TO ANALYZE OR NOT TO ANALYZE: A PRACTICAL SOLUTION TO THE LOVE–HATE RELATIONSHIP BETWEEN *DAUBERT* AND CERTIFICATION IN CLASS ACTION PROCEEDINGS

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> *No 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.*[1]

I. INTRODUCTION

To analyze or not to analyze: that was the question.[2]

In *Wal-Mart Stores, Inc. v. Dukes* (*Dukes II*),[3] while attempting to punt the question of whether a federal district court must conduct a full *Daubert*[4] analysis when examining the admissibility of expert testimony during class certification proceedings un-

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

2. *See* WILLIAM SHAKESPEARE, THE TRAGEDY OF HAMLET, PRINCE OF DENMARK act 3, sc. 1 (In contemplating whether it is better to live or die, the main character, Prince Hamlet, in Shakespeare's famous soliloquy, bemoans, "To be, or not to be, that is the question[.]").

3. 131 S. Ct. 2541 (2011).

4. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the United States Supreme Court held that the Federal Rules of Evidence—specifically, Rule 702—govern the admissibility of scientific evidence based on expert testimony and that a trial judge must determine whether an expert's testimony is both reliable and relevant prior to submitting it to a jury. 509 U.S. 579, 579–80 (1993); *see also* Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147 (1999) (extending *Daubert*'s holding to all expert testimony, not just scientific testimony).

der Rule 23 of the Federal Rules of Civil Procedure,[5] the United States Supreme Court muddied an already-contentious circuit split[6] as to whether *Daubert*'s standard should apply in a pre-merits phase of class action litigation.[7] Specifically, the Seventh Circuit Court of Appeals[8] has held that a full *Daubert* analysis should be conducted during certification if an expert's testimony is relied on to meet a requirement under Rule 23. On the other hand, the Eighth[9] and Ninth[10] Circuit Courts of Appeals have declined to adopt a full *Daubert* analysis during certification, reasoning that a district court should be afforded wide discretion in determining the admissibility of expert testimony.[11] Finally,

5. FED. R. CIV. P. 23 (setting forth the procedure to certify and adjudicate class actions brought in federal court).

6. *See infra* notes 8–10 and accompanying text.

7. *Dukes II*, 131 S. Ct. at 2553–54 ("The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that is so . . . ." (citing Dukes v. Wal–Mart, Inc., 222 F.R.D. 189, 191 (N.D. Cal. 2004) (citation omitted))).

8. Am. Honda Motor Co. v. Allen, 600 F.3d 813, 815–16 (7th Cir. 2010) ("We hold that when an expert's report or testimony is critical to class certification, as it is here, a district court must conclusively rule on any challenge to the expert's qualifications or submissions prior to ruling on a class certification motion. That is, the district court must perform a full *Daubert* analysis before certifying the class if the situation warrants. . . . The court must also resolve any challenge to the reliability of information provided by an expert if that information is relevant to establishing any of the Rule 23 requirements for class certification." (internal citations omitted)). Notably, the Eleventh Circuit Court of Appeals has also indicated, in an unpublished opinion, that it agrees with the Seventh Circuit's holding that a full *Daubert* analysis is appropriate at certification. Sher v. Raytheon Co., 419 F. App'x 887, 890 (11th Cir. 2011) ("We consider the Seventh Circuit's opinion in *American Honda* [regarding *Daubert*] persuasive." (internal citation omitted)). However, *Sher* dealt with the weight afforded to conflicting expert testimony, not admissibility. *Id.* ("Here, in its Rule 23 analysis, we find that the district court erred as a matter of law by not sufficiently evaluating and weighing conflicting expert testimony on class certification."). As such, it is outside the scope of this Article, which deals exclusively with the admissibility, not weight, of expert testimony during certification.

9. *In re* Zurn Pex Plumbing Prods. Liab. Litig., 644 F.3d 604, 612, 614 (8th Cir. 2011) ("[W]e are not convinced that the approach of *American Honda* would be the most workable in complex litigation or that it would serve case management better than the one followed by the district court here. . . . We conclude that the district court did not err by conducting a focused *Daubert* analysis which scrutinized the reliability of the expert testimony in light of the criteria for class certification and the current state of the evidence.").

10. Dukes v. Wal–Mart Stores, Inc., 603 F.3d 571, 602 n.22 (9th Cir. 2010) (*Dukes I*) ("We are not convinced by the dissent's argument that *Daubert* has exactly the same application at the class certification stage as it does to expert testimony relevant at trial."), *rev'd*, 131 S. Ct. 2541 (2011).

11. *In re Zurn Pex*, 644 F.3d at 615 ("A district court necessarily has 'considerable discretion' in deciding whether to admit expert testimony where the factual basis is disputed." (quoting Marvin Lumber & Cedar Co. v. PPG Indus., Inc., 401 F.3d 901, 916 (8th Cir. 2005))).

the Third Circuit Court of Appeals[12] has relied on the circuit split, itself, to hold that a district court must apply *Daubert* in at least some form when it utilizes expert testimony at the certification stage.

This Article posits that the Supreme Court should adopt a sliding *Daubert* scale at certification that would afford a district court the flexibility it needs to make crucial—and often dispositive—certification decisions. It begins, in Part II, with an overview of class certification under Rule 23, explaining the process by which a group of similarly situated plaintiffs litigate an action on a class-wide basis. Part III discusses the Supreme Court's seminal decision in *Daubert*, which set forth the standard governing the admissibility of expert testimony under Federal Rule of Evidence 702 in a merits phase of litigation. Part IV discusses the rise of the love–hate relationship between *Daubert* and class certification and tracks the current circuit split on the issue. Finally, Part V lays out the arguments for and against applying *Daubert* fully at certification, ultimately concluding that the issue is ripe for review and that the Supreme Court should adopt a sliding *Daubert* scale.

To support its position that a sliding *Daubert* scale should be applied during class certification, this Article sets forth three hypothetical class actions involving three types of claims traditionally brought under Rule 23—securities claims, antitrust claims, and mass tort claims. By way of example, the hypotheticals show not only how Rule 23 operates practically, but also how a bright-line *Daubert* ruling would be unworkable at certification.

II. OVERVIEW OF CLASS CERTIFICATION UNDER RULE 23

Rule 23 governs the procedure by which a group of similarly situated[13] plaintiffs litigate an action collectively—termed a class

12. *In re* Blood Reagents Antitrust Litig., No. 12-4067, — F.3d — , 2015 WL 1543101 (3d Cir. Apr. 8, 2015) ("We have no occasion to examine whether there might be some variation between the Seventh and Eighth Circuit formulations. Consistent with our holding here, both courts limit the *Daubert* inquiry to expert testimony offered to prove satisfaction of Rule 23's requirements.").

13. *See* FED. R. CIV. P. 23 advisory comm. note on subdiv. (b)(3) ("Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons *similarly situated*, without sacrificing procedural fairness or bringing about other undesirable results." (emphasis added)).

action[14] or representative suit[15]—in federal district court.[16] The rule is an exception to the general rule that a party must be named in order to litigate an action.[17] The procedural device serves two primary purposes.[18] First, it promotes judicial efficiency by aggregating duplicative claims to achieve economies of scale,[19] which is particularly important in situations where discovery would be similar and repetitive should the claims be brought individually.[20] Second, it enables the adjudication of claims that would not be brought in absence of class-wide treatment, such as claims where the amount recoverable is relatively small compared to the cost of litigating individually.[21] In addition

14. *Id.* r. 23(c)(1)(A) ("At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.").

15. Hansberry v. Lee, 311 U.S. 32, 40–41 (1940) (opining that "representative" suits are an exception to the traditional rule that "one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process" (citing Pennoyer v. Neff, 95 U.S. 714 (1877), *overruled in part on other grounds by* Shaffer v. Heitner, 433 U.S. 186 (1977))).

16. FED. R. CIV. P. 23 (setting forth the procedure to certify and adjudicate class actions brought in federal court).

17. Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432 (2013) ("The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" (quoting Califano v. Yamasaki, 442 U.S. 682, 700–01 (1979))).

18. Haley v. Medtronic, Inc., 169 F.R.D. 643, 647 (C.D. Cal. 1996) ("Class actions have two primary purposes: (1) to accomplish judicial economy by avoiding multiple suits; and (2) to protect the rights of persons who might not be able to present claims on an individual basis.").

19. *In re* U.S. Foodservice Inc. Pricing Litig., 729 F.3d 108, 130 (2d Cir. 2013) ("[S]ubstituting a single class action for numerous trials in a matter involving substantial common legal issues and factual issues susceptible to generalized proof will achieve significant economies of 'time, effort and expense, and promote uniformity of decision.'" (citing FED. R. CIV. P. 23 advisory comm. note on subdiv. (b)(3))).

20. A commonly cited policy behind the use of a procedural aggregation device like Rule 23 is judicial economy, or the notion that, within the class action context, litigating common issues under a single judge will conserve judicial resources by avoiding duplicative costs associated with repetitive discovery. *In re* Gen. Tire & Rubber Co. Sec. Litig., 429 F. Supp. 1032, 1034 (J.P.M.L. 1977) (reasoning that placing multiple similar claims "under the control of a single judge will ensure that duplicative discovery on the complex factual questions will be prevented and have the salutary effect of eliminating the possibility of conflicting pretrial rulings"). While it is true that aggregation does add some additional costs into the mix because complex cases are more expensive to litigate than non-complex cases, the net savings are likely positive when multiple parties or questions of law or fact are at issue. Sw. Ref. Co. v. Bernal, 22 S.W.3d 425, 437 (Tex. 2000) (positing that "[t]he class action is a procedural device intended to advance judicial economy by trying claims together that lend themselves to collective treatment . . . [and] is not meant to alter the parties' burdens of proof, right to a jury trial, or the substantive prerequisites to recovery").

21. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985) ("Class actions also may permit the plaintiffs to pool claims which would be uneconomical to litigate individu-

to these two primary purposes, the device serves the fringe purposes of equalizing litigating power between plaintiffs and defendants[22] and promoting fundamental fairness[23] by allowing the adjudication of claims that would traditionally be precluded should one plaintiff recover before another in an individual suit.[24]

To understand how expert testimony and, more specifically, *Daubert* interact with Rule 23, it is helpful to look at the certification decision broadly, including how a putative class utilizes expert testimony to meet its burden. To this end, Subpart A gives an overview of certification, including the parties' respective burdens under Rule 23(a)–(b), while Subpart B delves into the predominance requirement under Rule 23(b)(3)—an inquiry that almost always entails the use of expert testimony.[25]

A. The Certification Decision

The decision to resolve duplicative claims on a class-wide basis under Rule 23 is made pre-trial.[26] Prior to certifying, a district

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ally. For example, this lawsuit involves claims averaging about $100 per plaintiff; most of the plaintiffs would have no realistic day in court if a class action were not available."); Deposit Guar. Nat'l Bank, Jackson, Miss. v. Roper, 445 U.S. 326, 339 (1980) ("Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.").

22. *In re* NASDAQ Market-Makers Antitrust Litig., 169 F.R.D. 493, 528 (S.D.N.Y. 1996) (stating that class actions "equalize the bargaining power between plaintiffs as a group and [d]efendants as a group, and thus improve the chances of an equitable settlement").

23. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 833 (1999) (reasoning that Rule 23 ameliorates "situations where lawsuits conducted with individual members of the class would have the practical if not technical effect of concluding the interests of the other members . . . or of impairing the ability of the others to protect their own interests").

24. *See* Robi v. Five Platters, Inc., 838 F.2d 318, 321–22 (9th Cir. 1988) ("Generally, the preclusive effect of a former adjudication is referred to as *res judicata*. The doctrine of *res judicata* includes two distinct types of preclusion, claim preclusion and issue preclusion. Claim preclusion treats a judgment, once rendered, as the full measure of relief to be accorded between the same parties on the same claim or cause of action. . . . The doctrine of issue preclusion prevents relitigation of all issues of fact or law that were actually litigated and necessarily decided in a prior proceeding." (footnote omitted) (citations omitted) (internal quotation marks omitted)).

25. *See infra* Part IV(A)–(B).

26. FED. R. CIV. P. 23(c)(1)(A) ("At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.").

court will conduct a "rigorous analysis"[27] of the evidence to determine whether a putative class has met its burden of showing that the requirements under Rule 23 have been satisfied by a preponderance of the evidence.[28]

To show that the requirements under Rule 23 have been satisfied by a preponderance of the evidence, a class[29] must demonstrate two things. First, the class must show that each of the four requirements under Rule 23(a) is met, which effectively limits the universe of claims to those most similar to the named plaintiff's.[30] Second, the class must show that the action is most properly litigated in the aggregate by demonstrating that it fits into one of the three enumerated types of class actions under Rule 23(b).[31]

1. Rule 23(A) Requirements

Under Rule 23(a), a class must show four things: numerosity, commonality, typicality, and adequacy of representation.[32] Nu-

27. Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 161 (1982) ("[A] . . . class action[ ] . . . may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.").

28. *Dukes II*, 131 S. Ct. 2541, 2551 (2011) ("A party seeking class certification must affirmatively demonstrate . . . compliance with . . . Rule [23]."); *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 307 (3d Cir. 2008) ("Factual determinations supporting Rule 23 findings must be made by a preponderance of the evidence.").

29. In order to determine whether Rule 23(a)'s requirements have been met, a class must be sufficiently defined in order to know who will be later bound by a judgment. *See* FED. R. CIV. P. 23(c)(1)(B) (stating that a district court must "define the class" in its order for certification); Keegan v. Am. Honda Motor Co., 284 F.R.D. 504, 521 (C.D. Cal. 2012) ("Although not specifically mentioned in Rule 23, there is an additional prerequisite to certification—that the class be ascertainable."). "A class is sufficiently defined and ascertainable if it is 'administratively feasible for the court to determine [sic.] whether a particular [sic.] individual is a member.'" *Keegan*, 284 F.R.D. at 521 (quoting O'Connor v. Boeing N. Am., Inc., 184 F.R.D. 311, 319 (C.D. Cal. 1998) ("[A] class will be found to exist if the description of the class is definite enough so that it is administratively feasible for the court to ascertain whether an individual is a member.")).

30. *Falcon*, 457 U.S. at 156 (quoting Gen. Tel. Co. of the Nw., Inc. v. EEOC, 446 U.S. 318, 330 (1980) and stating that the requirements under Rule 23(a) "limit the class claims to those fairly encompassed by the named plaintiff's claims").

31. Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 811 (7th Cir. 2012) ("To be certified, a proposed class must satisfy the requirements of Federal Rule of Civil Procedure 23(a), as well as one of the three alternatives in Rule 23(b)." (citing Siegel v. Shell Oil Co., 612 F.3d 932, 935 (7th Cir. 2010)).

32. FED. R. CIV. P. 23(a) ("One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) [Numerosity] the class is so numerous that joinder of all members is impracticable; (2) [Commonality] there are questions of law or fact common to the class; (3) [Typicality] the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) [Adequacy

merosity under Rule 23(a)(1) is satisfied if "joinder of all members is impracticable."[33] While "[n]o magic number exists" to meet this burden,[34] courts have articulated that where the number of plaintiffs exceeds forty, joinder is "impracticable."[35]

Commonality under Rule 23(a)(2) is satisfied if "questions of law or fact [are] common to the class."[36] While this requirement appears to be a fairly simple one to meet, recent caselaw suggests otherwise. In fact, the Supreme Court has articulated that the common question of law or fact "must be of such a nature that . . . [the] determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."[37] This means that a putative class will fail if it merely points to a single common question; rather, it must show "the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation."[38]

Typicality under Rule 23(a)(3) is satisfied if "the claims or defenses of the representative parties are typical of the claims or defenses of the class."[39] Practically, this means that each claim must "[arise] from the same course of events, and [that] each class member makes similar legal arguments to prove the defendant's liability."[40]

Finally, adequacy of representation under Rule 23(a)(4) is satisfied if "the representative parties will fairly and adequately protect the interests of the class."[41] Although this requirement merges with commonality and typicality, it is distinguishable in that it is the part of the Rule most concerned with due process.[42]

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of Representation] the representative parties will fairly and adequately protect the interests of the class.").

33. *Id.* r. 23(a)(1).

34. Moskowitz v. Lopp, 128 F.R.D. 624, 628 (E.D. Pa. 1989).

35. "[C]lasses of 20 are too small, classes of 20–40 may or may not be big enough depending on the circumstances of each case, and classes of 40 or more are numerous enough." Ikonen v. Hartz Mountain Corp., 122 F.R.D. 258, 262 (S.D. Cal. 1988).

36. FED. R. CIV. P. 23(a)(2).

37. *Dukes II*, 131 S. Ct. 2541, 2551 (2011).

38. *Id.* (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009)).

39. FED. R. CIV. P. 23(a)(3).

40. *In re* Drexel Burnham Lambert Grp., Inc., 960 F.2d 285, 291 (2d Cir. 1992).

41. FED. R. CIV. P. 23(a)(4).

42. *Dukes II*, 131 S. Ct. at 2551 n.5 ("[Commonality and typicality] tend to merge with the adequacy-of-representation requirement . . . ." (quoting Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 157–58 n.13 (1982))); Phillips Petroleum Co. v. Shutts, 472 U.S. 797,

Specifically, the adequacy of representation requirement addresses three primary due process concerns that must be satisfied in order to certify: first, whether interests are aligned between a class and its representative;[43] second, whether interests are aligned between a class and its counsel;[44] and third, whether interests are aligned within the class, or if intra-class conflicts exist that impede certification.[45]

2. Rule 23(B) Class Types

In addition to meeting its burden under Rule 23(a), a putative class must show that the action is most properly litigated in the aggregate by demonstrating that it fits into one of the three enumerated types of class actions under Rule 23(b).[46] The first class type is the incompatible standards class under Rule 23(b)(1), which combines claims that, if brought individually, would create an issue of "inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class."[47] The second class type is the injunctive or declaratory

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798 (1985) ("The Due Process Clause requires . . . adequate representation." (internal quotation marks omitted)).

43. *See* Hansberry v. Lee, 311 U.S. 32, 42 (1940) (holding that "there has been a failure of due process only in those cases where it cannot be said that the procedure adopted[ ] fairly insures the protection of the interests of absent parties who are to be bound by it").

44. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 819 (1999) (reasoning that the "class [could not] qualify for certification when . . . class counsel [agreed] to exclude . . . as much as a third of the claimants" and when the class was required to, but did not, divide "into homogeneous subclasses . . . with separate representation to eliminate conflicting interests of counsel").

45. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625 (1997) (precluding certification because diverse medical conditions and differences in class members' objectives created intra-class diversity that foreclosed a finding of cohesion).

46. Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 811 (7th Cir. 2012) ("To be certified, a proposed class must satisfy the requirements of Federal Rule of Civil Procedure 23(a), as well as one of the three alternatives in Rule 23(b)." (citing Siegel v. Shell Oil Co., 612 F.3d 932, 935 (7th Cir. 2010))).

47. There are two types of Rule 23(b)(1) classes. Clause (A) deals with cases in which "[o]ne person may have rights against, or be under duties toward, numerous persons constituting a class, and be so positioned that conflicting or varying adjudications in lawsuits with individual members of the class might establish incompatible standards to govern his conduct." *Id.* r. 23 advisory comm. note on cl. (A). For example, "[s]eparate actions by individuals against a municipality to declare a bond issue invalid or condition or limit it, to prevent or limit the making of a particular appropriation or to compel or invalidate an assessment, might create a risk of inconsistent or varying determinations." *Id.* Clause (B) deals with cases in which "the judgment in a nonclass action by or against an individual member of the class, while not technically concluding the other members,

relief class under Rule 23(b)(2), which combines claims in which "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."[48] The final class type is the opt-out/monetary relief class under Rule 23(b)(3), which allows the aggregation of claims for efficiency reasons and requires that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[49]

A large number of putative classes seek certification under Rule 23(b)(3) due to the ability to obtain monetary relief.[50] Indeed, unless the action is one for which a limited fund exists to satisfy all claims—in which case the action would be certified as a Rule 23(b)(1)(B) class[51]—it is very difficult to obtain monetary

might do so as a practical matter." *Id.* r. 23 advisory comm. note to cl. (B). For example, "actions by shareholders to compel the declaration of a dividend . . . should ordinarily be conducted as class actions." *Id.* In addition, actions where "claims are made by numerous persons against a fund insufficient to satisfy all claims" are most properly certified under Rule 23(b)(1)(B). *Id.*

48. Rule 23(b)(2) classes address situations where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." *Id.* r. 23(b)(2). An example of this would be "actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration." *Id.* r. 23 advisory comm. note on subdiv. (b)(2). Notably, however, the "final relief [may not relate] exclusively or predominantly to money damages." *Id.*

49. Rule 23(b)(3) classes address situations where "questions of law or fact common to class members predominate over any questions affecting only individual members, and . . . a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Id.* r. 23(b)(3). A class is most properly certified as a Rule 23(b)(3) class in situations where "class-action treatment is not as clearly called for . . . , but it may nevertheless be convenient and desirable . . . [because] a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Id.* r. 23 advisory comm. note on subdiv. (b)(3). For example, "a fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class." *Id.*

50. Allison v. Citgo Petroleum Corp., 151 F.3d 402, 412 (5th Cir. 1998) ("[T]he (b)(3) class action was intended to dispose of all other cases [that do not fall within Rule 23(b)(1)–(2) classes] in which a class action would be 'convenient and desirable,' including those involving large-scale, complex litigation for money damages." (quoting Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 615 (1997))).

51. *See supra* note 47.

relief under any other subdivision.[52] Thus, because Rule 23(b)(3) classes generally litigate a property interest (money),[53] the Rule requires that a putative class make two additional showings—predominance[54] and superiority[55]—to ensure that the class is cohesive[56] and that certification will satisfy the due process rights of absent class members.[57] However, while predominance and superiority are both crucial in making a certification decision, generally only predominance implicates issues related to expert testimony.[58]

B. The Predominance Inquiry

Predominance is satisfied if "questions of law or fact common to class members predominate over any questions affecting only individual members."[59] While similar to commonality under Rule 23(a),[60] predominance under Rule 23(b)(3) is much more "demanding"[61] and focuses on whether a class is "sufficiently cohe-

52. *See supra* notes 47–48. *See also Dukes II*, 131 S. Ct. 2541, 2557 (2011) (ruling out the possibility that a putative class may seek monetary relief under Rule 23(b)(2), "at least where (as here) the monetary relief is not incidental to the injunctive or declaratory relief." (citing Ticor Title Ins. Co. v. Brown, 511 U.S. 117, 121 (1994) (per curiam))).

53. *See* Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 571–72 (1972) ("The Court has . . . made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money.").

54. *See infra* Part II(B) (discussing predominance under Rule 23(b)(3)).

55. If a district court concludes that common issues predominate, it will then determine whether class treatment is the superior means of adjudicating the controversy. FED. R. CIV. P. 23(b)(3). Rule 23(b)(3) sets forth four pertinent factors: (1) "the class members' interests in individually controlling the prosecution or defense of separate actions"; (2) "the extent and nature of any litigation concerning the controversy already begun by or against class members"; (3) "the desirability or undesirability of concentrating the litigation of the claims in the particular forum"; and (4) "the likely difficulties in managing a class action." *Id.* While no one factor is dispositive, the desire to concentrate complex litigation in one forum often weighs heavily in favor of granting certification for manageability purposes. *See In re* High-Tech Emp. Antitrust Litig., 289 F.R.D. 555, 584 (N.D. Cal. 2013) (*High-Tech Employee I*) ("[T]he desirability of concentrating the litigation in one forum weigh[s] heavily in favor of finding that class treatment is superior to other methods of adjudication of the controversy.").

56. *See infra* note 62 and accompanying text.

57. *See supra* note 42 and accompanying text.

58. *E.g.*, *In re* U.S. Foodservice Inc. Pricing Litig., 729 F.3d 108, 129–31 (2d Cir. 2013) (analyzing expert testimony under predominance and not under superiority).

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

60. *Id.* r. 23(a)(2).

61. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623–24 (1997) (stating that the requirement of predominance under Rule 23(b)(3) is "far more demanding" than the requirement of commonality under Rule 23(a)).

sive to warrant adjudication by representation."[62] A putative class can meet this burden by showing that "the same evidence will suffice for each member to make a prima facie showing" as to the cause of action.[63] Thus, the critical inquiry under predominance is not whether each class member will eventually prevail on the merits at trial, but whether "proof of the essential elements of the cause of action requires individual treatment."[64] Practically, this means that a district court will analyze each element of the cause of action to "determine which are subject to common proof and which are subject to individualized proof."[65]

In analyzing each element of a cause of action, a district court will rely heavily on testimony from the parties' experts to determine whether each element is "subject to common proof"[66]—a crucible that often turns into what one court has termed a "battle of the experts."[67] For example, in *In re Live Concert Antitrust Litigation*,[68] an antitrust suit in which the putative class alleged that Clear Channel Communications, Inc. violated the Sherman Act by attempting to monopolize the market of rock concerts, the United States District Court for the Central District of California walked through each element of monopolization[69] to determine whether common issues predominated over individual ones.[70] In

62. *Id.* at 623.

63. Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 815 (7th Cir. 2012) (quoting Blades v. Monsanto Co., 400 F.3d 562, 566 (8th Cir. 2005)).

64. Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 172 (3d Cir. 2001).

65. *High-Tech Employee I*, 289 F.R.D. 555, 564 (N.D. Cal. 2013) (quoting *In re* TFT–LCD (Flat Panel) Antitrust Litig., 267 F.R.D. 291, 310 (N.D. Cal. 2010), *abrogated on other grounds by In re* ATM Fee Antitrust Litig., 686 F.3d 741, 755 n.7 (9th Cir. 2012)). *See also Messner*, 669 F.3d at 815 ("Analysis of predominance under Rule 23(b)(3) 'begins, of course, with the elements of the underlying cause of action.'" (quoting Erica P. John Fund, Inc. v. Halliburton Co., 131 S. Ct. 2179, 2184 (2011))); *High-Tech Employee I*, 289 F.R.D. at 563–83 (N.D. Cal. 2013) (walking through the elements of antitrust violation, impact, and damages in order to determine whether the putative class met its burden of showing that common issues of law or fact predominate over individual ones).

66. *In re* U.S. Foodservice Inc. Pricing Litig., 729 F.3d 108, 123 (2d Cir. 2013).

67. *In re* Live Concert Antitrust Litig., 247 F.R.D. 98, 105 (C.D. Cal. 2007).

68. *Id.*

69. *Id.* at 122 ("In order to state a claim for monopolization under Section 2 of the Sherman Act, a plaintiff must prove: (1) Possession of monopoly power in the relevant market; (2) willful acquisition or maintenance of that power; and (3) causal antitrust injury." (internal quotation marks omitted) (quoting Pac. Express, Inc. v. United Airlines, Inc., 959 F.2d 814, 817 (9th Cir. 1992))).

70. *Id.*

doing so, the district judge relied on expert testimony[71] to define the parameters of the relevant product market and to find that Clear Channel actually possessed market power in that market.[72]

Because expert testimony is utilized so heavily by litigants in certification proceedings to show that the requirements under Rule 23(a) and (b) have or have not been met, the admissibility of that testimony is also heavily litigated. As such, it is important to understand how Federal Rule of Evidence 702—the rule dealing with the admissibility of expert testimony—operates.

III. OVERVIEW OF DAUBERT *AND RULE 702*

Rule 702 governs the admissibility of expert testimony in federal district court.[73] The Rule provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.[74]

In 1993, the Supreme Court held, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[75] that Rule 702 governs the admissibility of scientific evidence based on expert testimony in federal court

71. *Id.* at 122–47. Experts for the class "contend[ed] that each member of the class would introduce exactly the same evidence [at trial] to demonstrate the scope of the relevant market, possession of monopoly power in the market, and the alleged illegality . . . under the Sherman Act." *Id.* at 122. On the other hand, experts for the defendants "argue[d] that common issues d[id] not predominate because there [was] no common product market, no common anticompetitive conduct, and no common injury." *Id.*

72. *Id.* at 123 ("The relevant market is the field in which meaningful competition is said to exist." (internal quotation marks omitted) (quoting Image Technical Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1202 (9th Cir. 1997))).

73. FED. R. EVID. 702.

74. *Id.*

75. 509 U.S. 579, 597 (1993).

and that a trial judge must serve as a gatekeeper[76] to the jury, determining whether an expert's testimony is both reliable and relevant prior to admitting it.[77] Later, the Court extended *Daubert*'s gatekeeping obligation when it held, in *Kumho Tire Co. v. Carmichael*,[78] that *Daubert*'s framework does not merely apply to scientific expert testimony, but applies to all expert testimony.[79] This effectively overturned *Frye v. United States*,[80] a 1923 case in which the United States Court of Appeals for the District of Columbia Circuit held that expert testimony need only "be sufficiently established to have gained *general acceptance* in the particular field in which it belongs."[81] Indeed, prior to *Daubert*, as long as an expert's conclusions were generally accepted, the testimony was admissible.[82] Today, if a litigant moves to exclude expert testimony, a district court will often—though not always—conduct a "*Daubert* hearing"[83] to ascertain whether expert testimony is both reliable and relevant and whether an individual is qualified to testify as an expert in the field.[84] To this end, Subpart A discusses the reliability inquiry, and Subpart B discusses the relevance inquiry.[85]

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76. *In re* Apollo Grp. Inc. Sec. Litig., 527 F. Supp. 2d 957, 959 (D. Ariz. 2007) ("In *Daubert* . . . , the Supreme Court held that Rule 702 imposed a special gatekeeping obligation upon a trial judge to make a preliminary assessment of the admissibility of expert scientific testimony." (internal citation omitted)).

77. *Daubert*, 509 U.S. at 589 ("[T]he trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.").

78. 526 U.S. 137 (1999).

79. *Id.* at 147.

80. 293 F. 1013 (D.C. Cir. 1923), *superseded by rule as stated in Daubert*, 509 U.S. at 587 ("[Petitioners] contend that the *Frye* test was superseded by the adoption of the Federal Rules of Evidence. We agree." (footnote omitted)).

81. *Id.* at 1014 (emphasis added).

82. *See, e.g.*, United States v. Yee, 134 F.R.D. 161, 166 (N.D. Ohio 1991) ("The Court finds that the points made by defendants merely establish that there are firmly held beliefs in the community of scientists opposed to the government's use of F.B.I. Such firmly held beliefs, however, as noted above, do not prevent the novel scientific evidence from being found generally accepted in the pertinent scientific community.").

83. Dodge v. Cotter Corp., 328 F.3d 1212, 1228 (10th Cir. 2003) ("[A] *Daubert* hearing is but one method a court might choose to fulfill its gatekeeper obligation.").

84. *In re* Apollo Grp. Inc. Sec. Litig., 527 F. Supp. 2d 957, 960 (D. Ariz. 2007) ("'The question of admissibility only arises if it is first established that the individuals whose testimony is being proffered are experts in a particular . . . field.' Thus, as an initial matter, the trial court must determine whether the proffered witness is qualified as an expert by 'knowledge, skill, experience, training or education.'" (citation omitted) (quoting FED. R. EVID. 702; Daubert v. Merrell Dow Pharm., Inc., 43 F.3d 1311, 1315 (9th Cir. 1995) (*Daubert II*))).

85. *See infra* Part III(A)–(B).

A. Reliability

In order to determine the first prong, reliability, a district court will look to whether "the expert's findings are based on sound science, [which] will require some objective, independent validation of the expert's methodology."[86] To validate the expert's methodology, a district court will rely on certain factors enumerated in *Daubert* to determine "whether a theory or technique is scientific knowledge that will assist the trier of fact," including: (1) "whether [the expert's methodology] can be (and has been) tested";[87] (2) "whether the theory or technique has been subjected to peer review and publication";[88] (3) "the known or potential rate of error";[89] and (4) "the degree of acceptance of the method or technique within the relevant scientific community."[90] Importantly, these factors are not dispositive or exhaustive[91] and should be viewed in light of the flexible nature of Rule 702 envisioned by the Court:

> The inquiry envisioned by Rule 702 is . . . a flexible one. Its overarching subject is the scientific validity—and thus the evidentiary relevance and reliability—of the principles that underlie a proposed submission. The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.[92]

For this reason, courts prior to and following *Daubert* have applied other factors, including (1) whether experts are "proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying";[93] (2) "[w]hether [an] expert has unjustifiably extrapolated from an accepted premise to an unfounded conclu-

86. *Daubert II*, 43 F.3d at 1316.
87. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 593 (1993).
88. *Id.*
89. *Id.* at 594.
90. *In re Apollo*, 527 F. Supp. 2d at 960 (discussing *Daubert*'s factors).
91. *Id.* ("It is . . . well-settled that the four *Daubert* factors—testing, peer review, error rates, and acceptability in the relevant scientific community—are merely illustrative, not exhaustive, and may be inapplicable in a given case.").
92. *Daubert*, 509 U.S. at 594–95 (footnote omitted).
93. *Daubert II*, 43 F.3d 1311, 1317 (9th Cir. 1995).

sion";[94] (3) "[w]hether the expert has adequately accounted for obvious alternative explanations";[95] (4) whether [the] expert "is being as careful as he would be in his regular professional work outside his paid litigation consulting";[96] and (5) "[w]hether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give."[97]

B. Relevance

In order to determine the second prong, relevance, a district court will look to whether the expert testimony at issue will assist the fact-finder in understanding the evidence or in making a factual determination.[98] To do this, a party must show not only the existence of a nexus between the evidence and the issues in the case,[99] but also that the information provided exceeds common knowledge.[100] Practically, this means that where expert testimony relates to concepts within the bounds of lay knowledge, it does not qualify as expert testimony.[101] Notably, while the relevance prong appears to be a fairly easy test to meet, the Ninth Circuit Court of Appeals qualified, on remand from *Daubert*, that "[f]ederal judges must . . . exclude proffered scientific evidence under Rules 702 and 403 unless they are convinced that it speaks clearly and directly to an issue in dispute in the case, and that it will not mislead the jury."[102]

94. FED. R. EVID. 702 advisory comm. note on 2000 amend. (citing Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997) (stating that a district court "may conclude that there is simply too great an analytical gap between the data and the opinion proffered")).

95. *Id.* (citing Claar v. Burlington N. R.R. Co., 29 F.3d 499 (9th Cir. 1994)).

96. Sheehan v. Daily Racing Form, Inc., 104 F.3d 940, 942 (7th Cir. 1997).

97. FED. R. EVID. 702 advisory comm. note on 2000 amend. (citing Kumho Tire Co. v. Carmichael, 526 U.S. 137, 151 (1999)).

98. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 591 (1993).

99. *In re* Apollo Grp. Inc. Sec. Litig., 527 F. Supp. 2d 957, 961 (D. Ariz. 2007) ("[T]he party proffering such evidence must demonstrate a valid scientific connection, or 'fit,' between the evidence and an issue in the case." (quoting *Daubert*, 509 U.S. at 591)).

100. United States v. Finley, 301 F.3d 1000, 1008 (9th Cir. 2002) ("Expert testimony assists the trier of fact when it provides information beyond the common knowledge of the trier of fact." (citing *Daubert*, 509 U.S. at 591)).

101. *In re Apollo*, 527 F. Supp. 2d at 961–62 ("[E]xpert testimony is inadmissible if it concerns factual issues within the knowledge and experience of ordinary lay people, because it would not assist the trier of fact in analyzing the evidence.").

102. *Daubert II*, 43 F.3d 1311, 1321 n.17 (9th Cir. 1995).

IV. THE RISE OF A LOVE-HATE RELATIONSHIP BETWEEN DAUBERT *AND CERTIFICATION*

No one denies that *Daubert* applies fully in a merits phase of litigation, whether the action is brought on an individual or class-wide basis. This maxim stems from the purpose of Rule 702 as construed by *Daubert*: to guard an impressionable jury from unreliable or irrelevant expert testimony. But what happens when there is no jury to protect, or, more pointedly, no action to adjudicate? Does Rule 702 require that a district judge keep such testimony from himself or herself in a pre-merits phase of litigation in the same way he or she is required to keep it from a jury in a merits phase of litigation? *Reducitur ad absurdum*, the clear answer to this question is that a district judge, in determining whether an action is even capable of being brought at all, should not be required to hide expert testimony from himself or herself. The obviousness of this conclusion raises the question: Why is *Daubert* even an issue at certification? Two words: settlement pressure.[103]

The decision to certify a class under Rule 23 is, in many cases, not merely a decision to allow an action to proceed on a class-wide basis; rather, it is often dispositive of the entire action, as a practical matter, due to settlement pressure.[104] For this reason, the Third Circuit Court of Appeals has articulated that the certification decision is "the defining moment in class actions . . . [because] it may sound the 'death knell' of the litigation on the part of plaintiffs, or create unwarranted pressure to settle nonmeritorious claims on the part of defendants."[105] Relatedly, the Advisory Committee's Note to Rule 23's 1998 Amendment states that the decision to certify a class is crucial because it "may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability."[106] Thus, it appears that while *Daubert* need not apply during certification in the absence of an impressionable jury, the dispositive nature of certification justifies its application. After all, the benefit from

103. *See infra* Part V(A).

104. *See infra* Part V.

105. Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 162 (3d Cir. 2001).

106. FED. R. CIV. P. 23 advisory comm. note on 1998 amend., subdiv. (f).

applying *Daubert* fully during certification appears, on its face, to logically outweigh any possible downside, correct? Enter the current circuit split.[107]

A. To Analyze

In 2010, the Seventh Circuit Court of Appeals, in *American Honda Motor Co. v. Allen*,[108] held that a district court must conduct a full *Daubert* analysis during certification. In that case, a group of motorcycle purchasers sought certification as a Rule 23(b)(3) class, alleging that American Honda Motor Company and Honda of America Manufacturing (collectively, "Honda") defectively designed Honda's Gold Wing GL1800 motorcycle, which caused the motorcycle to shake excessively—termed "wobble"—rendering it unsafe.[109]

During certification proceedings, the putative class relied on a motorcycle-engineering expert to show that common issues predominated over individual ones, which, in the class's estimation, made the claim capable of adjudication on a class-wide basis.[110] To make this showing, the expert set forth a standard that he had personally devised and published in one journal.[111] Using his own standard, and testing only one GL1800, the expert opined that the motorcycle was defective in design, which affected the class as a whole and allowed the claim to be adjudicated on a class-wide basis through the use of common evidence.[112]

Honda moved to strike the expert's report, arguing that the "standard was unreliable because it was not supported by empirical testing[;] was not developed through a recognized standard-setting procedure[;] was not generally accepted in the relevant scientific, technical, or professional community[;] and was not the product of independent research."[113] In addition, Honda argued that "even if the standard was reliable, [the expert] did not reliably apply it to [the] case because he only tested one motorcycle

107. *See infra* Part IV(A)–(B).
108. 600 F.3d 813, 816 (7th Cir. 2010).
109. *Id.* at 814.
110. *Id.*
111. *Id.*
112. *Id.* at 814–15.
113. *Id.* at 814.

and did not account for variables that could affect [wobble]."[114] In response to the parties' arguments on motion to strike, the district court analyzed the expert's methodology using *Daubert*'s factors and ultimately concluded, without much explanation, that it would not exclude the expert report at such an early stage despite "definite reservations about the [expert's standard's] reliability."[115]

On interlocutory appeal, the Seventh Circuit vacated the district court's grant of certification, reasoning that the district court had failed to conduct a full *Daubert* analysis, which, in the Seventh Circuit's estimation, is necessary at certification. In reaching its holding, the Seventh Circuit opined:

> We hold that when an expert's report or testimony is critical to class certification, as it is here, . . . a district court must conclusively rule on any challenge to the expert's qualifications or submissions prior to ruling on a class certification motion. That is, the district court must perform a full *Daubert* analysis before certifying the class if the situation warrants. . . .
>
> Here, the district court started off on the right foot by beginning to undertake what might have become a fairly extensive *Daubert* analysis. . . . The district court acknowledged Honda's concerns about the reliability of [the expert's] testimony and largely agreed with them. . . . Yet, the district court ultimately declined, without further explanation, "to exclude the report in its entirety at this early stage of the proceedings."
>
> We give the court great latitude in determining not only *how* to measure the reliability of the proposed expert testimony but also whether the testimony is, in fact, reliable, but the court must provide more than just conclusory statements of admissibility to show that it adequately performed the *Daubert* analysis. . . . This was not sufficient. Indeed, it was an abuse of discretion.[116]

Following *American Honda*, several district courts have adopted the same bright-line rule regarding the application of

114. *Id.*

115. *Id.* at 815 (quoting Allen v. Am. Honda Motor Co., 264 F.R.D. 412, 425 (N.D. Ill. 2009), *order vacated*, 600 F.3d 813 (7th Cir. 2010)).

116. *Id.* at 815–16 (citations omitted) (internal quotation marks omitted).

Daubert at certification.[117] However, only one other circuit has chosen to do so. In *Sher v. Raytheon Co.*,[118] the Eleventh Circuit Court of Appeals, in an unpublished opinion, relied on *American Honda* to reach its holding that the district court had erred when it did not "conduct a *Daubert*-like critique" of expert testimony at certification and that the district court should have "declare[d] a proverbial, yet tentative winner" by "evaluating and weighing conflicting expert testimony on class certification."[119] It should be noted, however, that the Eleventh Circuit's analysis of the issue is flawed and, therefore, unreliable as precedent for the proper application of *Daubert* at certification. The opinion cites *American Honda*—a case that dealt with the admissibility of evidence—to support its proposition that the district court erred when it did not weigh conflicting expert testimony properly—a holding that dealt with the weight of expert testimony rather than its admissibility.[120]

B. Not to Analyze

In 2011, the Eighth Circuit Court of Appeals, in *In re Zurn Pex Plumbing Products Liability Litigation*,[121] held that a district court need not conduct a full *Daubert* analysis during certification, but may conduct a "focused" *Daubert* analysis.[122] In *In re Zurn Pex*, a group of homeowners sought certification as a Rule 23(b)(3) class, alleging that Zurn Pex, Inc. and Zurn Industries, Inc. ("Zurn Pex") used certain brass fixtures in plumbing systems that were defective and "doomed to leak within warranty."[123]

During certification proceedings, the putative class relied on two experts who sought to establish predominance by showing that Zurn Pex's brass fixtures were "susceptib[le] to stress corrosion cracking[,] . . . which result[ed] from a combination of pres-

117. Cannon v. BP Prods. N. Am., Inc., No. 3:10-CV-00622, 2013 WL 5514284, at *6 (S.D. Tex. Sept. 30, 2013); *In re* Chocolate Confectionary Antitrust Litig., 289 F.R.D. 200, 208 (M.D. Pa. 2012); *In re* Intel Corp. Microprocessor Antitrust Litig., MDL No. 05-1717 (JJF), 2010 WL 8591815, at *15 (D. Del. July 28, 2010).

118. 419 F. App'x 887 (11th Cir. 2011).

119. *Id.* at 888–90.

120. *Id.* at 890 ("The issue before the Seventh Circuit in *American Honda* was whether or not the district court should have conclusively ruled on the admissibility (versus the weight of, as in our case) of expert opinion prior to certifying the class.").

121. 644 F.3d 604 (8th Cir. 2011).

122. *Id.* at 610, 614.

123. *Id.* at 608–10.

sure and corrosion."[124] One expert[125] conducted a wide range of tests,[126] ultimately concluding that Zurn Pex's fixtures were susceptible to stress corrosion cracking.[127] The other expert[128] studied Zurn Pex's systems and the rate of failure attributable to the brass fixtures, finding that "[ninety-nine percent] of homes would experience a leak in at least one of the fittings within [twenty-five] years."[129]

After hearing the experts' testimony, the district court "charted a middle course" in its *Daubert* analysis, reasoning that a "full and conclusive *Daubert* inquiry would not be necessary or productive at [that] stage of the litigation, particularly since the expert opinions could change during continued discovery."[130] Instead, the district court adopted a "focused *Daubert* inquiry" to determine whether the expert testimony "should be considered in deciding the issues relat[ed] to class certification."[131] In so doing, the district court denied Zurn Pex's motion to strike and certified the class on its negligence and warranty claims.[132]

On interlocutory appeal, Zurn Pex argued that the district court should have conducted a full *Daubert* analysis in accordance with the Seventh Circuit's decision in *American Honda*.[133] In response, the purported class argued that the expert testimony should not be excluded during certification proceedings unless it is "so flawed [that] it cannot provide any information as to whether the requisites of class certification have been met."[134] In holding that the district court had not abused its discretion in

124. *Id.* at 609.

125. The first expert was a former dean of the University of Minnesota Institute of Technology who had published numerous articles on stress corrosion cracking over a forty-year period. *Id.*

126. *Id.* ("Dr. Staehle examined Zurn brass fittings, including some which had leaked as well as some which were new. He conducted a battery of tests on the fittings. His tests included scanning electron microscopy, electron dispersive spectroscopy, auger electron dispersive spectroscopy, microhardness testing, materials analysis, water chemistry analysis, and static load testing.").

127. *Id.*

128. The second expert was a professor emeritus at the University of Southern California, who was a statistician and had written books on warranties and product reliability. *Id.*

129. *Id.* at 609–10.

130. *Id.* at 610.

131. *Id.*

132. *Id.* at 608, 610.

133. *Id.* at 611.

134. *Id.* at 610 (internal quotation marks omitted).

applying a limited *Daubert* analysis,[135] the Eighth Circuit rejected the Seventh Circuit's decision in *American Honda*, stating:

> In this case, the district court . . . appl[ied] what it termed a "tailored" *Daubert* analysis. Rejecting both parties' extreme positions, it examined the reliability of the expert opinions in light of the available evidence and the purpose for which they were offered. . . . Moreover, we are not convinced that the approach of *American Honda* would be the most workable in complex litigation or that it would serve case management better than the one followed by the district court here.
>
> The district court sought to examine the reliability of the expert testimony in light of the existing state of the evidence and with Rule 23's requirements in mind. The record in this case illustrates why that approach was appropriate and why requiring an even more conclusive *Daubert* inquiry at the class certification stage would have been impractical. . . .
>
> It was after all Zurn which sought bifurcated discovery which resulted in a limited record at the class certification stage, preventing the kind of full and conclusive *Daubert* inquiry Zurn later requested. While there is little doubt that bifurcated discovery may increase efficiency in a complex case such as this, it also means there may be gaps in the available evidence. Expert opinions may have to adapt as such gaps are filled by merits discovery, and the district court will be able to reexamine its evidentiary rulings. A court's rulings on class certification issues may also evolve.
>
> • • •
>
> The main purpose of *Daubert* exclusion is to protect juries from being swayed by dubious scientific testimony. That interest is not implicated at the class certification stage where the judge is the decision maker. The district court's "gatekeeping function" under *Daubert* ensures that expert evidence submitted *to the jury* is sufficiently relevant and reliable, but there is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself.[136]

Notably, the Eighth Circuit then addressed Zurn Pex's argument that certification is similar to summary judgment and that

135. *Id.* at 608, 616 (affirming the district court's certification of the class as to its warranty and negligence claims).

136. *Id.* at 612–13 (internal quotation marks, citations, and brackets omitted) (emphasis in original).

a full *Daubert* analysis is generally required prior to granting a party's motion for summary judgment.[137] While acknowledging this argument as a valid one, the Eighth Circuit distinguished certification from summary judgment, reasoning:

> Zurn correctly points out that we require district courts to rely only on admissible evidence at the summary judgment stage . . . . Because summary judgment ends litigation without a trial, the court must review the evidence in light of what would be admissible before either the court or jury.
>
> In contrast, a court's inquiry on a motion for class certification is tentative, preliminary, and limited. The court must determine only if questions of law or fact common to class members predominate over any questions affecting only individual members and if a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. As class certification decisions are generally made before the close of merits discovery, the court's analysis is necessarily prospective and subject to change, and there is bound to be some evidentiary uncertainty.[138]

Following *In re Zurn Pex*, several courts have either refused to apply a full *Daubert* analysis or taken a flexible approach to *Daubert*'s application at certification. For example, in *Bruce v. Harley-Davidson Motor Co.*,[139] the United States District Court for the Central District of California held that the district court had not erred when it applied a limited *Daubert* analysis at certification.[140] In affirming, the Central District emphasized the same concern that plagued the Eighth Circuit in *In re Zurn Pex*: bifurcated discovery.[141] Particularly, the Central District stated:

> [T]he Eighth Circuit [in *In re Zurn Pex*] highlighted the preliminary nature of class certification proceedings. The court explained that especially where discovery has been bifurcated into a class phase and a merits phase, an expert's analysis may have to adapt as gaps in the available evidence are filled

137. *Id.* at 613.

138. *Id.* (internal quotation marks, citations, and brackets omitted).

139. Bruce v. Harley-Davidson Motor Co., No. CV 09-6588 CAS (RZx), 2012 WL 769604 (C.D. Cal. Jan. 23, 2012).

140. *Id.* at *4 ("The Court believes that the approach adopted by the district court and affirmed by the Eighth Circuit in *In re Zurn* is the appropriate application of *Daubert* at the class certification stage.").

141. *Id.*

> in by merits discovery. As in that case, here the Court granted defendants' request for bifurcated discovery. Accordingly, the opinions of [the expert at issue] must be assessed in light of the evidence currently available. To the extent gaps in [the expert]'s analysis can be filled using evidence obtained in merits discovery, the Court will consider at a later stage of this case whether his opinions are admissible.[142]

Similarly, in *In re U.S. Foodservice Inc. Pricing Litigation*,[143] the Second Circuit Court of Appeals held that the district court had not erred when it determined the admissibility of two plaintiff experts' testimony without conducting a full *Daubert* analysis or even a *Daubert* hearing.[144] In so holding, the Second Circuit posited that the Supreme Court had not taken a definitive stance on the issue,[145] and in absence of a definitive stance, it was not going to disturb a district court's ruling regarding expert testimony.[146]

C. *Dukes II*'s Dicta

In 2011, the Supreme Court finally had the opportunity to resolve the *Daubert* circuit split when it decided *Dukes II*, a case in which a putative class of over one million women brought a gender discrimination action against Wal–Mart, claiming that it had discriminated against the plaintiffs in its hiring and promotion practices.[147] During certification proceedings, the putative class relied on a sociology expert who analyzed Wal–Mart's organizational structure and found that there were "significant deficiencies in Wal–Mart's equal employment policies and practices" and that "Wal–Mart's personnel policies and practices [made] pay

142. *Id.* (internal citations omitted).

143. 729 F.3d 108, 112 (2d Cir. 2013) (affirming the certification of a Rule 23(b)(3) class of food purchasers who alleged that U.S. Foodservice, Inc., a large distributor of food products, had engaged in fraudulent overbilling in violation of 18 U.S.C. §§ 1961–1968, the Racketeer Influenced and Corrupt Organization Act).

144. *Id.* at 129–30.

145. *Id.* ("The Supreme Court has not definitively ruled on the extent to which a district court must undertake a *Daubert* analysis at the class certification stage. In . . . [*Dukes*], the Court offered limited dicta suggesting that a *Daubert* analysis may be required at least in some circumstances. . . . We need not reach [the issue] here . . . ." (footnote omitted) (internal citations omitted)).

146. *Id.* at 130 (quoting United States v. Farhane, 634 F.3d 127, 158 (2d Cir. 2011)) (internal quotation marks omitted).

147. *Dukes I*, 603 F.3d 571, 577 (9th Cir. 2010).

and promotion decisions vulnerable to gender bias."[148] Wal–Mart, in turn, argued that the expert's testimony was inadmissible pursuant to Rule 702 and *Daubert* because it was "vague and imprecise [and] because [the expert] . . . failed to identify a specific discriminatory policy at Wal–Mart."[149] In partially certifying, the district court rejected Wal–Mart's *Daubert* challenge, stating that the expert "present[ed] enough of a basis, both in his review of the scientific literature and on the facts of the case, to provide a foundation for his opinions."[150]

On interlocutory appeal, the Ninth Circuit Court of Appeals affirmed the district court's treatment of Wal–Mart's *Daubert* challenge, stating that the district court had not erred when it used the expert's testimony to support commonality because the expert's testimony answered the crucial question at certification—whether "a common question of fact . . . exist[ed] with respect to all members of the class."[151] Importantly, during its discussion, the Ninth Circuit opined that it was "not convinced . . . that *Daubert* has exactly the same application at the class certification stage as it does to expert testimony relevant at trial," but refused to address the question because the district court had looked to *Daubert* when determining the admissibility of the expert's testimony.[152]

In granting certiorari, the Supreme Court addressed *Daubert*'s application at certification briefly, stating, in dicta, that it doubted the district court's declaration that *Daubert* did not apply at certification.[153] Specifically, the Court opined:

> The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that is so, but even if properly considered, [the expert]'s testimony does nothing to advance respondents' case. "[What] . . . percent[age] of the employment decisions at Wal–Mart might be determined by stereotyped thinking" is the essential question on which respondents' theory of com-

148. *Id.* at 601.
149. *Id.*
150. *Id.* at 602 (internal quotation marks omitted).
151. *Id.* at 603.
152. *Id.* at 602–03 n.22.
153. *In re* U.S. Foodservice Inc. Pricing Litig., 729 F.3d 108, 129 (2d Cir. 2013) ("In . . . *Dukes*, the Court offered limited dicta suggesting that a *Daubert* analysis may be required at least in some circumstances.").

> monality depends. If [the expert] admittedly has no answer to that question, we can safely disregard what he has to say.[154]

In *Dukes II*, the Court's refusal to face the *Daubert* issue head-on did more than fail to resolve a controversial circuit split: it created widespread confusion. Today, courts and commentators are split on the issue of whether *Dukes II* is instructive to lower courts, with some reasoning that anything the Court says is precedential and others reasoning that because the Court did not fully address the issue, its dictum is not binding. Regardless, one thing is certain: the Court should rule definitively on the issue.

V. DAUBERT'*S SIGNIFICANCE IN CERTIFICATION*

The extent to which *Daubert* applies during certification matters for several reasons. From a litigation perspective, *Daubert*'s application is significant—and hotly contested—because it is often dispositive of the entire action.[155] On one hand, if a district court heavily scrutinizes expert testimony, it may be difficult for a putative class to meet its burden under Rule 23, in which case the action may not be brought if the incentive to litigate individually is relatively low.[156] On the other hand, if a district court fails to properly scrutinize expert testimony, it may certify a class that is not sufficiently cohesive, which is problematic if it causes a defending party to prematurely settle an action that is not capable of class-wide adjudication at trial.[157]

From a judicial efficiency perspective, the degree to which a court analyzes expert testimony prior to certification can impact a reviewing court's interlocutory decision[158] to affirm or reverse

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154. *Dukes II*, 131 S. Ct. 2541, 2553–54 (2011) (internal citations omitted) (second bracket in original).

155. *Compare* Am. Honda Motor Co., Inc. v. Allen, 600 F.3d 813, 819 (7th Cir. 2010) (decertifying because the district court failed to conduct a full *Daubert* analysis), *with In re* Zurn Pex Plumbing Prods. Liab. Litig., 644 F.3d 604, 612, 620 (8th Cir. 2011) (affirming certification even though the district did not conduct a full *Daubert* analysis).

156. *See supra* note 155 and accompanying text (recognizing the need for a balance between a full *Daubert* analysis and no *Daubert* analysis at the class certification stage).

157. *See infra* note 169 and accompanying text (recognizing the danger of premature settlement when class certification is too freely granted).

158. FED. R. CIV. P. 23(f) ("A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within [fourteen] days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders."); *In re Zurn Pex*, 644 F.3d at 611 ("Zurn brings this Rule 23(f) inter-

certification—a concern that understandably weighs heavy on a district judge.[159] Moreover, a district court's decision to certify a class based on a less-than-adequate examination of expert testimony could lead to a number of manageability issues at trial and, quite possibly, decertification.[160]

Despite these issues and the facial desirability of a full *Daubert* analysis, the reality is that district courts and parties facing this conundrum have limited time and resources to devote to an intensive analysis of expert testimony in a pre-merits phase of litigation where discovery may or may not have been fully conducted.[161] Needless to say, the proper application of *Daubert* at certification implicates widespread concerns related to judicial efficiency and requires a careful balancing of interests. As such, it is important to understand the arguments supporting a full *Daubert* analysis and a more limited, tailored *Daubert* analysis at certification in order to make a practical determination as to its proper application. To this end, Subpart A gives an overview of settlement pressure, which is the primary argument supporting a full *Daubert* analysis, and Subpart B gives an overview of efficiency, which is the primary argument supporting a tailored *Daubert* analysis.[162]

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locutory appeal of the order issued by the district court certifying the warranty and negligence classes.").

159. *See Am. Honda*, 600 F.3d at 814–15, 819 (overturning the certification of a Rule 23(b)(3) class because the district court erred in not conducting a full *Daubert* analysis).

160. *See* Key v. Gillette Co., 782 F.2d 5, 7 (1st Cir. 1986) ("In the present case, the district court found that the weak presentation of the individual discrimination claim, the serious deficiencies in the methodology of the principal expert, the failure of appellant's attorney to present the expert's testimony in a manner that could be understood by the court and his general lackluster performance during trial all reflected appellant's inability to 'fairly and adequately protect the interests of her class.' . . . [T]here was sufficient basis in the record to decertify because the requirement of fair and adequate representation of [R]ule 23(a)(4) was not met.").

161. *See* Roper v. Consurve, Inc., 578 F.2d 1106, 1112–13 (5th Cir. 1978), *aff'd sub nom*, Deposit Guar. Nat'l Bank, Jackson, Miss. v. Roper, 445 U.S. 326 (1980) ("A number of similar class actions have been certified by district courts, and appear to have been susceptible of management. Certification will achieve one of the primary purposes of the class action, 'enhanc[ing] the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture.'" (quoting Haw. v. Standard Oil Co. of Cal., 405 U.S. 251, 266 (1972))).

162. *See infra* Part V(A)–(B).

A. The Need to Mitigate Settlement Pressure

Courts and commentators that argue for a full *Daubert* analysis at certification generally base their reasoning on the need to mitigate the heightened risk of settlement pressure following certification.[163] The argument, in essence, posits that if anything less than a full *Daubert* analysis is applied during certification proceedings, a district court will more readily certify a putative class, which, in turn, leads to increased settlement pressure.[164]

As previously discussed, the decision to certify a class under Rule 23 is, in many cases, not merely a decision to allow an action to proceed on a class-wide basis; rather, it is often dispositive of the entire action, as a practical matter, due to settlement pressure.[165] For this reason, at least some courts and commentators have gone so far as to liken a class's litigating power following certification to "blackmail."[166] Undeniably, the more relaxed the procedural safeguards during certification, the higher the risk that a court will incorrectly certify a class despite its incapability of class-wide adjudication.[167] This is highly problematic if it allows a class to exploit flexible procedural safeguards during certification in order to strong-arm a defendant into settling.[168]

To illustrate, a recent decision to certify a putative class in two separate food-labeling class actions led defendant–companies Bear Naked and Kashi to enter into settlement negotiations solely to avoid trial.[169] Similarly, a recent decision to certify a puta-

163. Meredith M. Price, Comment, *The Proper Application of* Daubert *to Expert Testimony in Class Certification*, 16 LEWIS & CLARK L. REV. 1349, 1359 (2012) (arguing that settlement pressure requires a full *Daubert* analysis at certification).

164. *Id.*

165. *See supra* Part IV (noting class certification can afford individual plaintiffs with minimal damages the pressure needed to force settlement).

166. *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1298 (7th Cir. 1995) ("Judge Friendly, who was not given to hyperbole, called settlements induced by a small probability of an immense judgment in a class action 'blackmail settlements.'" (quoting HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973))); L. Elizabeth Chamblee, Comment, *Between "Merit Inquiry" and "Rigorous Analysis": Using* Daubert *to Navigate the Gray Areas of Federal Class Action Certification*, 31 FLA. ST. U. L. REV. 1041, 1085 (2004) (analogizing the pressure to settle following certification to "blackmail" in certain cases).

167. Chamblee, *supra* note 166, at 1085.

168. *Id.*

169. Glenn G. Lammi, *Update: Two Food Labeling Suits Settle After Judge Certified Narrowed Classes*, FORBES (May 12, 2014, 10:17 AM), http://www.forbes.com/sites/wlf/2014/05/12/update-two-food-labeling-suits-settle-after-judge-certified-narrowed-classes/2/ (stating that "[e]ven though [the district judge] substantially shrank the size of the plain-

tive class in an antitrust class action led defendant–companies Adobe, Apple, Google, Intel, Intuit, Lucasfilm, and Pixar to enter into settlement negotiations to mitigate the risks associated with placing the entire outcome of the action in the hands of a single jury.[170] Finally, in a comparable context, the National Collegiate Athletic Association recently sought certification of a settlement class[171]—which allows certification for the sole purpose of settling an action—to avoid trial in a highly publicized suit involving student–athletes who have suffered concussions while playing football.[172] These examples illustrate how important procedural safeguards are during certification to protect a defending party from unwarranted settlement pressure.

However, commentators who draw the blanket conclusion that *Daubert* should apply fully during certification because of settlement pressure miss the mark. In fact, settlement pressure is a desirable means of resolving a dispute if the claim is strong and it would be the most efficient way to resolve the controversy.[173] Moreover, settlement is entirely in line with the spirit and purpose of Rule 23, which is to allow for the speedy resolution of complex controversies.[174] Thus, the issue is not whether settle-

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tiffs' classes in her July 2013 rulings, Kellogg's determined that the benefit of settling outweighed the cost of continuing its defense and the risk of losing at trial").

170. Shaun Nichols, *Apple, Intel, Google Told to Stop Being Tightwads and Pay out MORE in Wage-Fix Settlement*, THE REGISTER (Aug. 8, 2014, 9:20 PM), http://www.theregister.co.uk/2014/08/08/judge_strikes_down_apple_and_intels_wagefixing_settlement/.

171. "[A] settlement class is a device whereby the court postpones the formal certification procedure until the parties have successfully negotiated a settlement, thus allowing a defendant to explore settlement without conceding any of its arguments against certification." *In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 786 (3d Cir. 1995) (providing a comprehensive overview of the settlement class device).

172. *In re* Nat'l Collegiate Athletic Ass'n Student-Athlete Concussion Injury Litig., MDL No. 2492, Master Docket No. 1:13-cv-09116, Class Action Settlement Agreement and Release at 1–2 (N.D. Ill. July 28, 2014), *available at* https://www.ncaa.org/sites/default/files/NCAA%20MDL%20—%20Final%20Settlement%20Agreement(1832814_21_CH).pdf (last visited May 1, 2015).

173. *Gen. Motors*, 55 F.3d at 784 ("The law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation. The parties may also gain significantly from avoiding the costs and risks of a lengthy and complex trial. These economic gains multiply when settlement also avoids the costs of litigating class status—often a complex litigation within itself. Furthermore, a settlement may represent the best method of distributing damage awards to injured plaintiffs, especially where litigation would delay and consume the available resources and where piecemeal settlement could result . . . .").

174. *In re* U.S. Foodservice Inc. Pricing Litig., 729 F.3d 108, 130 (2d Cir. 2013) ("[S]ubstituting a single class action for numerous trials in a matter involving substantial common legal issues and factual issues susceptible to generalized proof will achieve signif-

ment pressure exists, but whether that settlement pressure is unwarranted.

B. The Need for Efficiency

Settlement pressure is not the only argument supporting a full *Daubert* analysis; judicial efficiency itself supports a full *Daubert* analysis at certification in certain respects.[175] The argument goes like this: if anything less than a full *Daubert* analysis is applied during certification, a district court will more readily certify a putative class based on evidence that is inadmissible at trial, which is highly inefficient if the class is later decertified.[176]

While this argument is persuasive on its face, it too portrays a less-than-complete picture of the issue due, in part, to the desirability of bifurcated discovery and other manageability devices in class action proceedings.[177] As background, bifurcated discovery is the process by which a district court divides discovery into two phases: first, discovery as it relates to Rule 23 requirements, which is conducted during certification; and second, discovery as it relates to the merits, which is conducted later for trial.[178]

Bifurcated discovery, if done correctly, is highly operative as an efficiency device in class action proceedings because it aims to avoid a situation in which an action is never certified even after the parties expend a tremendous amount of financial resources on merits discovery.[179] Indeed, the Manual for Complex Litigation highlights just how important bifurcated discovery is to judicial efficiency when it states that the majority of district courts prefer to bifurcate discovery because "discovery into aspects of the merits unrelated to certification delays the certification decision and

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icant economies of 'time, effort and expense, and promote uniformity of decision.'" (quoting FED. R. CIV. P. 23 advisory comm. note on subdiv. (b)(3))).

175. Chamblee, *supra* note 166, at 1042.

176. Price, *supra* note 163, at 1364 ("The Seventh Circuit approach, advocating a full application of the *Daubert* standard, should be adopted by the Supreme Court as the proper method to analyze expert testimony because the test is consistent with the purpose and function of Rule 702 of the Federal Rules of Evidence, and ensures that certification is not erroneously predicated on evidence that ultimately would be excluded at trial.").

177. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.14 (2004) (discussing precertification discovery).

178. *See generally id.*

179. *See generally id.*

can create extraordinary and unnecessary expense and burden."[180]

The problem with bifurcating discovery, however, is that it may result in evidentiary holes during certification, which may make it difficult for a district court to conduct a full *Daubert* analysis at certification in a way that ensures the admissibility of that testimony at trial.[181] For example, this concern was present in *Harley-Davidson*, discussed *supra*, where the district court affirmed a limited *Daubert* analysis at certification because "gaps in the available evidence" caused by bifurcated discovery made it impossible to conduct a full *Daubert* analysis during certification.[182]

While creating a bright-line rule that *Daubert* should apply fully at certification would admittedly make the proceeding slightly more efficient by creating a more rigid procedural framework that would decrease the likelihood of decertification, it also would make the proceeding less efficient by decreasing a district court's incentive to bifurcate discovery. Thus, due to the need for, and the overwhelming desirability of, bifurcated discovery, the judicial efficiency argument leans in favor of a tailored *Daubert* analysis at certification.

VI. THE CASE FOR A SLIDING DAUBERT *SCALE AT CERTIFICATION*

In light of the widespread ramifications associated with the proper application of *Daubert* at certification, the Supreme Court should direct the lower courts to adopt a sliding *Daubert* scale that would allow a district court the flexibility it needs to analyze *Daubert* fully in certain cases and less fully in others. Before delving into the specifics of what such a scale would entail, it may be helpful to illustrate the need for such discretion through the use of three hypotheticals involving different causes of action traditionally brought under Rule 23—securities actions, antitrust actions, and mass tort actions.

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180. *Id.* § 21.14 (discussing precertification discovery).

181. *In re* Zurn Pex Plumbing Prods. Liab. Litig., 644 F.3d 604, 612, 620 (8th Cir. 2011) (reasoning that a full *Daubert* analysis was not applicable because the district court had bifurcated discovery, which prevented a complete inquiry).

182. Bruce v. Harley-Davidson Motor Co., No. CV 09-6588 CAS (RZx), 2012 WL 769604, at *4 (C.D. Cal. Jan. 23, 2012).

In each hypothetical, assume that the putative class is seeking certification under Rule 23(b)(3), which requires not only that the class meet its burden under Rule 23(a) to show numerosity, commonality, typicality, and adequacy of representation, but also that the class meet its burden under Rule 23(b)(3) to show predominance and superiority.[183] Additionally, assume that the defending party, Delta Corporation, is a publicly traded company that produces Widget, a product manufactured and distributed in the United States.

A. Hypothetical 1: Securities Class Actions[184]

A commonly certified[185] cause of action under Rule 23 is an action for securities fraud brought pursuant to Section 10(b) of the Securities Exchange Act of 1934[186] and SEC Rule 10b-5.[187] Together, these sections target securities fraud by making it "unlawful for any person, directly or indirectly . . . [t]o make any untrue statement of a material fact or to omit to state a material fact . . . in connection with the purchase or sale of any security."[188]

Three years ago, Delta filed its Form 10-K annual report with the Securities and Exchange Commission, in compliance with Sections 13 and 15(d) of the Securities Exchange Act of 1934.[189] This report contained, among other things, audited financial statements providing an overview of the financial condition of the company.[190] Based on this report, thousands of individuals purchased Delta's stock. One year later, an independent analyst report surfaced questioning, much to Delta's shareholders' chagrin, the integrity of Delta's Form 10-K, alleging that Delta intentionally made a material misstatement in order to artificially inflate

183. *See supra* Part II (presenting an overview of class certification under Rule 23).

184. This hypothetical is based on McIntire v. China MediaExpress Holdings, Inc., No. 11-cv-0804 (VM), ___ F. Supp. 2d ___, 2014 WL 4049896 (S.D.N.Y. Aug. 15, 2014).

185. Thomas E. Willging et al., *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74, 89 (1996) ("A (b)(3) class was certified in [ninety-four percent] to [one hundred percent] of the securities cases where a motion or sua sponte order on certification was filed.").

186. 15 U.S.C. § 78j(b) (2012).

187. 17 C.F.R. § 240.10b-5 (2014).

188. *Id. See also* 15 U.S.C. §§ 77(k), 78(j)(b).

189. Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934, Form 10-K, U.S. Securities and Exchange Commission, http://www.sec.gov/about/forms/form10-k.pdf (last visited May 1, 2015).

190. *Id.* at 9.

its stock price. Almost immediately, a class action was filed on behalf of those shareholders who purchased Delta's stock during the specified class period.

In this hypothetical, the central issue is going to be whether common issues predominate over individual ones, since it is well established that superiority is easily met in class actions involving securities fraud.[191] Specifically, a district court's inquiry will focus on one element of securities fraud that, historically, defeated certification due to its individualized nature: reliance.[192] Fortunately for the class, in 1988, the Supreme Court endorsed a rebuttable presumption of reliance in securities class actions—referred to as the fraud-on-the-market theory—that allows a district court to find reliance as long as a class can show two things: first, that the misstatement was material, and second, that the stock traded in an efficient market.[193] If the class establishes both prongs—presumably through the use of expert testimony—a district court may rely on the presumption to assume that it can be shown on a class-wide basis that each class member individually relied on the material misstatements contained in Delta's Form 10-K when purchasing Delta's stock.[194]

What does this fraud-on-the-market theory in securities class actions have to do with the applicability of *Daubert* during class certification? As a mechanism to incentivize class-wide resolution of securities actions, fraud-on-the-market has created a situation in which the merits of the action overlap substantially with Rule 23's requirements at certification.[195] Practically, this means that certification in such cases amounts to a proverbial rubber-stamping by the district court that the class will likely prevail at trial, which, in turn, increases the risk of settlement.[196] For this reason, and in absence of another competing interest, it is essential to apply *Daubert* fully in securities class actions to ensure

191. *See, e.g.*, *In re* Blech Sec. Litig., 187 F.R.D. 97, 107 (S.D.N.Y. 1999) ("In general, securities suits such as this easily satisfy the superiority requirement of Rule 23.").

192. McIntire v. China MediaExpress Holdings, Inc., No. 11-cv-0804 (VM), ___ F. Supp. 2d ___, 2014 WL 4049896, at *5 (S.D.N.Y. Aug. 15, 2014).

193. *Id.* at *6.

194. *Id.*

195. *See In re* IMAX Sec. Litig., 272 F.R.D. 138, 158 (S.D.N.Y. 2010) (discussing the existence of an overlap between Rule 23's requirements and the merits).

196. *Id.*

that the certification decision is based on, to the greatest possible extent, evidence that would be admissible at trial.

B. Hypothetical 2: Antitrust Class Actions[197]

The argument supporting a full *Daubert* analysis in securities class actions does not hold the same weight in all antitrust class actions. For example, imagine that Delta, instead of publishing a misstatement on its annual report, conspired with its largest competitor to monopolize the Widget market, in violation of Section 2 of the Sherman Antitrust Act, which makes it unlawful for an economic actor to monopolize, attempt to monopolize, or conspire to monopolize.[198]

In this hypothetical, while the court's inquiry would also focus primarily on predominance, the point of contention between the parties would be whether the class's theory supporting an allegation of monopolization makes economic sense.[199] However, unlike the fraud-on-the-market presumption in securities class actions that gives a putative class a short-cut in the certification process, there is no quick and easy way to show the validity of an economic theory in antitrust class actions.[200] Thus, the class will likely proffer the expert testimony of a distinguished economist to show that Delta had "market power" in the Widget market and that all class members suffered the same injury as a result of Delta's conduct such that the claim is capable of class-wide adjudication.[201] In response, Delta will likely proffer its own expert testimony from an equally distinguished economist to show that the product market is not quite as narrow as the class made it appear and that the class's expert grossly underestimated, or did not account for, certain variations in injury and damages.[202] Importantly, in the case of antitrust actions, parties may move to

197. This hypothetical is based on *In re* Visa Check/Mastermoney Antitrust Litig., 192 F.R.D. 68 (E.D.N.Y. 2000).

198. 15 U.S.C. § 2 (2012).

199. Spectators' Commc'n Network Inc. v. Colonial Country Club, 253 F.3d 215, 217 (5th Cir. 2001) (stating that a plaintiff's theory must make "economic sense").

200. *Id.* at 219–22.

201. *Visa*, 192 F.R.D. at 75.

202. *Id.* at 75–76.

bifurcate discovery during certification depending on the facts of the case.[203]

What is the connection between securities and antitrust class actions, economic theory, and the applicability of *Daubert*? While antitrust class actions can look similar to securities class actions in the certification phase if a defendant's conduct injured all class members in the same manner,[204] there may be certain instances in which a defendant's conduct injured class members in different ways.[205] Thus, on one hand, if the antitrust claim is truly duplicative—mirroring a typical securities claim—it is likely that the merits overlap substantially with Rule 23's requirements and a full *Daubert* analysis should be applied.[206] On the other hand, if the antitrust claim is not duplicative, in that class members' injuries vary, it is less likely that the merits overlap with Rule 23's requirements, thereby increasing the incentive to bifurcate discovery.[207] And, if discovery is bifurcated, a tailored *Daubert* analysis is most appropriate.[208] Accordingly, unlike a securities class action, where district courts should apply *Daubert* fully, district courts presiding over antitrust actions need discretion to apply *Daubert* fully in some cases and less fully in others, depending on the facts.

C. Hypothetical 3: Mass Tort Class Actions[209]

Lastly, if ever there is a need for discretion in the *Daubert* context, class actions involving mass tort claims are the quintessential paradigm. For purposes of this hypothetical, let's assume that Delta has manufactured Widget for fifty years in a small midwestern town and, unbeknownst to the residents, disposed of its waste in the local landfill. Three years ago, landowners in a

203. *See supra* Part V(B) ("Bifurcated discovery, if done correctly, is highly operative as an efficiency device in class action proceedings because it aims to avoid a situation in which an action is never certified even after the parties expend a tremendous amount of financial resources on merits discovery.").

204. *See In re* Blood Reagents Antitrust Litig., No. 12-4067, — F.3d — , 2015 WL 1543101 (3d Cir. Apr. 8, 2015) (applying *Daubert* fully in a case dealing with price fixing under Section 1 of the Sherman Antitrust Act, which is a per se violation of the Act).

205. Visa, 192 F.R.D. at 81–82.

206. *In re* IMAX Sec. Litig., 272 F.R.D. 138, 158 (S.D.N.Y. 2010).

207. *Id.*

208. *See supra* Part V(B) (arguing that a full *Daubert* analysis would cripple a district court's incentive to bifurcate discovery).

209. This hypothetical is based on Collins v. Olin Corp., 248 F.R.D. 95 (D. Conn. 2008).

nearby development learned about the dumping and became concerned that Delta may have been negligent in its disposal procedures. Upon inspection and soil sampling, the United States Environmental Protection Agency confirmed the existence of dangerous levels of industrial byproduct in the residents' soil, and the enraged landowners filed suit against Delta, alleging gross negligence.

Like the previous hypotheticals, the court's inquiry in a mass tort class action would focus on predominance, although superiority would be at issue as well.[210] However, unlike securities claims and antitrust claims, mass tort claims are not characteristically built for class-wide adjudication.[211] In fact, the Advisory Committee's Notes to Rule 23 state that "[a] 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways."[212]

To offset the highly individualized nature of mass tort claims, district courts facing certification utilize various, and often creative, devices[213] to manage the controversy—one of which is bifurcating discovery into a class phase and merits phase.[214] As previously discussed, bifurcating discovery, while highly operative as an efficiency device, may create evidentiary holes during certification that make it difficult for a district court to conduct a full *Daubert* analysis in a way that ensures the admissibility of that testimony at trial.[215] Yet, the importance of bifurcating aspects of the litigation in mass tort class actions cannot be overstated; indeed, certification depends on such devices.[216] As such, unlike securities and antitrust class actions, efficiency and manageability rationales in mass tort class actions lean favorably toward allowing a district court to tailor its *Daubert* analysis

210. *See supra* Part II(B) (outlining the essential elements of the predominance inquiry and stating that this inquiry focuses on whether a class is "sufficiently cohesive to warrant adjudication by representation").

211. FED. R. CIV. P. 23 advisory comm. note on subdiv. (b)(3); *Collins*, 248 F.R.D. at 102.

212. FED. R. CIV. P. 23 advisory comm. note on subdiv. (b)(3).

213. *See supra* Part V(B) (stating that bifurcated discovery is an example of a manageability device in class action proceedings).

214. *Id.*

215. *Id.*

216. *Id.*

where necessary in order to preserve its ability to utilize manageability devices.

D. The Proper Application of *Daubert* at Certification

In an ideal class certification world—a world in which the claims of each class member are truly duplicative, and courts have unlimited resources—*Daubert* should apply fully. However, as the three hypotheticals above demonstrate, the world of class action litigation is far from ideal.[217] Often, it is not only impractical but also impossible to apply *Daubert* fully in a way that ensures the admissibility of the evidence.[218] This is due, in part, to the need to utilize efficiency devices to manage the class and discovery.[219] As such, a bright-line *Daubert* ruling at certification would be unworkable.

Combined, the three hypotheticals illustrate the need for a sliding *Daubert* scale at certification that would allow a district court the flexibility it needs to analyze *Daubert* fully in certain cases and less fully in others. However, the success of such a scale depends less on its substantive elasticity than on its procedural rigidity. As such, the Supreme Court should direct the lower courts to adopt a sliding *Daubert* scale that, procedurally, would require a district judge to set forth his or her analysis of proffered expert testimony in the certification decision according to the following framework:

(1) Whether, and to what extent, *Daubert* was employed in making a certification decision (i.e., full analysis, tailored analysis, or no analysis);

(2) Where a court conducted a full or tailored *Daubert* analysis, the court's reasoning for employing such an analysis (presumably, the expert testimony at issue is relevant to a Rule 23 requirement);

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217. *See supra* Part VI(A)–(C) (discussing the application of the *Daubert* analysis in three different scenarios—securities class actions, antitrust class actions, and mass tort class actions).

218. *See supra* Part V(B) (explaining that the need for judicial efficiency is an argument to conduct a full *Daubert* analysis at the certification stage).

219. *Id.*

(3) Where a court conducted no *Daubert* analysis, the court's reasoning for doing so (presumably, the expert testimony at issue is not relevant to a Rule 23 requirement); and

(4) Where *Daubert* was employed in any respect, a court's express findings as to the admissibility of the expert testimony at issue.

A substantively flexible *Daubert* scale at certification, combined with a procedurally rigid framework, would accomplish the same goals that a bright-line *Daubert* test would accomplish, but in a much more efficient manner. Specifically, as discussed *infra*, it would mitigate settlement pressure in appropriate circumstances, increase settlement pressure where necessary, decrease the chance of decertification on interlocutory appeal, and promote efficiency devices during certification.

As previously stated, the extent to which *Daubert* applies can impact the dispositive nature of the certification decision.[220] On one hand, if a district court heavily scrutinizes expert testimony, it may be difficult for a putative class to meets its burden under Rule 23, in which case the action may not be brought at all.[221] On the other hand, if a district court fails to properly scrutinize expert testimony, it may certify a class that is not sufficiently cohesive, which is problematic if it causes a defending party to prematurely settle an action.[222] To counteract this, a sliding *Daubert* scale would allow a district court to apply *Daubert* fully in the first instance and less fully in the second instance as long as the court expresses why its analysis was appropriate in light of Rule 23's requirements.

Similarly, the degree to which a court analyzes expert testimony prior to certification can impact a reviewing court's inter-

220. *See supra* note 155 and accompanying text (comparing a case in which the appellate court decertified a class because the lower court did not conduct a full *Daubert* analysis with a case in which the appellate court affirmed certification of a class despite the district court's failure to conduct a full *Daubert* analysis).

221. *See supra* notes 155–156 and accompanying text ("[I]f the incentive to litigate individually is relatively low[,]" then the action may not be brought at all.).

222. *See supra* notes 170–173 and accompanying text (illustrating recent examples in which settlement pressure necessitates strict procedural safeguards during the certification stage).

locutory decision to affirm or reverse certification.[223] Additionally, a district court's decision to certify a class based on a less-than-adequate examination of expert testimony could lead to decertification at trial.[224] This is highly inefficient; yet, it can be at least partially avoided by requiring that a district court expressly set forth its *Daubert* analysis in its order. *American Honda*, although arguing for a bright-line full *Daubert* analysis,[225] actually supports this proposition. In decertifying the class of motorcycle purchasers, the Seventh Circuit stated that although the district court had conducted an "extensive" *Daubert* analysis, it abused its discretion by not fully explaining its conclusion.[226] Notably, an explanation of *Daubert*'s relationship to Rule 23's requirements was missing from the opinion. Had the district court explained that nexus in detail, it is arguable that the Seventh Circuit would have held that the district court had not abused its discretion even in absence of a full *Daubert* analysis.

Finally, a sliding *Daubert* scale would continue to endorse and promote the use of efficiency devices during certification, including bifurcated discovery. If the Court were to create a bright-line rule requiring the lower courts to apply a full *Daubert* analysis during certification, it may dissuade a court from bifurcating discovery for fear of having gaps in the evidentiary record to support its certification decision.[227] This is highly wasteful in situations where a putative class is not certified after full discovery.[228] Rather, the flexibility of a sliding *Daubert* scale would most adequately honor the spirit of Rule 23 by affording a district court the discretion that the Rule itself promotes by allowing the court to ensure that the class action device is the most efficient means

223. *See* Am. Honda Motor Co. v. Allen, 600 F.3d 813, 813–18 (7th Cir. 2010) (overturning the certification of a Rule 23(b)(3) class because the district court erred in not conducting a full *Daubert* analysis).

224. *See supra* note 160 and accompanying text.

225. *Am. Honda*, 600 F.3d at 813–18.

226. *Id.* at 816; Allen v. Am. Honda Motor Co., 264 F.R.D. 412, 428 (N.D. Ill. 2009), *order vacated*, 600 F.3d 813 (7th Cir. 2010) ("Viewing all of the arguments together, the court has definite reservations about the reliability of Mr. Ezra's wobble decay standard. Nevertheless, the court declines to exclude the report in its entirety at this early stage of the proceedings.").

227. *See supra* Part V(B) (discussing the argument that the need for judicial efficiency supports a full *Daubert* analysis).

228. *Id.*

of adjudicating the controversy without forcing the parties to conduct a mini-trial before the action is even commenced.[229]

VII. CONCLUSION

To analyze or not to analyze: that is still the question.[230]

As illustrated by the three hypotheticals, a sliding *Daubert* scale at certification is not merely workable: it is necessary. By giving a district court discretion to apply *Daubert* fully in cases where the merits overlap substantially with Rule 23's requirements and less fully in cases where the merits overlap some, but not substantially, a sliding scale would empower the court to truly adjudicate the controversy most efficiently in light of the cause of action and the parties' interests.

Moreover, the procedural rigidity of the scale recommended in this Article would accomplish the same goals that a bright-line *Daubert* test would accomplish, but in a much more efficient manner. Specifically, it would mitigate settlement pressure in appropriate circumstances, increase settlement pressure where necessary, decrease the chance of decertification on interlocutory appeal, and promote efficiency devices during certification.

Although the Supreme Court failed to adequately rule on *Daubert*'s applicability during certification in *Dukes II*, the Court should now consider the issue to resolve the current circuit split. In doing so, the Court should endorse a sliding *Daubert* scale at certification that would afford a district court the flexibility it needs to make crucial—and often dispositive—certification decisions.

229. Unger v. Amedisys Inc., 401 F.3d 316, 321 (5th Cir. 2005) ("Class certification hearings should not be mini-trials on the merits of the class or individual claims.").

230. SHAKESPEARE, *supra* note 2 and accompanying text.