatively affecting the just determination of the merits of the case.<sup>187</sup>

The judge omitted the beginning of the Supreme Court's quotation, which expressed a concern for protecting defendants.<sup>188</sup> The beginning of the Court's quote stated that "a preliminary determination of the merits may result in substantial prejudice to a defendant" since such a hearing may not employ traditional rules.<sup>189</sup> The Court never clarified which "traditional rules" would be missing.<sup>190</sup>

The judge in *Thompson* disregarded the bias and prejudice inherent in an unreliable evidentiary foundation, and refused to take a

182. FED. R. EVID. 101, 1101(b).

183. *Id.* at 1101(d)(2).

184. *Thompson*, 71 F.R.D. at 401 n.2. In *Thompson*, female teachers brought a Title VII action against multiple Michigan school districts to challenge the schools' sick/disability leave provisions. The teachers alleged that the provisions treated pregnancy differently than other temporary disabilities. The district court certified the case as a class action. *Id.* at 418.

185. *Id.*

186. *Id.* (internal quotations admitted). *But see* *Mars Steel Corp. v. Cont'l Bank, N.A.*, 880 F.2d 928, 938 (7th Cir. 1989) (applying the Federal Rules of Evidence in a Rule 23 fairness hearing); *see also infra* note 199.

187. *Thompson*, 71 F.R.D. at 401-02 n.2 (internal citation omitted).

188. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974).

189. *Id.*

190. *Id.*

closer look to avoid “unjustifiable expense and delay.”<sup>191</sup> The caveat is that Federal Rule of Evidence 102 also provides that the evidentiary rules “shall be construed to secure fairness in administration.”<sup>192</sup> The view that employing the Rules of Evidence during certification hearings will cause unjustifiable expense and delay fails to consider the increased use of experts at this stage, the time consumed in decertifying a class erroneously certified on unreliable expert testimony, the possibility of appealing certification decisions, and the coercion to settle after certification.<sup>193</sup>

By refusing to conduct a proper *Daubert* analysis, the court adds unjustifiable expense and delay by allowing plaintiffs with flawed evidence to proceed to trial.<sup>194</sup> This holds true particularly in light of some courts’ willingness to both resolve doubts in favor of the plaintiffs and certify classes with less than a preponderance of the evidence.<sup>195</sup> In today’s context, continued refusal to employ safeguards for evidentiary reliability undermines fairness in administration and actually leads to continued delay through certification appeals.<sup>196</sup>

The better view of the Rules of Evidence comes from the rules themselves. According to Rule 101, the Federal Rules of Evidence “govern proceedings in the courts of the United States . . . to the extent and with the exceptions stated in rule 1101.”<sup>197</sup> Rule 1101 does not list “class certification hearings” among its exceptions.<sup>198</sup> The Seventh Circuit, in *Mars Steel Corp. v. Continental Bank N.A.*, held that the Federal Rules of Evidence applied to proceedings under Rule 23 and specifically noted that “[f]airness hearings conducted under Fed. R. Civ. P. 23(e) are not among the proceedings excepted from the Rules of Evidence.”<sup>199</sup>

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191. FED. R. EVID. 102; *Thompson*, 71 F.R.D. at 401-02 n.2. Rule 1 of the Federal Rules of Civil Procedure also provides that the rules “shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.” FED. R. CIV. P. 1.

192. FED. R. EVID. 102.

193. See *infra* Part VI.A.

194. Courts may certify a class based on flawed evidence so long as the evidence is not so flawed as to be inadmissible as a matter of law. *Vickers v. Gen. Motors Corp.*, 204 F.R.D. 476, 479 (D. Kan. 2001).

195. See *Green v. Wolf Corp.*, 406 F.2d 291, 298 (2d Cir. 1968); *In re Sumitomo Copper Litig.*, 182 F.R.D. 85, 88 (S.D.N.Y. 1998); *In re Disposable Contact Lens Antitrust Litig.*, 170 F.R.D. 524, 531-32 (M.D. Fla. 1996); *In re Potash Antitrust Litig.*, 159 F.R.D. 682, 688-89 (D. Minn. 1995).

196. See, e.g., *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 135 (2d Cir. 2001) (hearing and granting an appeal to decertify a class action); see also *infra* note 317.

197. FED. R. EVID. 101.

198. See *id.* at 1101(d).

199. 880 F.2d 928, 938 (7th Cir. 1989). In *Mars*, Judge Easterbrook observed: “The Federal Rules of Evidence ‘govern proceedings in the courts of the United States . . . to the extent and with the exceptions stated in Rule 1101.’ The exceptions, listed in Rule 1101(d), include proceedings such as extradition and sentencing in criminal cases.” *Id.* (internal citations omitted).

Due, in part, to the Supreme Court's lack of clarification in *Eisen* as to which "traditional rules" would be missing from class certification,<sup>200</sup> courts admit expert evidence that lacks the evidentiary safeguards typically employed during trial. Courts use *Eisen* as a justification for both disregarding the Federal Rules of Evidence and making certification decisions without weighing the substance or amount of offered proof.<sup>201</sup> This combination contradicts the goals and purposes of both the class action mechanism and the Federal Rules of Evidence. As a result, judges have certified classes based on newspaper articles and hearsay.<sup>202</sup>

### B. Judicial Treatment of Daubert in Recent Years

Although conducting a *Daubert* analysis before admitting expert evidence would foster the restoration of fairness and the goals of the class action, many courts refuse to use *Daubert* during class certification. This reluctance, however, has not prevented litigants from raising *Daubert* challenges to the admissibility of expert affidavits.<sup>203</sup> These challenges received various levels of rejection and only limited success. Yet, the courts' rationale for rejection provides insight into how to dispel their *Daubert* concerns.

200. See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974).

201. See, e.g., *Visa Check/MasterMoney*, 280 F.3d at 135 (holding that the plaintiffs' expert's testimony is only inadmissible if it is so flawed as to be inadmissible as a matter of law and refusing to engage in the "statistical dueling" of experts); *In re Microcrystalline Cellulose Antitrust Litig.*, 218 F.R.D. 79, 83 (E.D. Pa. 2003) (refusing to consider the Federal Rules of Evidence at the class certification stage); *In re St. Jude Med., Inc. Silzone Heart Valves Prods. Liab. Litig.*, No. MDL 01-1396 JRTFLN, 2003 WL 1589527, at \*11 (D. Minn. March 27, 2003) (refusing to analyze the evidence of the medical expert under *Daubert*); *Nichols v. SmithKline Beecham Corp.*, No. Civ.A. 00-6222, 2003 WL 302352, at \*4 (E.D. Pa. Jan. 29, 2003) (holding that the plaintiffs' expert's testimony need not be sufficient under *Daubert* to be admissible); *Thomas & Thomas Rodmakers, Inc. v. Newport Adhesives & Composites, Inc.*, 209 F.R.D. 159, 162 (C.D. Cal. 2002) (denying defendant's motion to strike and employing only a lower *Daubert* standard); *Bacon v. Honda of Am. Mfg., Inc.*, 205 F.R.D. 466, 478 (S.D. Ohio 2001) (admitting testimony to show commonality that was sufficient only to make a marginal showing of commonality); *Midwestern Mach. v. N.W. Airlines, Inc.*, 211 F.R.D. 562, 565-66 (D. Minn. 2001) (allowing *Daubert* only to the extent that it prevents methodology that is "so apparently flawed").

202. *Paxton v. Union Nat'l Bank*, 688 F.2d 552, 562 n.14 (8th Cir. 1982) ("Hearsay testimony may be admitted to demonstrate typicality."); see *In re Hartford Sales Practices Litig.*, 192 F.R.D. 592, 597 (D. Minn. 1999) (concluding that considering newspaper articles during class certification is appropriate); David Minvielle, Comment, *Use of the Hearsay Objection in Class Certification Hearings to Promote Preliminary Evaluation on the Merits of the Case*, 45 LOY. L. REV. 585, 600 (1999).

203. The scope of this Comment is limited to federal class actions, however many state courts have addressed the same issues. See, e.g., *Earnest v. Amoco Oil Co.*, 859 So. 2d 1255, 1258-59 (Fla. 1st DCA 2003) (holding that the expert's methodology did not show class injury or establish questions of law or fact common to the proposed class); *Howe v. Microsoft Corp.*, 656 N.W.2d 285, 295 (N.D. 2003) (stating that it was not appropriate to engage in a *Daubert* analysis during certification); *In re S.D. Microsoft Antitrust Litig.*, 657 N.W.2d 668, 675 (S.D. 2003) (applying a lower *Daubert* standard to determine whether the expert's testimony rests on both a reliable foundation and is relevant to the task at hand).

### I. Daubert Denied

A number of district courts dismiss *Daubert* motions during class certification as premature. One court feared that this sort of analysis went to the merits of the case and denied the defendant's motions.<sup>204</sup> In another court, the defendants contended that the plaintiffs' expert based his opinion on unreliable methodology.<sup>205</sup> Not only did this district court refuse to evaluate the expert's methodology, it stated that "[o]n a motion for class certification, the Court cannot, and indeed should not, engage in the [*Daubert*] analysis."<sup>206</sup> Therefore, before trial the defendants filed a motion to exclude the plaintiffs' expert witness and supported this motion with their own MIT expert.<sup>207</sup> Denying the motion again, the court remarked that "Chief Justice Rehnquist surely did not intend the proceeding he created in *Daubert* to devolve into yet another battle of the experts."<sup>208</sup>

Although the court in *Vickers v. General Motors Corp.* also declined to engage in a *Daubert* analysis, it noted that "a court should not 'certify a class . . . on the basis of an expert opinion so flawed that it is inadmissible as a matter of law.'"<sup>209</sup> The *Vickers* court seemed to balance this minimal standard for admitting expert evidence with a local Kansas rule that required the plaintiff to present an evidentiary basis demonstrating that the action was "properly maintainable."<sup>210</sup> The plaintiffs' expert admitted during the hearing that his report re-

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204. *O'Connor v. Boeing N. Am., Inc.*, 184 F.R.D. 311, 321 n.7 (C.D. Cal. 1998).

205. *In re Monosodium Glutamate Antitrust Litig.*, 205 F.R.D. 229, 234 (D. Minn. 2001).

206. *Id.*

207. *In re Monosodium Glutamate Antitrust Litig.*, No.Civ. 00-MDL-1328(PAM), 2003 WL 244729, at \*1 (D. Minn. Jan. 29, 2003). This citation refers to the hearing on the defendants' motion to exclude the plaintiffs' expert witness after certification. The court notes that proponents of an expert witness must prove admissibility by a preponderance of the evidence. *Id.* (citing *Lauzon v. Senco Prods., Inc.*, 270 F.3d 681, 686 (8th Cir. 2001)).

208. *In re Monosodium Glutamate*, 2003 WL 244729, at \*1. It was actually Justice Blackmun, not Justice Rehnquist, who delivered the majority opinion in *Daubert*. Justice Rehnquist filed a separate opinion concurring in part and dissenting in part with the majority. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 598 (1993). Justice Rehnquist joined the majority opinion in *Kumho Tire Co. v. Carmichael*, which Justice Breyer authored. 526 U.S. 137 (1999). Justice Breyer states, "[w]e conclude that *Daubert's* general holding—setting forth the trial judge's general 'gatekeeping' obligation—applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge." *Id.* at 141. The court makes no reference to, and consequently, no exception for a "battle of the experts."

209. 204 F.R.D. 476, 479 (D. Kan. 2001). In *Vickers*, property owners who lived near the General Motors plant brought an action against General Motors for damaging their land and cars by releasing sulphuric acid into the air. On the motion for class certification, the district court held that owners' proposed definition of the class, although subject to refinement based on further development, was insufficient to support certification. *Id.* at 478. In addition, the judge noted that the owners' expert relied on a diagram which he did not understand and the opposing expert's model provided persuasive contrary evidence. *Id.* at 478-79.

210. *Id.* at 479.

lied on evidence with various flaws.<sup>211</sup> Consequently, the court denied class certification since the proposed class definition lacked a sufficient evidentiary basis.<sup>212</sup>

## 2. *Formal Daubert Analysis Rejected but Courts Claim to Scrutinize the Evidence*

Some courts reject a strict application of *Daubert*; however, as stated by the court in *Bacon v. Honda of America Manufacturing, Inc.*, they “will carefully scrutinize [the] expert testimony to determine whether it in fact supports the certification of a class in [the] case.”<sup>213</sup> True to its word, the *Bacon* court scrutinized the evidence and denied class certification.<sup>214</sup> If a court refuses to conduct a full *Daubert* analysis, then it should at least follow *Bacon* and seriously analyze the proffered evidence to decide whether the plaintiff proved the requirements of Rule 23 by a preponderance of the evidence.<sup>215</sup>

Although the court in *In re Polypropylene Carpet Antitrust Litigation* also claimed it would carefully scrutinize the plaintiffs’ evidence,<sup>216</sup> unlike *Bacon*, it fell short of its own standard. The court began by postponing a *Daubert* analysis until trial, and proposed a “new” evidentiary inquiry for use during class certification.<sup>217</sup> This query asked whether the expert methodology “will comport with the basic principles of econometric theory, will have any probative value, and will primarily use evidence that is common to all members of the proposed class.”<sup>218</sup> Translated into “*Daubert* terminology,” the court examines the reliability and relevance of the expert’s methodology.

211. *Id.* at 478.

212. *Id.* at 479.

213. 205 F.R.D. 466, 471 (S.D. Ohio 2001); see also *In re St. Jude Med., Inc. Silzone Heart Valves Prods. Liab. Litig.*, No. MDL 01-1396 JRTFLN, 2003 WL 1589527, at \*11 n.14 (D. Minn. Mar. 27, 2003) (citing *Bacon*, 205 F.R.D. at 469-71). In *Bacon*, African-American employees brought an employment discrimination suit against Honda, alleging that Honda engaged in a pattern and practice of minority discrimination. The court denied their motion for class certification since the employees did not establish the requirements of Rule 23(a) with respect to the disparate treatment claims. 205 F.R.D. at 490.

214. *Bacon*, 205 F.R.D. at 490.

215. *Bacon* did not specify what burden of proof was used to evaluate the sufficiency of the evidence.

216. 996 F. Supp. 18, 26 (N.D. Ga. 1997). Litigants in this case sought damages and equitable relief pursuant to the Clayton Act as a remedy for alleged violations of the Sherman Antitrust Act. The plaintiffs alleged that there was a conspiracy to artificially maintain the price of polypropylene carpet and motioned for class certification. The district court granted the motion. *Id.* at 30.

217. *Id.* at 26.

218. *Id.* Ironically, this same court failed to mention its own test four years later when it refused to address “the full panoply of issues relevant to the *Daubert* analysis.” *Reid v. Lockheed Martin Aeronautics Co.*, 205 F.R.D. 655, 661 (N.D. Ga. 2001). In *Reid*, the court refused to certify the class since the expert “admitted in his deposition that his reports contain[ed] numerous errors including mathematical mistakes, the inclusion of wrong and misleading tables, counting as zeros disparities that really were not zeros, and missing an

In its Rule 23(b)(3) analysis, the court required the plaintiffs to produce “sufficient evidence” to support a “reasonable conclusion” that they would use common evidence.<sup>219</sup> Yet, the court did not insist that the plaintiffs eliminate the possibility that the common evidence (the pricing structure) moved in different directions, which would completely undermine predominance.<sup>220</sup> Nor did the court require the plaintiffs’ expert to prove the existence of a pricing structure with any statistical evidence.<sup>221</sup> Instead, the court “readily agree[d]” that the plaintiffs’ evidence might not establish a common relationship, but noted that the evidence was not “worthless” or “inherently faulty” so it certified the class.<sup>222</sup> Although it initially seemed that the court would actually weigh the evidence to determine whether the plaintiffs offered sufficient proof to support a reasonable conclusion of predominance, the court ultimately certified the class with a cursory review of unsubstantiated, speculative evidence.

A Pennsylvania district court relied on the analysis in *In re Polypropylene Carpet Antitrust Litigation* as persuasive precedent that courts need not ever consider whether an expert’s opinion would be admissible under *Daubert* during certification.<sup>223</sup> In reaching this conclusion, the judge reasoned that a *Daubert* inquiry would inappropriately require plaintiffs to fully evaluate all of their data at the preliminary stage of class certification.<sup>224</sup> While it may be true that plaintiffs should not have to evaluate *all* data prior to certification, to the extent that the plaintiffs rely on both the data and the experts interpreting and collecting the data to satisfy the Rule 23 requirements, they should prove, by a preponderance of the evidence, that the evidence sufficiently supports those requirements. To require less allows the court to certify classes with varying levels of proof on an *ad hoc* basis, which undermines consistency and could promote the type of forum shopping among federal circuits that occurs in state courts.<sup>225</sup>

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implied decimal that rendered some of the disparities incorrect and changed some of the variances.” *Id.*

219. *Polypropylene Carpet*, 996 F. Supp. at 24.

220. *Id.* at 23.

221. *Id.*

222. *Id.* at 24-25, 29, 30.

223. *Nichols v. SmithKline Beecham Corp.*, No. CIV. A. 00-62222003 WL 302352, at \*4 (E.D. Pa. Jan. 29, 2003). In *Nichols*, the plaintiffs brought an antitrust suit against SmithKline Beecham Corporation under the Clayton Act. They alleged that SmithKline violated the federal antitrust laws by stockpiling and causing patents to be listed with the Food and Drug Administration in a way that allowed SmithKline to indefinitely extend its monopoly on Paxil. *Id.* at \*1. The court denied the plaintiffs’ motion for class certification. *Id.* at \*9.

224. *Id.* at \*4.

225. See generally Linda S. Mullenix, *Abandoning the Federal Class Action Ship: Is There Smoother Sailing for Class Actions in Gulf Waters?*, 74 TUL. L. REV. 1709 (2000).

### 3. *Daubert Analysis Limited but Noted*

A number of courts are willing to perform a “limited” *Daubert* analysis.<sup>226</sup> Courts tailor this narrow inquiry “to the purpose for which the expert opinion is offered.”<sup>227</sup> Consequently, the court addresses whether it “may utilize [the expert’s testimony] in deciding whether the requisites of Rule 23 have been met.”<sup>228</sup>

The Second Circuit applies a limited *Daubert* analysis, but grants certification if the plaintiffs demonstrate at least a “colorable method of pro[of],” or if the “proposed methods are so insubstantial as to amount to no method at all.”<sup>229</sup> The Second Circuit refused to weigh the opposing experts’ opinions even though they offered entirely contradictory views on whether the plaintiffs met their burden of satisfying Rule 23.<sup>230</sup> Although a limited *Daubert* analysis provides some protection, the leniency with which the court considered the evidence undermined the initial protection. If a court conducts only a limited *Daubert* analysis, it should seriously scrutinize and evaluate all the evidence so it can make a fully informed decision on whether the plaintiffs’ evidence more likely than not satisfies Rule 23. In addition, the court should not err on the side of certification when it performs only a cursory review of the offered proof.<sup>231</sup>

Nevertheless, a district court in California favorably interpreted the Second Circuit’s limited analysis and, in *Thomas & Thomas Rodmakers, Inc. v. Newport Adhesives & Composites, Inc.*, agreed that a “lower *Daubert* standard should be employed.”<sup>232</sup> To support its proposition, the court declared that “an inquiry into the admissibility of the proposed expert testimony under *Daubert* would be an inappropriate consideration of the merits of the plaintiffs’ claims.”<sup>233</sup> The court further proffered that “an expert report should not be excluded merely on the basis that it assumes the substantive allegations of the complaint rather than relying upon actual data that may yet to be discovered.”<sup>234</sup> This reasoning disregards the Supreme Court’s re-

226. See *In re Visa Check/MasterMoney Antitrust Litig.*, 192 F.R.D. 68, 77 (E.D.N.Y. 2000), *aff’d*, 280 F.3d 124 (2d Cir. 2001), *cert. denied sub nom. Visa U.S.A., Inc. v. Wal-Mart Stores, Inc.*, 536 U.S. 917 (2002); *Midwestern Mach. v. N.W. Airlines, Inc.*, 211 F.R.D. 562, 565-66 (D. Minn. 2001) (stating that the application of *Daubert* is “somewhat limited at this stage”).

227. *Visa Check/MasterMoney*, 192 F.R.D. at 77.

228. *Id.*

229. *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 135 (2d Cir. 2001) (citing *In re Potash Antitrust Litig.*, 159 F.R.D. 682, 687 (D. Minn. 1995)).

230. *Id.*

231. Some courts err on the side of certification. See *Green v. Wolf Corp.*, 406 F.2d 291, 298 (2d Cir. 1968); *In re Sumitomo Copper Litig.*, 182 F.R.D. 85, 88 (S.D.N.Y. 1998).

232. 209 F.R.D. 159, 162 (C.D. Cal. 2002).

233. *Id.*

234. *Id.* at 163. *But see In re Hartford Sales Practices Litig.*, 192 F.R.D. 592, 602 (D. Minn. 1999) (“In determining whether class certification is appropriate under Rule 23, the

quirement of actual, not presumed, conformance with Rule 23,<sup>235</sup> ignores the court's independent duty to inquire whether the plaintiffs met their burden,<sup>236</sup> and takes no notice of the Supreme Court's directive to consider the merits to the degree necessary to determine compliance with Rule 23.<sup>237</sup>

#### 4. *Daubert Applied*

Two district courts, one in the Fifth Circuit and one in the Third Circuit, actually applied a full *Daubert* analysis during class certification.<sup>238</sup> In *Sanneman v. Chrysler Corp.*, the district court indicated in a footnote that it concluded, prior to the hearing, that the proposed expert's testimony "was proper under *Daubert* and the Federal Rules of Evidence."<sup>239</sup> A Texas district court provided more details of its *Daubert* analysis in *McNamara v. Bre-X Minerals Ltd.*<sup>240</sup> In a full written opinion, the court explained how it used *Daubert* to examine each of the defendants' contentions in their motion to strike the plaintiffs' expert opinion.<sup>241</sup> Because of *Daubert*, the court held that it would not consider the plaintiffs' expert's methodology to determine the efficiency of a particular securities market since the method "had not been subjected to peer review, and was not shown to be generally

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court must accept as true the allegations in the complaint."); *Lockwood Motors, Inc. v. Gen. Motors Corp.*, 162 F.R.D. 569, 573 (D. Minn. 1995).

235. See *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982).

236. See *Valley Drug Co. v. Geneva Pharms., Inc.*, 350 F.3d 1181, 1188 (11th Cir. 2003).

237. See *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.12 (1978) (quoting *CHARLES ALAN WRIGHT ET AL.*, 15 FEDERAL PRACTICE AND PROCEDURE § 3911, at 485 n.45 (1976)).

238. See *McNamara v. Bre-X Minerals Ltd.*, No. 5:97-CV-159, 2002 WL 32076175 (E.D. Tex. Sept. 30, 2002); *Sanneman v. Chrysler Corp.*, 191 F.R.D. 441 (E.D. Pa. 2000).

239. 191 F.R.D. at 451 n.16; see also *Kelly & Holley*, *supra* note 1, at 6. For additional information on the *Sanneman* case, see *supra* note 119.

240. 2002 WL 32076175, at \*1. This citation refers only to the court's response to the defendants' joint motion to strike the opinions and testimony of the plaintiffs' expert. The plaintiffs' alleged violations of Section 10(b) of the Securities Exchange Act of 1934 are commonly known as "10b-5 claims." To prove a 10b-5 claim, the plaintiffs must show "(1) a material misstatement or omission (2) which occurred in connection with the purchase or sale of securities (3) that was made with scienter (4) harm, and (5) causation." *Id.* (quoting *Mercury Air Group, Inc. v. Mansour*, 237 F.3d 542, 546 (5th Cir. 2001)). Since the causation element required reliance, the plaintiffs used the fraud-on-the-market doctrine. *Id.* According to this doctrine, "where materially misleading statements have been disseminated into an impersonal, well-developed market for securities, the reliance of individual plaintiffs on the integrity of the market price may be presumed." *Id.* (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 247 (1988)). Consequently, the plaintiffs offered an expert opinion on what constituted an efficient market for purposes of the plaintiffs' fraud-on-the-market theory. The court admitted the expert's opinion, with the exception of his "random walk analysis." *Id.* at \*6.

241. *Id.*

accepted by economists.”<sup>242</sup> The court did, however, admit all other aspects of the expert’s opinion.<sup>243</sup>

Although this Section presented *Daubert* challenges as a progression of success, in reality, no uniformity or clear development exists in the courts. *Daubert* challenges, though frequently rejected, remain “hit or miss.” Until courts recognize the need to conduct a full *Daubert* analysis, litigants should argue that expert opinions are inadmissible as a matter of law and lack a proper factual foundation.<sup>244</sup> The defense should also consider asking the court to appoint its own panel of experts under Federal Rule of Evidence 706.<sup>245</sup> Experts appointed under Rule 706 may assist the court in deciding the ultimate causation issue.<sup>246</sup>

The courts’ varied approaches to *Daubert* largely reflect a misguided reluctance to venture near the merits of the case and a lack of awareness of the resulting inconsistencies of requiring variable levels of proof. Some judges may simply be unsure about how to accurately apply the Federal Rules of Evidence during certification since the rules do not traditionally permit affidavits. Since courts accept affidavits during class certification and summary judgment and use both methods to discard frivolous civil cases, examining how the courts employ the Rules of Evidence during summary judgment provides one illustration of how *Daubert* could function as a means for excluding unreliable testimony during certification.

#### V. TOWARD A PRINCIPLED APPROACH TO EXPERT EVIDENCE IN CLASS CERTIFICATION

The heavy reliance on expert testimony via affidavits and the necessity of avoiding a mini-trial during certification makes it impossible to implement the Federal Rules of Evidence in the same manner as they are used during trial. However, the summary judgment process applies the rules in a way that ensures evidentiary safeguards and efficiency. Both summary judgment and class certification proceedings show a trend of using expert affidavits as evidence.<sup>247</sup> Summary judgment, like class certification, presents a mechanism for dismissing meritless claims, limiting harassment of defendants, and

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242. *Id.* at \*6.

243. *Id.* at \*7.

244. *See* *Vickers v. Gen. Motors Corp.*, 204 F.R.D. 476, 479 (D. Kan. 2001) (noting that during certification, the court should not admit expert testimony that is “so flawed that it is inadmissible as a matter of law”); Dawson, *supra* note 1, at 2051.

245. FED. R. EVID. 706.

246. *See* Patrick Lysaught, *Forces Shaping Mass Tort Litigation: Strategies for Defense Counsel*, 67 DEF. COUNS. J. 165, 170 (2000). Judge Pointer, in the Alabama breast implant litigation cases, used a Rule 706 panel to address a *Daubert* challenge. *Id.*

247. Edward Brunet, *Summary Judgment Materials*, 147 F.R.D. 647, pt. VI (1993); Davis & Kowalski, *supra* note 25, at 285.

conserving judicial resources.<sup>248</sup> In fact, at its outset, summary judgment faced many of the same policy and institutional growing pains that now confront class certification.<sup>249</sup> Consequently, even though class certification addresses more of a jurisdictional question and summary judgment a procedural one, summary judgment provides a starting point for discussion on how to implement evidentiary rules in certification.

A. *The Rules of Evidence in Summary Judgment as a Framework for Class Certification*

Federal Rule of Civil Procedure 56, which regulates summary judgment motions, allows the court to enter summary judgment when the pleadings, affidavits, and other papers on file demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law.<sup>250</sup> Judges typically hold hearings for both class certification and summary judgment.<sup>251</sup> During summary judgment, litigants frequently depend on expert opinions to demonstrate issues of material fact;<sup>252</sup> however, if those opinions are unreliable, then the issue of material fact may be nothing more than smoke and mirrors. Consequently, at the summary judgment stage, expert affidavits must comply with the Federal Rules of Evidence.<sup>253</sup> To help the court evaluate reliability, Rule 56(e) of the Federal Rules of Civil Procedure permits opposing counsel to submit alternative expert evidence to discredit or challenge the plaintiff's affidavits.<sup>254</sup>

When parties challenge expert opinions, the court may grant summary judgment on two grounds: (1) when, under *Daubert* and *Kumho Tire*,<sup>255</sup> evidence essential to the plaintiff's case is inadmissible, or (2) the evidence is insufficient to sustain a jury verdict.<sup>256</sup> In this first situation, the judge must apply Rule 702 to determine

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248. *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 155 (1982); Douglas M. Towns, Note, *Merit-Based Class Action Certification: Old Wine in a New Bottle*, 78 VA. L. REV. 1001, 1003 (1992).

249. See Towns, *supra* note 248, at 1020.

250. FED. R. CIV. P. 56(c).

251. Mullenix, *supra* note 16, at A14; William W. Schwarzer, *Summary Judgment and Expert Evidence*, in ALI-ABA COURSE OF STUDY: OPINION AND EXPERT TESTIMONY IN FEDERAL AND STATE COURTS, 295, 298 (April 3-4, 2003).

252. See Brunet, *supra* note 247, at pt. VI.

253. FED. R. CIV. P. 56(e) ("Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.")

254. *Id.* Federal Rule of Civil Procedure 56(e) permits affidavits "to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits." *Id.*

255. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999); *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

256. Schwarzer, *supra* note 251, at 297.

whether the expert is testifying to scientific, technical, or other specialized knowledge to assist the judge in understanding the evidence or to determine a fact at issue.<sup>257</sup> If the court decides that the “scintilla of evidence . . . is insufficient to allow a reasonable juror to conclude that the position more likely than not is true, the court remains free to . . . grant summary judgment.”<sup>258</sup> Similarly, during class certification, the judge should weigh all the evidence to decide whether the plaintiffs provided sufficient proof, as judged by a preponderance of the evidence standard, to satisfy Rule 23’s requirements.

Courts may grant summary judgment after excluding expert evidence that supplied an essential element of the case.<sup>259</sup> Admissibility of expert testimony under *Daubert* and sufficiency of the evidence involve two distinct but associated inquiries. Admissibility concerns whether the court will allow a party to introduce the evidence during trial (expert evidence must pass *Daubert* prior to admission);<sup>260</sup> sufficiency asks the court to evaluate the expert’s conclusions and decide whether the combined evidence adequately introduces a jury question.<sup>261</sup> After a *Daubert* evaluation for reliability and relevancy,<sup>262</sup> the judge may consider expert affidavits that either bolster or supply entirely the sufficiency of the evidence.<sup>263</sup>

Likewise, parties in the class certification context should be able to submit expert affidavits to contest or support the requisites of Rule 23 only after the affidavits survive a *Daubert* analysis.<sup>264</sup> The judge should then evaluate the expert’s conclusions and decide, after considering all of the evidence, whether the plaintiffs’ combined evidence more likely than not satisfies each of the prerequisites in Rule 23.

Just as the plaintiff must prove the Rule 23 requirements for class certification, the plaintiff, to prevent the court from granting summary judgment for the defendant, must come forward with sufficient evidence of an essential element of the claim.<sup>265</sup> In summary judgment, conflicts in expert evidence and inferences must be viewed in the light most favorable to the non-moving party, which, in this scenario, would be the plaintiff.<sup>266</sup> In class certification, if the court de-

257. FED. R. EVID. 702. The issue in class certification is whether the plaintiff meets the requisites of Rule 23.

258. *Daubert*, 509 U.S. at 596.

259. Schwarzer, *supra* note 251, at 298.

260. *Id.* at 299.

261. *In re Joint E. & S. Dist. Asbestos Litig.*, 52 F.3d 1124, 1132 (2d Cir. 1995).

262. *Daubert*, 509 U.S. at 592-93.

263. Schwarzer, *supra* note 251, at 299.

264. For an admonishment to district courts for considering only the plaintiffs’ expert testimony, see *West v. Prudential Sec., Inc.* 282 F.3d 935, 938 (7th Cir. 2002).

265. See *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

266. *Joint E. & So. Dist. Asbestos Litig.*, 52 F.3d at 1124, 1137.

depends on *Daubert* safeguards and scrutinizes the evidence in accordance with the preponderance of the evidence standard, it could then resolve ambiguities in favor of the plaintiff. In neither summary judgment nor class certification should the judge accept the plaintiff's factual allegations as true;<sup>267</sup> indeed, this level of deference to plaintiffs exists only in a Rule 12(b)(6) motion to dismiss.<sup>268</sup>

Unlike Rule 12(b)(6) motions,<sup>269</sup> the court at the class certification stage must conduct a "rigorous analysis" in which it may need to address questions that are "intimately" involved with the merits.<sup>270</sup> By refusing to conduct any analysis of the opposing expert opinions, courts fail to adequately evaluate all of the evidence and seem to use *Eisen's* merit inquiry prohibition as a supportive crutch.<sup>271</sup> The rules of Civil Procedure endow district courts with substantial authority to conduct a comprehensive analysis.<sup>272</sup> Appellate courts review *Daubert* decisions, even at the summary judgment stage, on an abuse of discretion standard,<sup>273</sup> which gives the judiciary substantial latitude to rule on evidentiary matters and to produce a well-informed certification decision.

Regardless of the virtues of this approach, some may argue that summary judgment's evidentiary procedures should not apply during class certification because the plaintiff has not completed discovery. Although the summary judgment process allows plaintiffs to finish discovery and present the totality of their evidence, the plaintiff preparing for class certification has also already engaged in extensive discovery.<sup>274</sup> Courts should limit discovery to the issues necessary to

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267. See generally *West*, 282 F.3d at 938. But see *In re Hartford Sales Practices Litig.*, 192 F.R.D. 592, 602 (D. Minn. 1999) ("In determining whether class certification is appropriate under Rule 23, the court must accept as true the allegations in the complaint.").

268. FED. R. CIV. P. 12(b)(6).

269. See *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 106 (D.C. Cir. 2002); *McNamara v. Bre-X Minerals Ltd.*, No. 5:97-CV-159, 2002 WL 32076175, at \*3 (E.D. Tex. Sept. 30, 2002) (noting that a Rule 12(b)(6) motion "differs significantly" from a class certification hearing).

270. See *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 157 n.13 (1982) (stating that courts must conduct a rigorous analysis to determine whether the plaintiff met all of the Rule 23(a) requirements for certification); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.12 (1978) (noting that some of the questions that involved determining the appropriateness of class certification are "intimately" involved with the merits of the case). In the Eleventh Circuit, the court has a duty to independently evaluate whether the plaintiffs met their burden on each Rule 23 requirement, even if uncontested by the defendant. *Valley Drug Co. v. Geneva Pharms., Inc.*, 350 F.3d 1181, 1188 (11th Cir. 2003).

271. See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974) (prohibiting a preliminary inquiry into the merits of a case during class certification).

272. See FED. R. CIV. P. 23(d).

273. Even though summary judgment is typically reviewed de novo, rulings on admissibility under *Daubert* are reviewed for abuse of discretion. *Gen. Elec. v. Joiner*, 522 U.S. 136, 147 (1997).

274. *Crump*, *supra* note 17, at 7; *Savett*, *supra* note 81, at 33 ("Defendants will raise a myriad of objections to avoid and stall the production of documents. Nevertheless, courts

a certification determination;<sup>275</sup> however, plaintiffs often seek broad discovery on the merits to develop fundamental aspects of their case prior to certification.<sup>276</sup> As noted by the *Manual for Complex Litigation*, “[b]ifurcating class and merits discovery . . . can result in duplication and unnecessary disputes among counsel over the scope of discovery.”<sup>277</sup> The 2003 advisory committee notes to revised Rule 23 observed, “[a]lthough an evaluation of the probable outcome on the merits is not properly part of the certification decision, discovery in aid of the certification decision often includes information required to identify the nature of the issues that actually will be presented at trial.”<sup>278</sup> The notes advise that “[i]n this sense it is appropriate to conduct controlled discovery into the ‘merits,’ limited to those aspects relevant to making the certification decision on an informed basis.”<sup>279</sup> Consequently, the committee encourages “active judicial supervision” to “achieve the most effective balance that expedites an informed certification determination without forcing an artificial and ultimately wasteful division between ‘certification discovery’ and ‘merits discovery.’”<sup>280</sup> In the past, district courts have enjoyed considerable discretion in determining the scope of discovery in class certification,<sup>281</sup> however, failure to permit discovery on class certification issues may

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generally permit plaintiff[s] to pursue extensive discovery provided the documents being sought are relevant.”) *But see* *Midwestern Mach. v. N.W. Airlines, Inc.*, 211 F.R.D. 562, 566 (D. Minn. 2001) (stating “[i]t would be inappropriate, however, for a court to look beyond the methodology and critique the prospective results of its application to a complete set of data. A party and its experts should not be expected to have fully evaluated all data at the preliminary stage of class certification.” (citations omitted)). For more information on discovery issues in class certification, see James F. Jorden, *Discovery and Evidentiary Issues in Non-Federal Question Class Actions*, in *NON-FEDERAL CLASS ACTIONS 2002: PROSECUTION & DEFENSE STRATEGIES* 439 (PLI Litig. Course & Admin. Practice Handbook Series No. H-679, 2002), available at WL 679 PLI/Lit 439.

275. Stephen H. Kupperman, *Discovery and Evidentiary Issues in Non-Federal Question Class Actions*, in *NON-FEDERAL CLASS ACTIONS: PROSECUTION AND DEFENSE STRATEGIES* 373, 377 (PLI Litig. Course & Admin. Practice Handbook Series No. H-660, 2001), available at WL 660 PLI/Lit 373.

276. *Id.* at 377. However, experts retained in anticipation of litigation that will not be testifying in a future trial may not be compelled to provide information during discovery to the opposing side. *See Ludwig v. Pilkington N. Am., Inc.*, No. 03 C 1086, 2003 WL 22242224, slip op. at \*3 (N.D. Ill. Sept. 29, 2003) (holding that environmental consultants hired by a glass manufacturer, but who didn’t expect to testify at trial cannot be compelled to provide information to residents suing for arsenic contamination), *class cert. granted*, 2003 WL 22478842, slip op. at \*5 (N.D. Ill. Nov. 4, 2003).

277. *MANUAL FOR COMPLEX LITIGATION (THIRD)* § 30.12 (1995).

278. FED. R. CIV. P. 23 advisory committee’s note.

279. *Id.*

280. *Id.*

281. *Villar v. Crowley Maritime Corp.*, 990 F.2d 1489, 1495 (5th Cir. 1993); *Stewart v. Winter*, 669 F.2d 328, 331 (5th Cir. 1982); *see, e.g., Kamm v. Cal. City Dev. Corp.*, 509 F.2d 205, 209 (9th Cir. 1975).

constitute an abuse of discretion, particularly in light of the 2003 revisions to Rule 23.<sup>282</sup>

In ruling on summary judgment motions, courts have effectively employed *Daubert* and the Rules of Evidence to help them navigate the gray area of highly specialized issues, and to separate cases with issues of material fact from meritless claims.<sup>283</sup> By subjecting evidence presented at the certification stage to similar evidentiary procedures, the court may lighten its judicial burden by making more informed decisions, provide consistency within the federal courts, and consequently restore the legitimacy of the class action.

### B. *The Case for Evidentiary Rules in Class Certification*

Before three vital Supreme Court cases, the summary judgment process contained almost as many gray areas and uncertainties as does class certification. The summary judgment trilogy, *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,<sup>284</sup> *Celotex Corp. v. Catrett*,<sup>285</sup> and *Anderson v. Liberty Lobby, Inc.*,<sup>286</sup> expanded and clarified the use of summary judgment. These cases continue to supply trial courts with the necessary means to promote efficiency and fairness while avoiding unjustifiable expense and delay in accordance with Rule 102.<sup>287</sup> Before these cases, courts took a more restrictive approach toward summary judgment.<sup>288</sup> This restrictive approach is mirrored in the class certification context, except that certification remains on the cusp of transition.

Most courts faced with evidentiary concerns during certification evade *Daubert* challenges by claiming that this asks them to travel into the prohibited area of “merit inquiry.”<sup>289</sup> Courts have not uni-

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282. See, e.g., *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1086 (6th Cir. 1996); *Chateau de Ville Prod., Inc. v. Tams-Witmark Music Library, Inc.*, 586 F.2d 962, 966-67 (2d Cir. 1978); *Yaffee v. Powers*, 454 F.2d 1362, 1367 (1st Cir. 1972), *questioned by* *Dionne v. Springfield Sch. Comm.*, 340 F. Supp. 334, 335 (D. Mass. 1972). In *Valley Drug Co. v. Geneva Pharmaceuticals, Inc.*, the court held that denying a request for “downstream recovery,” discovery relating to the wholesalers’ sales practices, constituted an abuse of discretion because the record to decide the issue of whether the class met the prerequisite of Rule 23(b)(3) was incomplete. 350 F.3d 1181, 1195 (11th Cir. 2003).

283. *Daubert* challenges have become increasingly fatal to cases with unreliable evidence. See LLOYD DIXON & BRIAN GILL, RAND INST. FOR CIV. JUST., CHANGES IN THE STANDARDS FOR ADMITTING EXPERT EVIDENCE IN FEDERAL CIVIL CASES SINCE THE *DAUBERT* DECISION xvi (2001).

284. 475 U.S. 574 (1986).

285. 477 U.S. 317 (1986).

286. 477 U.S. 242 (1986).

287. FED. R. EVID. 102; see also Towns, *supra* note 248, at 1028.

288. See, e.g., *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970) (heavily distinguished) (adopting Judge Frank’s approach in *Arnstein v. Porter*, 154 F.2d 464, 475 (2d Cir. 1946)).

289. See, e.g., *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 135 (2d Cir. 2001); *Thomas & Thomas Rodmakers, Inc. v. Newport Adhesives & Composites, Inc.*, 209 F.R.D. 159, 162-63 (C.D. Cal. 2002) (“It is clear to the Court that a lower *Daubert*

formly applied the restriction against an inquiry into the merits,<sup>290</sup> which has produced a hodgepodge of discretionary decisions that lack a principled justification.<sup>291</sup> When conducting a rigorous analysis in complex cases,<sup>292</sup> district courts must often examine more than just the pleadings to understand the claims, defenses, facts, and applicable substantive law before “mak[ing] a meaningful determination of the certification issues.”<sup>293</sup> This examination does not stop when the court encounters an expert opinion.

Judge Easterbrook, of the Seventh Circuit, recognized this need to evaluate expert testimony during certification in an opinion reversing and reprimanding a district court judge.<sup>294</sup> He began by noting that the judge “thought [a] clash [between economists] enough by itself to support class certification and a trial on the merits.”<sup>295</sup> However, according to Easterbrook, that limited support “amount[ed] to a delegation of judicial power to the plaintiffs, who [could] obtain class certification just by hiring a competent expert.”<sup>296</sup> Accordingly, he emphasized that a district court judge “may not duck hard questions by observing that each side has some support,”<sup>297</sup> and concluded that “[t]ough questions must be faced and squarely decided, if necessary by holding evidentiary hearings and choosing between competing perspectives.”<sup>298</sup> Although Judge Easterbrook did not specifically mention *Daubert*, his point is clear: district courts have a duty to inquire into the relevancy and reliability of expert testimony during certification regardless of whether that inquiry leads them into a battle of the experts or the case’s merits.<sup>299</sup>

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standard should be employed at this stage of the proceedings. Courts have declined to engage in a *Daubert* analysis at the class certification stage of an action on the ground that an inquiry into the admissibility of the proposed expert testimony under *Daubert* would be an inappropriate consideration of the merits of the plaintiff’s claims.”); *O’Connor v. Boeing N. Am., Inc.*, 184 F.R.D. 311, 321 n.7 (C.D. Cal. 1998) (noting that the defendant’s request for a *Daubert* analysis is inappropriate because it is directed at the merits of the plaintiffs’ claims).

290. An inquiry into the merits is prohibited by *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974).

291. *Bone & Evans*, *supra* note 20, at 1254; *Davis & Kowalski*, *supra* note 25, at 289.

292. Courts must conduct a rigorous analysis of the Rule 23(a) requirements. *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 160 (1982).

293. *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996).

294. *See West v. Prudential Sec., Inc.*, 282 F.3d 935, 938, 940 (7th Cir. 2002).

295. *Id.* at 938. This is precisely what the Second Circuit does. *See In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 135 (2d Cir. 2001).

296. *West*, 282 F.3d at 938.

297. *Id.*

298. *Id.*

299. *See Valley Drug Co. v. Geneva Pharms., Inc.*, 350 F.3d 1181, 1188, 1195 (11th Cir. 2003).

The Supreme Court intended *Daubert* to apply to all proceedings with expert testimony.<sup>300</sup> *Daubert* protects “the trier of fact,” which indicates that the safeguard applies equally to the judge or the jury, from flawed evidence and ensures that the decision-maker considers only relevant and reliable expert testimony.<sup>301</sup> One court dodged *Daubert* by concluding that it was not a trier of fact at the certification hearing since it could not engage in a merit inquiry.<sup>302</sup> The *Daubert* analysis, however, is not an inquiry into the merits; it functions to shield the judicial process from flawed testimony, not to seek the truth of the claims.<sup>303</sup> In response to one set of plaintiffs’ allegations that striking their expert affidavit would go to the merits of the case, the court in *In re Ford Motor Company Ignition Switch Products Liability Litigation*, stated that it did not examine the plaintiffs’ expert reports “with the intent of determining the likelihood of any of the parties prevailing at trial,” but instead “read those documents in order to determine the contours of the issues that would be involved in such a trial.”<sup>304</sup>

Although most courts refuse to conduct a full *Daubert* analysis during certification, courts allow litigants to make a *Daubert* challenge against the same experts and the same evidence during trial.<sup>305</sup> If the expert’s opinion or method does not withstand *Daubert* at trial, and the court suddenly realizes that it cannot manage all the claims under differing state laws or that common claims do not predominate, it must then decertify the class.<sup>306</sup> The court could have prevented the additional time and expense of a trial had it conducted a *Daubert* inquiry during certification. This roundabout process con-

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300. See generally *Daubert v. Merrell Dow Pharms. Inc.*, 509 U.S. 579, 591-92 (1993) (using the broad terminology “trier of fact” rather than “jury”).

301. See *id.* at 591-92.

302. See *In re Visa Check/MasterMoney*, 192 F.R.D. 68, 76 (E.D.N.Y. 2000) (“I am very far from the ‘trier of fact’ contemplated in Rule 702. Indeed, I am expressly forbidden from engaging in ‘a preliminary inquiry into the merits of the case.’”), *aff’d*, 280 F.3d 124 (2d Cir. 2001), *cert. denied sub nom. Visa U.S.A., Inc. v. Wal-Mart Stores, Inc.*, 536 U.S. 917 (2002).

303. Davis & Kowalski, *supra* note 25, at 293.

304. *In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 174 F.R.D. 332, 345 (D.N.J. 1997), *vacated in not relevant part*, 1999 U.S. Dist. LEXIS 22891 (D.N.J. July 27, 1999). In *Ford*, plaintiffs wanted to certify a class action on behalf of purchasers or lessees of vehicles that allegedly caught fire because of a defective ignition switch. *Id.* at 337. A second class of purchasers and lessees whose vehicles did not catch fire also wanted to certify their action as a class action. *Id.* at 338. The district court, however, denied certification to both groups because they failed to demonstrate the predominance and superiority requirements for Rule 23(b)(3) certification. *Id.* at 356. The court also refused the plaintiffs’ request to provide them with conditional certification. *Id.*

305. See *Bacon v. Honda of Am. Mfg., Inc.*, 205 F.R.D. 466, 471 (S.D. Ohio 2001).

306. The Third Circuit has certified classes with the caveat that, if the case becomes unmanageable, it may decertify or redefine the class. See *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 815 (3d Cir. 1995); *In re Sch. Asbestos Litig.*, 789 F.2d 996, 1011 (3d Cir. 1986).

tradicts the rationale for using class actions in the first place: to promote judicial economy and efficiently resolve multiple claims.<sup>307</sup>

Some courts liberally construe the class certification requirements and hold that “if there are doubts at the certification stage those uncertainties should be resolved in favor of certifying the class.”<sup>308</sup> This position reflects the flexibility in Rule 23(c), which allows the court to issue conditional certification orders and then alter or amend them before deciding the merits.<sup>309</sup> However, as the Supreme Court indicated, “actual, not presumed conformance with Rule 23(a) remains . . . indispensable.”<sup>310</sup> Consequently, courts should not use this flexibility as a means to certify a class that fails to satisfy the prerequisites of Rule 23.

When contemplating a certification decision in favor of certifying the class, courts should consider both Rule 102 of the Federal Rules of Evidence, which requires judges to construe the rules to eliminate unjustifiable expense and delay,<sup>311</sup> and Rule 1 of the Federal Rules of Civil Procedure, which directs judges to construe and administer the rules “to secure the just, speedy, and inexpensive determination of every action.”<sup>312</sup> Even the Supreme Court observed that the principal purpose of the class action procedure is “the efficiency and economy of litigation.”<sup>313</sup> If the class is certified without “significant proof” of the Rule 23(a) requirements,<sup>314</sup> then decertified at trial, the court’s initial certification decision undermines the principal purpose of the class action mechanism.<sup>315</sup>

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307. See *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 160 (1982).

308. *In re Microcrystalline Cellulose Antitrust Litig.*, 218 F.R.D. 79, 93 (E.D. Pa. 2003) (citing *Eisenberg v. Gagnon*, 766 F.2d 770, 785 (3d Cir. 1985)); see also *Kidwell v. Transp. Communications Int’l Union*, 946 F.2d 283, 305 (4th Cir. 1991); *Black v. Rhone-Poulenc, Inc.*, 173 F.R.D. 156, 159 (S.D. W. Va. 1996) (“The recent trend in class certification decisions is to interpret Rule 23 flexibly and give it a liberal construction.”). Although a class may be conditionally certified under Rule 23(c)(1), the Rules say nothing about resolving uncertainties in favor of the class. See FED. R. CIV. P. 23. In *Microcrystalline*, the plaintiffs, who purchased microcrystalline cellulose, which is an “inert binding agent in pharmaceutical and vitamin tablets,” filed suit against the sellers. *Microcrystalline*, 218 F.R.D. at 81. In the plaintiffs’ motion for class certification, they alleged antitrust violations. *Id.* The district court granted the motion for class certification, stating, “[t]he Court of Appeals has held that if there are doubts at the certification stage those uncertainties should be resolved in favor of certifying the class.” *Id.* at 93.

309. FED. R. CIV. P. 23(c)(1).

310. *Falcon*, 457 U.S. at 160.

311. FED. R. EVID. 102.

312. FED. R. CIV. P. 1.

313. *Falcon*, 457 U.S. at 159 (quoting *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974)).

314. *Id.* at 159 n.15.

315. *Id.* at 159 (stating that the efficiency and economy of litigation is the principal purpose of the class action).

Without *Daubert* safeguards, resolving doubts in favor of certification ignores the consequences of certification for the defendant,<sup>316</sup> wastes judicial resources, increases the expense of the action, and causes delays while the defendant appeals a possibly uninformed and unjust certification.<sup>317</sup> Federal courts of appeal recently granted thirty-two of forty-one certification appeals, and decertified the vast majority of those classes.<sup>318</sup> The appellate courts upheld the district courts' class certification in only five instances.<sup>319</sup> Although these figures indicate that the appeals process in Rule 23(f) appears to be working properly, the reversal of this many cases indicates that the appellate courts may not approve of the district courts' permissive approach to certification.<sup>320</sup>

Like summary judgment, class certification provides a method for conserving judicial resources by avoiding multiple suits.<sup>321</sup> Federal Rule of Civil Procedure 23(a)(1) reserves the class action mechanism for situations in which joinder is unavailable, which reinforces the emphasis on fostering judicial economy.<sup>322</sup> When courts decline to use a *Daubert* inquiry during certification and later discover that the expert's unreliable opinion led them to erroneously certify the class, the class action wastes judicial resources and is not the most efficient means of adjudication. If the district courts conducted a *Daubert* inquiry prior to admitting evidence or if they at least considered and evaluated all of the evidence against a preponderance of the evidence standard, they could avoid squandering judicial resources on a class that does not sufficiently prove the requirements of Rule 23(a).<sup>323</sup>

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316. See *infra* Part VI.A.

317. See *West v. Prudential Sec., Inc.*, 282 F.3d 935, 937-38 (7th Cir. 2002) (handling an appeal from class certification and noting the need for resolving the appeal promptly). Federal circuit courts have granted thirty-two of forty-one Rule 23(f) petitions (appeals from orders granting or denying class action certification). Fardy, *supra* note 139, at 9. The "vast majority" of these decisions decertified the class. *Id.*

318. Fardy, *supra* note 139, at 9.

319. *Id.*

320. The Second Circuit does not seem to mind the permissive approach to certification and encourages its courts to err on the side of certifying the class. See *Green v. Wolf Corp.*, 406 F.2d 291, 298 (2d Cir. 1968) ("[I]f there is to be an error made, let it be in favor and not against the maintenance of the class action, for it is always subject to modification should later developments during the course of the trial so require.>").

321. *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974); see *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 351 (1983).

322. See FED. R. CIV. P. 23(a). Other factors besides simple numbers play into determining the feasibility of joinder. These include "(1) the nature and complexity of the action, (2) the size of individual claims, and (3) the geographic distribution of the members of the class." JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 16.2 (3d ed. 1999) (footnotes omitted).

323. *Daubert* challenges have become increasingly fatal to cases. See DIXON & GILL, *supra* note 283, at xvi.

## VI. THE CHANGING LANDSCAPE OF CLASS ACTIONS

At their core, class actions serve three vital purposes: (1) preserving judicial resources and increasing judicial economy;<sup>324</sup> (2) protecting the rights of consumers who would not pursue individual claims due to expense, reticence, or ignorance;<sup>325</sup> and (3) guarding against the possibility of inconsistent results.<sup>326</sup> Although the class action mechanism retains the potential for fairly and efficiently adjudicating multiple claims,<sup>327</sup> it can also “put considerable pressure on the defendant to settle, even when the plaintiffs’ probability of success on the merits is slight.”<sup>328</sup> Congress has proposed a number of bills, many titled “Class Action Fairness Acts,” to move class actions from state to federal courts where Congress believes there will be greater consistency.<sup>329</sup> Yet, with their already overburdened dockets, the federal courts cannot afford to waste judicial resources on trials arising from erroneously certified classes, much less on classes removed from state courts.<sup>330</sup> Employing *Daubert* during certification can both mitigate the “blackmail” charge by dismissing frivolous class actions and act as a tool for conserving judicial resources in the event that Congress passes a class action fairness act.<sup>331</sup>

## A. Blackmail Settlements

The Federal Rules of Evidence provide safeguards to ensure fair proceedings,<sup>332</sup> yet as seen previously, federal courts refuse to employ them during certification.<sup>333</sup> The resulting prejudice to defendants led, in part, to prominent judges reversing certification decisions that

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324. *Am. Pipe & Constr. Co.*, 414 U.S. at 553; *See Parker*, 462 U.S. at 351.

325. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985); *Kramer v. Scientific Control Corp.*, 534 F.2d 1085, 1091 (3d Cir. 1976); *Brown v. Cameron-Brown Co.*, 92 F.R.D. 32, 49-50 (E.D. Va. 1981); *Shields v. First Nat’l Bank*, 56 F.R.D. 442, 445 (D. Ariz. 1972).

326. *First Fed. v. Barrow*, 878 F.2d 912, 919 (6th Cir. 1989).

327. Bruce Hay & David Rosenberg, “*Sweetheart*” and “*Blackmail*” Settlements in Class Actions: Reality and Remedy, 75 NOTRE DAME L. REV. 1377, 1379 (2000).

328. *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999).

329. For a discussion of moving class actions into federal courts, see John H. Beisner & Jessica D. Miller, *They’re Making a Federal Case Out of It . . . in State Court*, 25 HARV. J. L. & PUB. POL’Y 143 (2001); see also Mullenix, *supra* note 225.

330. See CHIEF JUSTICE WILLIAM H. REHNQUIST, 2002 YEAR-END REP. ON THE FEDERAL JUDICIARY pt. II, available at <http://www.supremecourtus.gov/publicinfo/year-end/2002year-endreport.html> (last visited Feb. 5, 2004).

331. On October 22, 2003 the Senate rejected, by one vote, the cloture motion for the Class Action Fairness Act of 2003. Ralph Lindeman, *Class Action Bill: Senate Motion to Consider Class Action Bill Fails by One Vote; Dodd, Landrieu Key Votes*, 4 Class Action Litig. Rep. (BNA) 768 (Oct. 24, 2003). Senator Mary Landrieu cast the key vote defeating the bill and explained that even though she “remained firmly committed to class action reform,” she did not receive certain crucial changes. *Id.*

332. FED. R. EVID. 102.

333. See *supra* Part IV.B.

fostered what they considered blackmail.<sup>334</sup> Once plaintiffs certify their class, they may coerce or “blackmail” defendants into settlement.<sup>335</sup> Lax certification standards risk high litigation and settlement costs by inviting frivolous, weak class action suits.<sup>336</sup> Plaintiffs may capitalize on these lenient standards to gain an undue advantage in negotiating settlements.<sup>337</sup> As a result, the plaintiffs’ recovery may not reflect the merits of their claims so much as it does the defendants’ fear of staking their financial viability on the outcome of a single jury trial.<sup>338</sup> Rather than face the possibility of devastating damage awards and potential bankruptcy,<sup>339</sup> risk averse defendants often prefer to settle.<sup>340</sup>

Notably, Judge Posner, in *In re Rhone-Poulenc Rorer, Inc.*,<sup>341</sup> and Judge Easterbrook, in both *West v. Prudential Securities, Inc.*<sup>342</sup> and *In re Bridgestone/Firestone, Inc.*,<sup>343</sup> commented disapprovingly on how the class action device has turned into a medium for blackmail.<sup>344</sup> Judge Posner indicated alarm over the demonstrably weak proof of the plaintiffs’ claims as compared to the tremendous litigation and liability risks for the defendant.<sup>345</sup> Judge Easterbrook voiced a similar concern that settlements “reflect [a] high risk of catastrophic loss” and force “defendants to pay substantial sums even when the plaintiffs have weak positions.”<sup>346</sup> Consequently, “[t]he effect of a class certification in inducing settlement to curtail the risk of large

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334. See *In re Bridgestone/Firestone, Inc.*, Tires Prod. Liab. Litig., 288 F.3d 1012, 1016, 1021 (7th Cir. 2002), *rev’g in part* 205 F.R.D. 503, *cert. denied sub nom.* Gustafson v. Bridgestone/Firestone, Inc., 537 U.S. 1105 (2003); *West v. Prudential Sec., Inc.*, 282 F.3d 935, 937, 940 (7th Cir. 2002); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299, 1304 (7th Cir. 1995).

335. See, e.g., *Bridgestone/Firestone*, 288 F.3d at 1016; *West*, 282 F.3d at 937; *Rhone-Poulenc Rorer*, 51 F.3d at 1299.

336. Bone & Evans, *supra* note 20, at 1254.

337. Towns, *supra* note 248, at 1029.

338. Hay & Rosenberg, *supra* note 327, at 1390.

339. More than a dozen corporations involved in asbestos litigation sought protection in the bankruptcy courts, as did companies involved in the Dalkon Shield and silicone breast implant litigation. Deborah R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 DUKE J. COMP. & INT’L L. 179, 188 (2001).

340. Bone & Evans, *supra* note 20, at 1254; Hay & Rosenberg, *supra* note 327, at 1390.

341. 51 F.3d 1293, 1299 (7th Cir. 1995).

342. 282 F.3d 935, 937 (7th Cir. 2002).

343. 288 F.3d 1012, 1016 (7th Cir. 2002).

344. *But see In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 145, 147 (2d Cir. 2001) (certifying a class despite its potential coercive effect).

345. *Rhone-Poulenc Rorer*, 51 F.3d at 1299.

346. *West*, 282 F.3d at 937 (citing Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497 (1991); Reinier Krakman, Hyun Park et al., *When Are Shareholder Suits in Shareholder Interests?*, 82 GEO. L.J. 1733 (1994); Roberta Romano, *The Shareholder Suit: Litigation Without Foundation?*, 7 J.L. ECON. & ORG. 55, 61 (1991)).

awards provides a powerful reason to take an interlocutory appeal.”<sup>347</sup>

Judge Easterbrook reiterated this position in *In re Bridgestone/Firestone, Inc.* by remarking that the consequences of aggregating millions of claims “makes the case so unwieldy, and the stakes so large, that settlement becomes almost inevitable—and at a price that reflects the risk of a catastrophic judgment as much as, if not more than, the actual merit of the claims.”<sup>348</sup> Although some scholars have debated the reality of this position,<sup>349</sup> using *Daubert* before admitting expert evidence combined with weighing the evidence to judge whether it satisfies the requirements of Rule 23 by a preponderance of the evidence will allow courts to parse through weak claims and strengthen the fairness and efficiency of the class action mechanism. Requiring reliable expert opinions early in the process could lessen the opportunity for blackmail on weak claims and restore the positive functions of the class action mechanism.<sup>350</sup>

### B. *The Class Action Fairness Acts*

One of the most important functions of the class action is the preservation of scarce judicial resources.<sup>351</sup> As Chief Justice Rehnquist observed in his *2002 Year-End Report on the Federal Judiciary*, the federal courts are operating with insufficient resources and cannot bear any additional burden.<sup>352</sup> He explains:

Despite a substantial increase in workload, the number of judge-ships in the Courts of Appeals for the First, Second, and Ninth Circuits has not increased for 18 years—since 1984. During that time period, appellate filings in the First Circuit have risen 56%, in the Second Circuit they have risen almost 70%, and in the Ninth Circuit appellate filings have more than doubled—rising almost 115%.<sup>353</sup>

Congress may soon exponentially amplify the burden on the already overtaxed judiciary if it passes a class action fairness act.<sup>354</sup> Although

347. *Id.*

348. 288 F.3d at 1016.

349. See, e.g., Charles Silver, “We’re Scared to Death”: *Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357 (2003) (suggesting that the cases make questionable or unproven factual allegations regarding wrongful coercion of defendants).

350. The three noble purposes of the class action mechanism are listed at the beginning of Part VI, *supra*.

351. *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974) (stating that the efficiency and economy of litigation is the principal purpose of the class action).

352. See REHNQUIST, *supra* note 330, at pt. II.

353. *Id.*

354. For information on past bills, see Glenn A. Danas, *The Interstate Class Action Jurisdiction Act of 1999: Another Congressional Attempt to Federalize State Law*, 49 EMORY L.J. 1305 (2000).

the federal judiciary stringently opposes the act since it already lacks sufficient operational resources,<sup>355</sup> Congress continues to introduce different forms of the bill each year.<sup>356</sup> Each version of the act differs, but the core provision in each implements a concept of “minimal diversity.”<sup>357</sup> Minimal diversity expands federal court jurisdiction over large interstate class actions by requiring that only one plaintiff and one defendant reside in different states.<sup>358</sup> In the most recent version of the act, if minimal diversity exists, any defendant or any plaintiff may remove the action from state to federal courts *without* the consent of all the defendants or all the plaintiffs.<sup>359</sup>

The Senate recently rejected, by one vote, a cloture motion to bring the Class Action Fairness Act of 2003 to its floor.<sup>360</sup> This close defeat encouraged supporters to quickly create a similar bill that might attract one additional vote.<sup>361</sup> If Congress actually passes a version of the class action fairness act, the federal judiciary will have to find a means to reduce the strain on its court system.<sup>362</sup> Just as the courts developed and expanded the use of summary judgment to dispense with meritless claims and conserve judicial resources, the courts could fairly dispense with frivolous class actions by subjecting experts to a *Daubert* analysis during certification and weighing the evidence offered to prove the requirements of Rule 23 in accordance with the preponderance of the evidence standard.

A recent study of *Daubert*'s impact in the courts indicates that challenges to expert evidence have become increasingly fatal to cases.<sup>363</sup> The study noted that once judges fulfilled their role as

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355. See *Class Action Fairness Act of 2003: Hearing on H.R. 1115 Before the House Comm. on the Judiciary*, 108th Cong. 123 (2003) (statement of Rep. John Conyers).

356. See, e.g., *Class Action Fairness Act of 2003*, S. 274, 108th Cong. (2003); *Class Action Fairness Act of 2002*, H.R. 2341, 107th Cong. (2002); *Class Action Fairness Act of 2001*, S. 1712, 107th Cong. (2001); *Class Action Fairness Act of 2000*, S. 353, 106th Cong. (2000); *Interstate Class Action Jurisdiction Act of 1999*, H.R. 1875, 106th Cong. (1999).

357. See S. 274, § 4.

358. See *id.*

359. *Id.* § 5(a).

360. Lindeman, *supra* note 331, at 768. Senate supporters of the bill think that a bill could still be passed this session. Ralph Lindeman, *Class Action Bill: Provisions in Senate Class Action Bill Said in Conflict with Federal Notice Rules*, 4 CLASS ACTION LITIG. REP. (BNA) 815 (Nov. 14, 2003). For more information on the Class Action Fairness Act of 2003, see Representative John Conyers, Jr., *Class Action “Fairness”—A Bad Deal for the States and Consumers*, 40 HARV. J. ON LEGIS. 493 (2003); Martha Neil, *New Route for Class Actions: Proposals Raise Questions About Whether Giving Federal Courts More Power Over Cases Will Cure the System's Ills*, 89 A.B.A. J. 48 (2003).

361. Lindeman, *supra* note 331, at 768.

362. The RAND Institute for Civil Justice recommends increasing judicial resources. DEBORAH R. HENSLER ET AL., RAND INST. FOR CIVIL JUSTICE, CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 36 (1999). The Institute notes, “[s]aving money on damage class actions by limiting judicial scrutiny is a foolish economy that has the long-term consequence of wasting society’s resources.” *Id.*

363. DIXON & GILL, *supra* note 283, at xvi.

“watchful gatekeepers,” they examined all aspects of the evidence more closely and rigorously assessed its reliability.<sup>364</sup> Consequently, if the federal courts employ *Daubert* at the class certification stage, they could effectively eliminate both unreliable evidence and unsubstantiated class actions while lightening their overburdened docket.

#### VII. INHERENT FLEXIBILITY: JUDGES’ BROAD AUTHORITY TO PREVENT REPETITION

The district courts already possess the authority to conduct a *Daubert* inquiry and weigh the evidence offered to prove the requisites of Rule 23 during class certification. Appellate courts review certification decisions on an abuse of discretion standard,<sup>365</sup> and Federal Rule of Civil Procedure 23(d) allows the court to determine the course of the proceedings.<sup>366</sup> When viewed in light of Federal Rule of Civil Procedure 1, which directs courts to administer the rules to “secure the just, speedy, and inexpensive determination of every action,”<sup>367</sup> the district courts have a greater responsibility to use their authority to eliminate inconsistent views of “sufficiency” and to make more informed certification decisions.

##### A. Federal Rule of Civil Procedure 23(d)

The drafters of the Federal Rules of Civil Procedure recognized the need for flexibility and fashioned Rule 23 to endow district courts with significant discretion.<sup>368</sup> According to Rule 23(d), the court has authority to “prevent undue repetition or complication in the presentation of evidence or argument,” and to ensure “fair conduct of the action.”<sup>369</sup> Rule 23(d)(3), in particular, specifically allows courts to impose additional conditions on the class representative as the circumstances warrant.<sup>370</sup> The court can also fashion appropriate orders to deal with “procedural matters.”<sup>371</sup> The Federal Rules of Evidence are considered procedural in nature.<sup>372</sup> Accordingly, these explicit grants

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364. *Id.* at xv.

365. *E.g.*, *Califano v. Yamasaki*, 442 U.S. 682, 703 (1979); *Valley Drug Co. v. Geneva Pharms., Inc.*, 350 F.3d 1181, 1187 (11th Cir. 2003); *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 132 (2d Cir. 2001); *Rutstein v. Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1228, 1233 (11th Cir. 2000); *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 291 (2d Cir. 1999).

366. FED. R. CIV. P. 23(d).

367. FED. R. CIV. P. 1.

368. Marvin E. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 39 (1967).

369. FED. R. CIV. P. 23(d).

370. *Id.* at 23(d)(3).

371. *Id.* at 23(d)(5).

372. *Feldman v. Allstate Ins. Co.*, 322 F.3d 660, 666 (9th Cir. 2003).

of power allow the court not only to employ the Federal Rules of Evidence, but also to control all aspects of class certification.

In short, drafters of Rule 23 aimed to conserve judicial resources and to provide a procedural vehicle for aggregating multiple claims. The class certification requirements of Rule 23(a) and 23(b) are framed in general terms to empower the courts with the flexibility to apply the requirements to an expansive array of claims.<sup>373</sup> Rule 23(d) gives judges broad discretion to assure fair and just adjudication.<sup>374</sup> Using evidentiary rules and a uniform burden of proof to evaluate sufficiency during certification promotes fair and just adjudication by acting as a barrier to the admission of unreliable expert testimony as well as to certifying classes with insufficient proof.

### B. Abuse of Discretion Standard

In addition to the authority granted by Federal Rule of Civil Procedure 23(d), appellate courts review district court decisions on class certification using an abuse of discretion standard.<sup>375</sup> Rule 23(f) allows courts of appeal to grant interlocutory orders to review the district court's grant or denial of class action certification.<sup>376</sup> Appellate courts have broad discretion over whether to accept a Rule 23(f) petition.<sup>377</sup>

Since no "hard-and-fast test" exists for determining whether to grant a Rule 23(f) petition, intermediate appellate courts consider several factors.<sup>378</sup> These factors may include whether the case raises a novel or unsettled question,<sup>379</sup> the likelihood of success on the merits,<sup>380</sup> the posture of the case,<sup>381</sup> and the "death-knell" factor, which

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373. See FED. R. CIV. P. 23(a), (b).

374. See *id.* at 23(d).

375. See *In re Delta Air Lines*, 310 F.3d 953, 960 (6th Cir. 2002), *cert. denied, sub nom.*, *N.W. Airlines Corp. v. Chase*, 123 S. Ct. 2252 (2003). The Second Circuit is "noticeably less deferential to the district court when that court has denied class status than when it has certified a class." *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 291 (2d Cir. 1999) (quoting *Lundquist v. Sec. Pac. Auto. Fin. Servs. Corp.*, 993 F.2d 11, 14 (2d Cir. 1993)). In *Caridad*, present and former African-American employees brought a Title VII race discrimination action against Metro-North Commuter Railroad. *Id.* at 283. The district court denied class certification. *Id.* The Second Circuit reversed the denial of class certification because the district court credited Metro-North's expert evidence over that of the plaintiffs' expert. *Id.* at 293. Accordingly, the court held that "[s]uch a weighing of the evidence is not appropriate at this stage in the litigation." *Id.*

376. FED. R. CIV. P. 23(f).

377. See FED. R. CIV. P. 23(f) ("A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order.").

378. *Delta*, 310 F.3d at 959.

379. FED. R. CIV. P. 23(f) advisory committee's note; *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 99-100 (D.C. Cir. 2002) (considering review "when the certification decision presents an unsettled and fundamental issue of law relating to class actions").

380. *Delta*, 310 F.3d at 960.

recognizes that the costs of continuing litigation for either party may present a difficulty.<sup>382</sup> Consequently, Rule 23(f) appeals should be the exception, not the norm.<sup>383</sup> However, by granting thirty-two of forty-one class certification appeals and decertifying all but five, the appellate courts seem to strongly indicate that the district courts should substantially inquire into whether the plaintiff actually provided sufficient evidence of the Rule 23 requirements.<sup>384</sup>

All of these factors and considerations can lead to one result: the district court should use its authority to conduct a full *Daubert* analysis prior to admitting expert evidence. District court judges should also use their authority to weigh the evidence when conducting a rigorous analysis to determine whether the plaintiff met, by a preponderance of the evidence, the prerequisites of Rule 23. Then the court could fairly resolve ambiguities in favor of the plaintiff and err on the side of certification.

#### VIII. CONCLUSION

As the reliance on experts becomes routine during class certification, district courts need to respond to preserve both the proper purposes of the class action and the overarching need for just and fair resolution of the case. Ideally, to make a fair and informed decision on certification, judges should routinely apply *Daubert* as a precursor to admitting expert evidence, adequately evaluate opposing expert opinions, and use a preponderance of the evidence standard to judge the sufficiency of the plaintiffs' evidence before resolving ambiguities in favor of the plaintiffs and erring on the side of certification.<sup>385</sup> Courts have a duty to exclude unreliable and irrelevant testimony from consideration. Using *Daubert* during certification is an effective means of reducing the number of frivolous class actions, increasing judicial economy, preventing blackmail, bolstering the legitimacy of class actions, and restoring the noble and practical purposes of the class action device.

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381. If it looks as though the district court will reexamine its decision to certify the class, appellate courts are less likely to grant interlocutory appeals. *Id.*

382. See *Lorazepam*, 289 F.3d at 99; *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999).

383. *Delta*, 310 F.3d at 959-60; *Lorazepam*, 289 F.3d at 105.

384. See Fardy, *supra* note 139, at 9.

385. The burden of proof during class certification has not been previously addressed in court cases. However, since the typical burden of proof in civil cases is a preponderance of the evidence, courts should require plaintiffs to prove that they have more likely than not met the requirements of Rule 23. See *supra* Part II.B.