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Daubert Motions in Class Certification: Using or Challenging Expert Testimony Amid Divergent Court Standards

THURSDAY, DECEMBER 1, 2022

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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Leveraging *Daubert* Motions in Class Certification

Presented By Geoffrey M. Wyatt and Jordan M. Schwartz
December 1, 2022

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1 Overview

Federal Rule of Evidence 702

The proponent of the expert evidence must show:

- The witness is **qualified**
- The testimony is **reliable** – i.e., that:
  - The testimony is based on sufficient facts or data
  - It is the product of reliable principles and methods
  - The expert has reliably applied the principles and methods to the facts of the case
- The testimony will **assist the trier of fact**

Federal Rule of Evidence 702

- Advisory Committee on Rules of Evidence approved changes to Rule 702 in May 2022 and Standing Committee approved changes in June 2022
  - Change to introductory language of Rule 702 clarifying that an expert witness may testify if "***the proponent demonstrates to the court that it is more likely than not***" certain requirements have been met.
  - Change to language of subsection (d) clarifying that "***the expert's opinion reflects a reliable application of***" the principles and methods to the facts of the case
- Most of the debate has focused on pharmaceutical and mass tort cases, but any changes would also have implications for class actions

Federal Rule of Evidence 702

- Current Status:

- On June 7, 2022, the Standing Committee on Rules of Practice and Procedure unanimously approved the amended Rule 702 for consideration by the Judicial Conference of the United States.

- If the Judicial Conferences approves of the amendments, it will then recommend the new language to the U.S. Supreme Court.

- If the U.S. Supreme Court agrees, the new Rule will take effect December 1, 2023 unless the U.S. Congress passes legislation rejecting, modifying, or deferring the new rule.

Federal Rule of Civil Procedure 23

The plaintiff must demonstrate:

- **Numerosity**: the class is so numerous that joinder of all members is impractical
- **Commonality**: there are questions of law or fact common to the class
- **Typicality**: the claims or defenses of the representative parties are typical of the claims or defenses of the class
- **Adequacy**: the representative parties will fairly and adequately protect the interests of the class

In consumer class actions seeking money damages, the plaintiff must also demonstrate:

- **Superiority**: the class action is superior to other methods of adjudication
- **Predominance**: there are common questions of law or fact that predominate over any individual class member's questions

Daubert at Class Certification

- *Daubert* motions have become a common feature of class certification
- There is currently a split among federal courts regarding how to evaluate the reliability of an expert's testimony for purposes of class certification
  - With some variations in the details, the 3rd, 5th, 7th, 9th and 11th Circuits have generally applied or allowed a full *Daubert* analysis
  - Conversely, the 8th Circuit has endorsed a limited or "tailored" *Daubert* test
  - The 2nd and 6th Circuits have both issued recent decisions noting the conflict but declining to rule either way on the issue

2 Status of the Law

Supreme Court Rulings

- The Supreme Court touched briefly on expert issues as they relate to class certification in *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013), but did not address *Daubert* directly
  - The Court did not address whether the expert testimony supporting the plaintiffs' damages theory was reliable
  - But the Court did reaffirm that class certification requires a "rigorous analysis" that includes examination of expert opinions and concluded that it was erroneous to "refus[e] to entertain arguments against [the plaintiffs'] damages model that bore on the propriety of class certification simply because those arguments would also be pertinent to the merits determination"
  - The *Comcast* ruling clearly endorses an in-depth analysis of plaintiffs' class action theories at the class certification stage, including expert issues, though it did not directly address how *Daubert* applies
- In combination with the Court's dicta in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 354 (2011), this suggests that the Court may favor a full *Daubert* analysis with regard to experts' class certification opinions
  - In *Dukes*, the Court noted that "[t]he District Court concluded that *Daubert* did not apply to expert testimony at the class certification stage of class-action proceedings. . . . We doubt that this is so." *Id*. (citation omitted).
  - At this point, however, it seems unlikely that the Court will make its position on that issue clear any time soon
  - However, lower federal courts have increasingly moved toward full *Daubert* analyses at class certification

Full *Daubert* Analysis

The 5th, 7th and 11th Circuits clearly require a full *Daubert* analysis.

- *Prantil v. Arkema Inc.*, 986 F.3d 570, 575 (5th Cir. 2021) ("We answer that question in the affirmative; the *Daubert* hurdle must be cleared when scientific evidence is relevant to the decision to certify.").

- *Howard v. Cook Cnty. Sheriff's Off.*, 989 F.3d 587, 601 (7th Cir. 2021) (holding that the district court improperly relied upon an expert's opinions whereas "the court should have ensured that they lived up to the standard of *Daubert* and Rule 702").

- *Local 703, I.B. of T. Grocery & Food Employees Welfare Fund v. Regions Fin'l Corp.*, 762 F.3d 1248, 1258 n.7 (11th Cir. 2014) ("We hold that when an expert's report or testimony is critical to class certification, . . . the district court must perform a full *Daubert* analysis before certifying the class . . .") (alterations in original) (citation omitted).

Full *Daubert* Analysis

- The 3rd Circuit appears to have adopted a full analysis as well:
  - *In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 187-88 & n.8 (3d Cir. 2015) ("We join certain of our sister courts to hold that a plaintiff cannot rely on challenged expert testimony, when critical to class certification, to demonstrate conformity with Rule 23 unless the plaintiff also demonstrates, and the trial court finds, that the expert testimony satisfies the standard set out in *Daubert*. The Supreme Court has emphasized that the class certification analysis must be 'rigorous.'").

- The Fifth Circuit, in the *Prantil* decision adopting the full standard, cited *In re Blood Reagents* when it concluded that by "so holding, we join three other federal courts of appeal." *Prantil v. Arkema Inc.*, 986 F.3d 570, 575 (5th Cir. 2021).

- A more recent Third Circuit decision appears to confirm this conclusion. *See Allen v. Ollie's Bargain Outlet, Inc*., 37 F.4th 890, 899 (3d Cir. 2022) ("So, under *Blood Reagents*, expert evidence used to certify a class action must be admissible under Federal Rule of Evidence 702.").

Full *Daubert* Analysis?

- The 9th Circuit originally adopted a more lenient approach.
  - *See Sali v. Corona Reg'l Med. Ctr.,* 909 F.3d 996 (9th Cir. 2018) ("[I]n evaluating challenged expert testimony in support of class certification, a district court should evaluate admissibility under the standard set forth in *Daubert*. . . . But admissibility must not be dispositive. Instead, an inquiry into the evidence's ultimate admissibility should go to the weight that evidence is given at the class certification stage.") (citation omitted).

- However, more recent decisions indicate that the 9th Circuit may have reversed course and suggests a full *Daubert* analysis is usually warranted.
  - *See Grodzitsky v. Am. Honda Motor Co.*, 957 F.3d 979, 984 (9th Cir. 2020) ("[I]n evaluating challenged expert testimony in support of class certification, a district court should evaluate admissibility under the standard set forth in *Daubert*").

Undecided Circuits

- Both the 6th and 2nd Circuits have expressly declined to answer this question.

- The 6th Circuit allows, but does not require, a full *Daubert* analysis:
  - *In re Carpenter Co.*, No. 14-0302, 2014 U.S. App. LEXIS 24707, at *11 (6th Cir. Sept. 29, 2014) ("Given the Supreme Court's statement in *Wal-Mart* and the district court's application of *Daubert* to critical witnesses," district court did not abuse discretion by conducting a *Daubert* analysis at the class certification stage).

  - *Hicks v. State Farm Fire & Cas. Co.*, 965 F.3d 452, 465 (6th Cir. 2020) ("The Supreme Court has not yet decided whether a district court must undertake a *Daubert* analysis at the class-certification stage when an expert's report is critical to the class certification analysis. . . . We have yet to settle this matter.").

- The 2nd Circuit took a similar position to *Hicks*:
  - *Kurtz v. Costco Wholesale Corp.*, 818 F. App'x 57, 62 (2d Cir. 2020) ("The parties appear to assume that Weir's report must be admissible under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), at the class certification stage. That is far from well-established.").

Undecided Circuits – Full *Daubert* Analysis Required

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Many district courts in undecided Circuits have adopted the full *Daubert* analysis:

District of D.C.

- *Campbell v. Nat'l R.R. Passenger Corp.*, 311 F. Supp. 3d 281, 295 (D.D.C. 2018) ("The Court is persuaded that it must conduct a full *Daubert* inquiry at the class-certification stage.").

First Circuit

- *In re Loestrin 24 Fe Antitrust Litig.*, 410 F. Supp. 3d 352, 384 (D.R.I. 2019) (prefacing rulings on *Daubert* motions by stating that "[b]efore taking up [plaintiffs'] Motion for Class Certification, the Court must address the parties' challenges to the expert analysis underpinning their claims and defenses").

Second Circuit

- *In re Namenda Indirect Purchaser Antitrust Litig.*, 338 F.R.D. 527, 543 (S.D.N.Y. 2021) ("Although neither the Supreme Court nor the Second Circuit has definitively held that a *Daubert* inquiry is necessary to evaluate expert opinions offered in support of class certification, 'the heavy weight of authority militat[es] towards a *Daubert* inquiry at class certification.' *Namenda VII*, 2021 WL 100489, at *8 (discussing cases).").

Fourth Circuit:

- *Mr. Dee's Inc. v. Inmar, Inc.*, No. 1:19CV141, 2021 WL 4224720, at *12 (M.D.N.C. Sept. 16, 2021) ("Accordingly, the Court will engage in the traditional *Daubert* analysis to determine whether the Supplemental Grace Report should inform the class-certification decision").

Undecided Circuits – Full *Daubert* Analysis Required

Many district courts in undecided Circuits have adopted the full *Daubert* analysis:

Sixth Circuit:

- *Won v. Gen. Motors, LLC*, No. 19-11044, 2022 WL 3010886, at *3 (E.D. Mich. July 28, 2022) ("The parties do not appear seriously to contest whether the *Daubert* analysis applies at this stage of the case, and there are several indicators from appellate courts suggesting that it does.").

- *Desai v. Geico Cas. Co.*, 574 F. Supp. 3d 507, 526 (N.D. Ohio 2021) ("Against that textual background, and the Supreme Court's statement that it doubts that Rule 702 does not apply to class certification, *Dukes*, 564 U.S. at 354, 131 S.Ct. 2541, the Court concludes that Rule 702 applies to class certification.").

Tenth Circuit:

- *In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Practices & Antitrust Litig.*, No. 17-md-2785-DDC-TJJ, 2020 WL 1164869, at *1-2 (D. Kan. Mar. 10, 2020) ("The Tenth Circuit has not yet ruled on whether a court must conduct a full *Daubert* analysis at the class certification stage . . . . [B]ecause the parties' motions seek to exclude opinions used to support or oppose Rule 23's class certification requirements, the court applies the *Daubert* standard to those proffered opinions to determine whether the court should consider them at the class certification stage.").

Undecided Circuits – Full *Daubert* Analysis *Not* Required

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However, there are still some decisions in undecided Circuits favoring a more restricted approach in undecided Circuits:

Fourth Circuit:

- *Baxley v. Jividen*, 504 F. Supp. 3d 539, 543 (S.D. W. Va. 2020) (“Given the fact that both Plaintiffs and the Defendant rely on much more than expert testimony in this case, the Court finds this individual affidavit is not so ‘critical’ to the Court's certification decision that a full *Daubert* analysis is required at this juncture.”).

Sixth Circuit:

- *Elmy v. W. Express, Inc.*, No. 3:17-CV-01199, 2021 WL 3172311, at *1 (M.D. Tenn. July 27, 2021) (declining to consider *Daubert* challenge at class certification stage where expert report was not critical to the class certification analysis).

"Tailored" *Daubert* Analysis

- In *In re Zurn Pex Plumbing Prods. Liab. Litig.,* 644 F.3d 604 (8th Cir. 2011), the Eighth Circuit held that a "more conclusive *Daubert* inquiry at the class certification stage would [be] impractical"; rather, the court reasoned that a more "focused" inquiry was necessary due to the preliminary nature of class certification rulings. *Id.* at 612, 614.
- The Eighth Circuit has reiterated that the holding in *Zurn Pex* that "requir[es] only a 'focused *Daubert* analysis'" is "binding and well decided precedent"
  - *Smith v. ConocoPhillips Pipe Line Co.*, 801 F.3d 921, 925 n.2 (8th Cir. 2015) (quoting *Zurn Pex*, 644 F. 3d at 614).
- Some courts have rejected the *Zurn Pex* reasoning or distinguished it
  - *Soutter*, 299 F.R.D. at 130 ("The rationale that animated *Lewis* and *Zurn* and their fellow travelers . . . is at odds with the real world effect of a class certification decision.").
  - *Chen-Oster v. Goldman, Sachs & Co.*, 114 F. Supp. 3d 110, 115 (S.D.N.Y. 2015) (rejecting *Zurn* and holding its rationale "must yield to the mandate to conduct a rigorous analysis prior to certifying a class"), *objections overruled*, 325 F.R.D. 55 (S.D.N.Y. Mar. 30, 2018).
  - *PB Prop. Mgmt., Inc. v. Goodman Mfg. Co., L.P.*, No. 3:12-cv-1366-HES-JBT, 2016 WL 7666179, at *9 (M.D. Fla. May 12, 2016) (conducting a "full" *Daubert* analysis; noting that, in *Zurn Pex*, "the parties conducted bifurcated discovery, which resulted in a limited record at the class certification stage.").

"Tailored" *Daubert* Analysis

- However, other courts outside of the Eighth Circuit have also utilized the "tailored" *Daubert* approach.

- *Baxley v. Jividen*, 504 F. Supp. 3d 539, 543 (S.D. W. Va. 2020) (citing *In re Zurn Pex* in holding that a "full" *Daubert* analysis is not required).

- *Day v. GEICO Cas. Co.*, No. 21-CV-02103-BLF, 2022 WL 16556802, at *4 (N.D. Cal. Oct. 31, 2022) ("Recognizing that the Eighth Circuit requires only a 'focused *Daubert* inquiry' at the class certification stage, *see In re Zurn Pex Plumbing Prod. Liab. Litig.*, 644 F.3d 604, 610 (8th Cir. 2011), the Court agrees with the above approach").

- *Beltran v. InterExchange, Inc.*, No. 14-CV-03074-CMA-KMT, 2018 WL 526907, at *7 (D. Colo. Jan. 24, 2018), *aff'd*, No. 14-CV-03074-CMA-CBS, 2018 WL 1509258 (D. Colo. Mar. 27, 2018) ("*Daubert* must be carefully applied and "tailored" to the importance of the expert opinion to the class certification decision. *In re Zurn Pex Plumbing Prod. Liab. Litig.*, 644 F.3d 604, 612 (8th Cir. 2011).").

"Tailored" *Daubert* Analysis

- What exactly does the "tailored" or "focused" approach entail?
  - The ultimate difference appears to be that the "Court need not decide conclusively if the evidence it considers at this stage 'will ultimately be admissible at trial.'"
    - *Taqueria El Primo LLC v. Illinois Farmers Ins. Co*., 577 F. Supp. 3d 970, 985 (D. Minn. 2021).
    - *See also Barfield v. Sho-Me Power Elec. Coop.*, No. 11-CV-04321-NKL, 2013 WL 12145824, at *2 (W.D. Mo. July 8, 2013) ("In other words, the court asks whether the expert's opinion is sufficiently reliable to meet the requirements of class certification, without determining every detail of admissibility.").
  - Some courts also emphasize that deficiencies under this approach "go to the credibility of the testimony, not its admissibility." *Sabata v. Nebraska Dep't of Corr. Servs.*, 337 F.R.D. 215, 231 (D. Neb. 2020).
    - To the extent that Courts apply a "tailored" approach based on this reasoning, the amended Rule 702 may push courts towards the "full" analysis.

"Tailored" *Daubert* Analysis

- Rule 702 can still have teeth at the class-certification stage according to some district judges
  - *In re Hardieplank Fiber Cement Siding Litig.*, No. 12-md-2359, 2018 WL 262826, at *8 (D. Minn. Jan. 2, 2018)
    - Court must "***scrutinize***[] the reliability of the expert testimony in light of the criteria for class certification and the current state of the evidence." *Id.* at *8 (emphasis added) (quoting *Zurn Pex*, 644 F. 3d at 614).
    - Methodology for establishing common questions must be excluded if it "is fundamentally flawed and untrustworthy"
      - Expert did not tether his opinions to industry standards and "cherry picked 6 'flawed' planks out of the billions currently on U.S. Structures"
- Defendants should be prepared to argue that plaintiffs' experts flunk *Daubert* under both the "full" and "focused" standard

Discovery – Does Bifurcation Affect the Analysis?

- If discovery is complete, the court is more likely to apply a full *Daubert* analysis:
  - *See, e.g.*, *PB Prop. Mgt., Inc. v. Goodman Mfg. Co., L.P.*, No. 3:12-CV-1366-HES-JBT, 2016 WL 7666179, at *1 (M.D. Fla. May 12, 2016) (holding that "the reasoning behind the 'tailored' *Daubert* analysis in *Zurn* [wa]s not present" because the parties had conducted merits discovery).

- In fact, even *Zurn Pex* suggests that a full *Daubert* analysis would be permissible where merits discovery has taken place:
  - "[A]n exhaustive and conclusive *Daubert* inquiry ***before the completion of merits discovery*** cannot be reconciled with the inherently preliminary nature of pretrial evidentiary and class certification rulings."
    - *Zurn Pex*, 644 F. 3d at 613 (emphasis added).

Discovery – Does Bifurcation Affect the Analysis?

- A magistrate judge in the District of Nebraska has applied *Zurn Pex*'s tailored approach even where the parties had simultaneously engaged in both class-certification and merits-based discovery
  - *Sabata v. Nebraska Dep't of Corr. Servs.*, No. 4:17CV3107, 2019 WL 3975373 (D. Neb. Aug. 22, 2019).
    - Court did not bifurcate discovery because the class certification and merits questions overlapped
    - Plaintiffs' experts noted that their opinions were "partial and preliminary" based on information available to them
    - Because district court will be able to "reexamine its evidentiary rulings," *id.* at *3 (quoting *Zurn Pex*, 644 F. 3d at 613), the court found that "the reasoning behind *In re Zurn Pex*'s focused *Daubert* analysis is equally applicable in this case," *id.*

Purpose of *Daubert*

- The "Full" *Daubert* Approach Rationale
  - *Daubert* is meant to do more than just protect the jury from flawed evidence; it is meant to ensure that unreliable expert testimony is removed from the case
  - Class certification often requires plaintiffs to present expert testimony to, for example, show commonality, predominance or ascertainability
  - Thus, if plaintiffs' experts' theories are flawed, they fail to carry their burden and class certification is improper
  - A full *Daubert* analysis at the class certification stage ensures that only qualified experts with methodologically sound opinions are relied upon
  - And in many cases, the expert evidence at the certification stage is a preview of evidence plaintiffs would use to try to prove their case to a jury

Purpose of *Daubert*

- The “Tailored” Approach Rationale
  - *Daubert* is necessary only to shield the fact finder from flawed evidence in a federal trial
  - Class certification hearings are not trials
  - Class certification hearings are heard before judges, not juries
  - Judges do not need *Daubert* protection
  - Class certification hearings are preliminary proceedings before trial
  - Discovery is often very limited at the class certification stage

Pros & Cons of *Daubert* at Class Certification

- Pros
  - Ensures experts are qualified to give opinions at the certification stage
  - Allows in only opinions that are methodologically/scientifically sound
  - Court and parties are more fully informed on the merits of the case
  - Allows parties to engage in settlement discussions earlier in the case
- Cons
  - Expensive early discovery & motion practice
  - Might weaken post-certification *Daubert* challenges

Beyond *Daubert*

- Implications of admissible expert evidence for class certification
- Does “rigorous analysis” standard require court to “weigh” expert evidence?
  - *In re Hydrogen Peroxide Antitrust Litig.,* 552 F.3d 305 (3d Cir. 2008) (”Expert opinion with respect to class certification, like any matter relevant to a Rule 23 requirement, calls for rigorous analysis. It follows that opinion testimony should not be uncritically accepted as establishing a Rule 23 requirement merely because the court holds the testimony should not be excluded, under *Daubert* or for any other reason.”).

- Increased focus on this question in the wake of *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021) (“No concrete harm, no standing. . . . The 6,332 class members whose credit reports were not provided to third-party businesses did not suffer a concrete harm and thus do not have standing as to the reasonable-procedures claim.”).

Beyond *Daubert*

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- Ninth Circuit: extent of uninjured class members, though "serious," was one for the jury at trial.
  - *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651 (9th Cir. 2022) ("'Reasonable minds may differ as to whether the [overcharge Dr. Mangum] calculated is probative' as to all purchasers in the class, but that is a question of persuasiveness for the jury once the evidence is sufficient to satisfy Rule 23.").
  - *In re Packaged Seafood Prods. Antitrust Litig.*, 332 F.R.D. 308, 328 (S.D. Cal. 2019) ("Defendant's criticisms are serious and could be persuasive to a finder of fact. But determining which expert is correct is beyond the scope of this Motion.").
- D.C. Circuit could soon address the issue.
  - *Nat'l ATM Council, Inc. v. Visa Inc.* 2021 WL 4099451 (D.D.C. Aug. 4, 2021) (even though defendants disputed findings of plaintiffs' experts, "plaintiffs [] met their burden [] of demonstrating a colorable method by which they intend to prove class-wide impact").

3 Best Practices & Common Pitfalls

What Procedure Applies?

- Setting aside how *Daubert* applies at class certification stage, courts also vary in their approach as to the procedure for raising *Daubert* challenges

- Check local rules and scheduling order (or judge's standing orders) for sequencing of summary judgment, *Daubert* and class certification – raise these issues at the initial case management conference if necessary

- Make sure the schedule will provide for sufficient discovery to raise *Daubert* challenges

- Some additional considerations:
  - Will *Daubert* motions be made before or at the same time as opposition to class certification?
  - If at the same time, are they separate motions, or do they need to be included in the opposition to class certification?
  - Think about how summary judgment interacts with *Daubert* and class certification issues
  - Keep an eye on page limits and/or limits on the number of briefs
  - Will there be a *Daubert* hearing? Do you want one?

Working with Defense Experts

- Step # 1 in any effort to mount a *Daubert* challenge to plaintiffs' experts is working with your own defense experts – start early

- Ask whether a plaintiffs' certification expert's analysis satisfies each of the *Daubert* criteria

- Identify the flaws in the analysis
  - Focus on mistakes or weaknesses that matter
  - Obvious but ultimately inconsequential flaws (e.g., incorrect nonmaterial facts) can help create an atmosphere of unreliability, but should not be the focus

- Goal: To show that variation among class members precludes class treatment. Look for issues that relate to whether there is variation among class members re:
  - Elements of cause of action
    - Proof of causation
    - Damages

Working with Defense Experts

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Elements: Do classwide differences prevent or undermine common proof of plaintiffs' claims?

- Develop the questions that you want to ask plaintiffs' expert at deposition to get the admissions you need to get him/her excluded
- Explain the flaws in plaintiffs' expert's analysis in your defense expert reports
- Consider whether your expert should do original work, such as surveys
- Prepare your expert to testify about the flaws in plaintiffs' expert's analysis
- If there is a certification hearing with live testimony, the credibility of a defense expert's critique can go a long way to convince a court to exclude plaintiffs' expert
- Your expert can't make the same mistakes – credibility is key to avoid a "duel to a draw"

Causation Opinions: Common Methodological Flaws

An allegedly common adverse outcome does not equal common proof of causation

- *E.g., Grodzitsky v. Am. Honda Motor Co.*, No. 2:12–CV–1142, 2015 WL 2208184, at * 6 (C.D. Cal. Apr. 22, 2015) (plaintiffs' expert's testimony excluded based on failure to justify implicit assumption that all cars required service of window because of alleged defect, but the data the expert relied on did not specify the reason service on the window was required)
- Failure to rule out alternative causes
- Has plaintiffs' expert considered and ruled out:
  - Other potential sources of the alleged contamination?
  - Other potential causes recognized in the scientific literature for the condition(s) at issue?
  - Other potential sources of the alleged defect through product testing?

Causation Opinions: Common Methodological Flaws

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Opinions about hypothetical or composite plaintiffs

- Plaintiffs' expert conflates or cherry-picks facts to offer an opinion about a hypothetical class member, rather than the named plaintiffs
- Cherry-picking highest data points
  - *See, e.g.*, *Coleman v. Union Carbide Corp.*, No. 2:11-0266, 2013 WL 5461855, at * 24 (S.D. W. Va. Sept. 30, 2013) (excluding air modeler who used highest recorded exposure levels, which court characterized as a "regulatory-based [approach] . . . designed to produce a hypothetical and prospective worst case scenario" for the purpose of protecting public safety, rather than to estimate the actual exposure allegedly experienced by the proposed class) (citations omitted).
  - *In re Lipitor (Atorvastatin Calcium) Mktg., Sales Pracs. & Prod. Liab. Litig.*, 185 F. Supp. 3d 761, 782 (D.S.C. 2016) ("Basing an opinion on such cherry-picked data is unreliable and does not satisfy *Daubert*.").
- Failure to have any controls
  - *E.g.*, *Prantil v. Arkema France S.A.,* No. 4:17-CV-02960, 2022 WL 1570022, at *11 (S.D. Tex. May 18, 2022) ("By failing to control for (or even recognize) differences between the class and control areas, Dr. Kilpatrick committed a fatal error. The Court therefore finds his methodologies and opinions unreliable and grants Arkema's Motion to Exclude on that basis.").

Defect Opinions: Common Methodological Flaws

Same principles apply to opinions offered to prove commonality/predominance of classwide defect

- *Gonzalez v. Owens Corning*, 317 F.R.D. 443 (W.D. Pa. 2016), *aff'd*, 885 F.3d 186 (3d Cir. 2018).
  - Expert tested shingle samples chosen from the warranty claim files of roofing manufacturer Owens Corning to determine whether the shingles met industry standard.
  - "[S]ample size was only 300 shingles out of the millions of shingles manufactured during the proposed class period." *Id.* at 479-80.
  - The shingles tested were sent to the manufacturer with a warranty claim, which reflected "some level of dissatisfaction and product failure." *Id.* at 480.
  - Both of these failures rendered methodology "flaw[ed]" and expert's opinions inadmissible. *Id.* at 479.

Damages Opinions: Common Methodological Flaws

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Surveys

- Plaintiffs' experts often rely upon survey data to support their opinions about value, either qualitative (e.g., the importance of product representations) or quantitative (e.g., the reduction in property value attributable to the stigma associated with a contaminated property)
- Survey data is appealing, because it seems easily translatable to a class of plaintiffs
- Surveys are rife with potential methodological errors
- Survey data and related expert testimony can be excluded if survey questions don't accurately reflect factual circumstances of class members

Damages Opinions: Common Methodological Flaws

Common flaws with surveys

- *Anchoring*: Question provides a number in the question and then asks subjects for an unrelated response
  - For example: subjects saw "8 Hours Moisture" and were asked how many hours of ***SPF 15 sun protection*** do you think the product provides?

- *Loading*: Question written in a way that forces respondent into an answer that does not accurately reflect her opinion or situation
  - For example, question incorrectly implies that the information on the front of the packaging (which is the only information given to participants) includes all the information participants need to form an assessment of sun protection duration

- *Leading*: Respondents are provided with a menu of choices, strongly implying that the "correct" answer is one of those; no menu choice indicating that there is insufficient information to answer the question as presented
  - *In re KIND LLC "Healthy and All Natural" Litig*., No. 15-MC-2645 (NRB), 2022 WL 4125065 (S.D.N.Y. Sept. 9, 2022) ("Dr. Dennis's survey is inadmissible because it is biased and leads the consumer to select the answer preferred by plaintiffs.").

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Consider doing your own survey

- Opportunities:
  - If you're trying to show that plaintiffs' survey is flawed, there is perhaps no better way to illustrate it than by designing and executing one correctly
  - If your survey confirms your suspicions, it can be devastating to class certification even if you don't win your *Daubert* challenge
- Risks:
  - If the survey goes poorly, you're stuck with it, with potentially disastrous consequences for *Daubert* and class certification
  - Surveys generally are resource-intensive
  - May provide other side with more targets for *Daubert* motions of their own

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Regression analyses

- Regression analysis: “a statistical tool designed to express the relationship between one variable, such as price, and explanatory variables that may affect the first variable.”
  - *In re Aftermarket Auto. Lighting Prods. Antitrust Litig.*, 276 F.R.D. 364, 371 (C.D. Cal. 2011) (citation omitted).
- Plaintiffs often use in class actions to attempt to isolate the impact of a defendant’s conduct or an event on price or value.
- Frequent sources of error include:
  - Invalid assumptions, particularly related to continuity over time or the factual circumstances of class members.
    - *E.g.*, *Cannon*, 2013 WL 5514284, at *8-9 (excluding expert where regression analysis failed to: (a) make the appropriate comparison between the change in values in the class and control areas before and after allegedly significant emissions events; and (b) control for other variables (e.g., effects of a hurricane)); *In re Live Concert Antitrust Litig.*, 863 F. Supp. 2d 966, 973-83 (C.D. Cal. 2012) (excluding three of four analyses for failing to account for “major factors” or variables that likely would have impacted conclusions).
  - While any single defect in a regression analysis may not be sufficient grounds for exclusion, if the errors add up, the plaintiffs’ experts’ opinion may be excluded.

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- **Conjoint analysis**
  - Conjoint analysis is a methodology to calculate damages that uses customer surveys to determine values for each attribute.
    - Researchers use conjoint studies to examine the trade-offs that consumers make among different features when buying a product or service.
    - Based on the consumers' preferences, statistical modeling is used to determine the relative value of the individual product attributes.
  - Elements of a conjoint analysis (i.e., where things can go wrong):
    - Survey design
    - Survey execution
    - Processing and analysis of survey results
    - Input to damages measure

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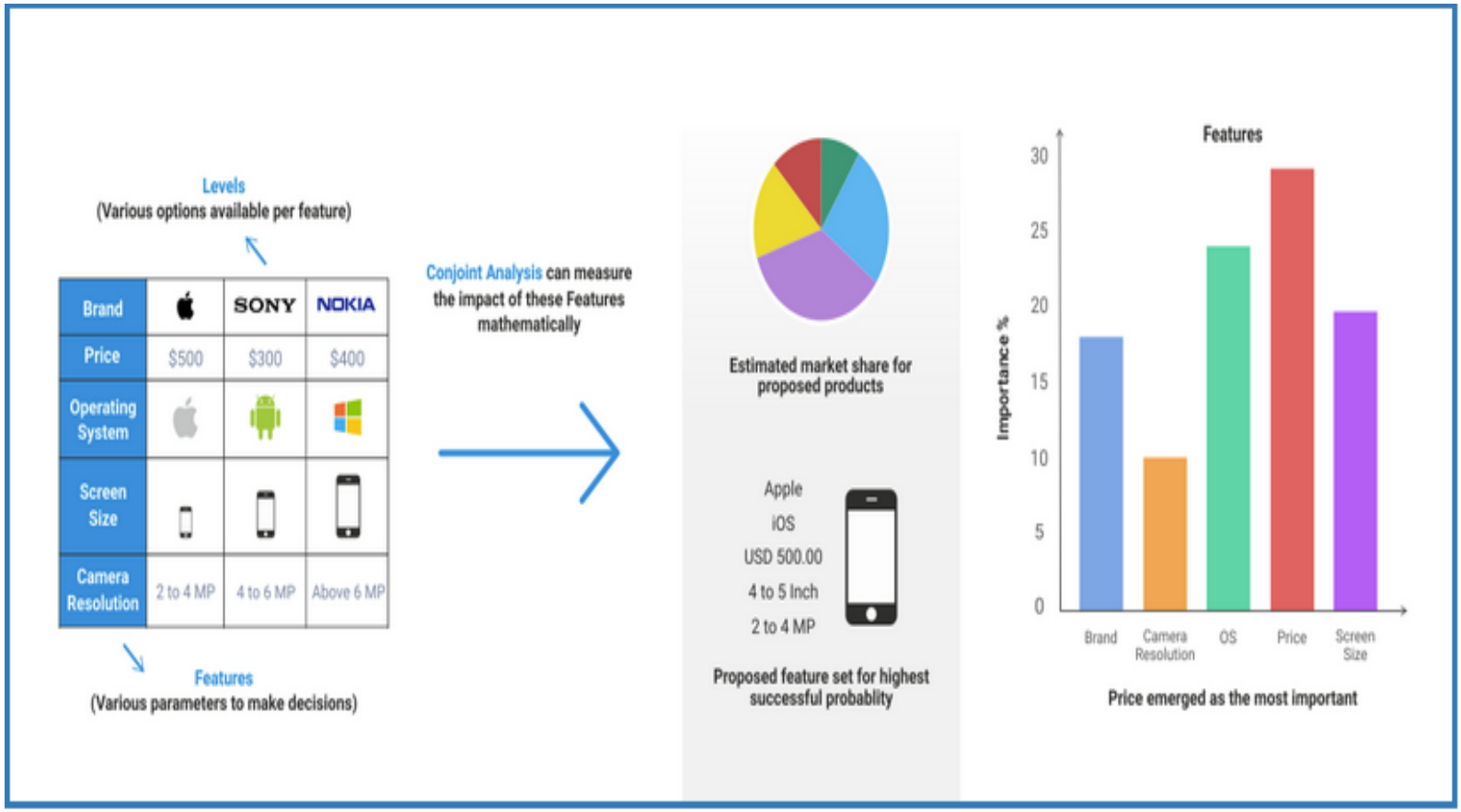

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- Sample question:

Which of the following cell phone plans do you prefer?		
1400 minutes	1000 minutes	800 minutes
Unused minutes rollover for one month	No rollover of unused minutes	Unused minutes rollover for one year
New phone every year	New phone every two years	No new phone
Nights and weekends count toward monthly minutes	Free nights and weekends (do not count toward monthly minutes)	Free calling to top 5 contacts
Costs $100 per month	Costs $75 per month	Costs $60 per month

- Respondents are asked a series of these questions where they must trade off the features and pricing of the various plans to select the offering they most prefer.
- The pattern of responses is analyzed for each respondent in order to determine the underlying value system (or "utilities").
- The conjoint simulation model is then built based on these utilities and allows for "what if" testing of any combination of features and pricing, whether or not that combination was shown in the survey.

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- Increasingly accepted by courts
  - "Conjoint analysis has won acceptance from courts and legal commentators"
    - *Dzielak v. Whirlpool Corp.*, No. 2:12-0089, 2017 WL 1034197 at *6 (D.N.J. Mar. 17, 2017).
  - See also:
    - *In re Fisher-Price Rock 'N Play Sleeper Mktg.*, Sales Pracs. & Prod. Liab. Litig., 567 F. Supp. 3d 406, 410 (W.D.N.Y. 2021) ("The court's evaluation of Mr. Weir's testimony is made easier by the consensus on both sides that conjoint analysis is a valid tool for evaluating consumer behavior. In the common expression, it is a 'thing.'").
    - *Benson v. Newell Brands, Inc.*, No. 19 C 6836, 2021 WL 5321510, at *5 (N.D. Ill. Nov. 16, 2021) ("As plaintiffs indicate, price-premium damages calculations based on conjoint analysis designed to isolate the portion of the payment attributable to a misrepresented product feature have been accepted by several courts.").
    - *Testone v. Barlean's Organic Oils, LLC*, No. 19-CV-169 JLS (BGS), 2021 WL 4438391, at *15 (S.D. Cal. Sept. 28, 2021) ("This 'conjoint analysis' is generally accepted as a means of measuring damages under *Comcast*.").
    - *In re Takata Airbag Prod. Liab. Litig.*, No. 15-MD-02599, 2022 WL 3584510, at *2 (S.D. Fla. Aug. 16, 2022) ("As an initial matter, courts will accept conjoint surveys as economic-damages models.").

Damages Opinions: Common Methodological Flaws

- Some common criticisms of conjoint analysis that could be the subject of *Daubert* challenges
  - Conjoint does not account for supply, only demand – i.e., it is a "willingness to pay" study and it therefore is only trying to measure how demand might change if a product attribute is removed from a product
  - It does not model changes in supply that could occur as a result of changes in demand
  - Some courts have excluded conjoint surveys on this basis
  - *In re NJOY, Inc. Consumer Class Action Litig.*, 120 F. Supp. 3d 1050, 1119 (C.D. Cal. 2015)
    - "[The expert's] conjoint analysis does not satisfy *Comcast*. His conjoint methodology could quantify the relative value a class of consumers ascribed to the safety message, but it does not permit the court to turn the 'relative valuation . . . into an absolute valuation to be awarded as damages. . . . The ultimate price of a product is a combination of market demand and market supply. . . . Harris's model looks only 'to the demand side of the market equation,' converting what is properly an 'objective evaluation of relative fair market values [in]to a seemingly subjective inquiry of what an average consumer wants'") (first and fourth alterations in original) (citations omitted).
  - *In re Gen. Motors LLC Ignition Switch Litig.*, 407 F. Supp. 3d 212, 237 (S.D.N.Y.), *motion to certify appeal granted, reconsideration denied*, 427 F. Supp. 3d 374 (S.D.N.Y. 2019)
    - In short, where the law awards damages based on the difference in market value, evidence — including conjoint analyses — that measures only consumers' subjective valuation or willingness to pay is not sufficient evidence of such damages
  - *In re Emerson Elec. Co. Wet/Dry Vac Mktg. & Sales Litig.*, No. 4:12MD2382 HEA, 2021 WL 5003102, at *6 (E.D. Mo. Oct. 28, 2021), *reconsideration denied sub nom. IN RE: EMERSON ELECTRIC CO. WET/DRY VAC MARKETING AND SALES LITIGATION,*, No. 4:12MD2382 HEA, 2022 WL 670131 (E.D. Mo. Mar. 7, 2022)
    - "Boedeker's evidence thus measures consumers' private valuations (on average) of certain hypothetical GM vehicles sold with fully disclosed defects; it does not measure the *market value* of those vehicles. For that reason, Boedeker's conjoint analysis does not provide competent proof of Plaintiffs' damages."

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- Conjoint studies have well-known biases that lead to overstating of consumer value
  - Because conjoint is a hypothetical "forced choice" analysis and because consumers can sometimes figure out the goal of the survey, overstatement of consumer attribute value has been noted in some studies
  - Need some reality checks against real-world transactions
  - *Townsend v. Monster Beverage Corp.*, 303 F. Supp. 3d 1010, 1049 (C.D. Cal. 2018)
    - "[The expert's] survey design suffers from focalism bias, rendering it useless for the purpose of determining price premiums attributable to the challenged statements. 'Focalism bias is widely discussed in the conjoint [analysis] literature and occurs when respondents pay more attention to a product attribute or feature in the choice exercises than they ordinarily would in the actual purchase process, thus increasing the apparent relative subjective value they assign to the attribute in the conjoint study.'" (alteration in original) (citations omitted).

Damages Opinions: Common Methodological Flaws

- **"*Comcast*" problem – plaintiffs' expert's testimony does not track/support theory of liability**
  - Refers to *Comcast*, 569 U.S. 27.
    - Certiorari granted to address: "Whether a district court may certify a class action without resolving whether the plaintiff class had introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis." *Id.* at 39 (emphasis omitted) (citation omitted).
    - Plaintiffs originally alleged 4 theories of antitrust impact; district court rejected 3 out of 4.
  - Class could not be certified because the plaintiffs' expert failed to differentiate among the damages attributable to different theories of antitrust impact, all but one of which had been rejected.
  - Not a *Daubert* issue, but a relevance issue.
    - Impact of decision has been somewhat limited:
      - Antitrust
      - Plaintiffs, on notice of issue, know to differentiate among damages attributable to various theories of liability

Damages Opinions: Common Methodological Flaws

- **"*Comcast*" problem (continued)*:* common methodological flaws**
  - *Comcast* may provide a viable basis for attacking plaintiffs' experts in other contexts
    - Food litigation - misrepresentation claims
      - Challenged label claims, such as "all natural," likely mean different things to different purchasers
      - Labeling claim at issue encompasses multiple product characteristics, of which only one or a few are allegedly inconsistent with the representation
      - E.g., *Randolph v. J.M. Smucker Co.*, 303 F.R.D. 679, 693-94 (S.D. Fla. 2014).
  - Plaintiffs' experts have had considerable difficulty isolating the price impact solely attributable to the ingredient (e.g., GMO) or characteristic (e.g., presence/absence of a warning) that allegedly renders the defendant's representation inaccurate
    - *Randolph*, 303 F.R.D. 679.
    - *Werdebaugh v. Blue Diamond Growers*, No. 12-CV-02724, 2014 WL 7148923 (N.D. Cal. Dec. 15, 2014).
    - *Brazil v. Dole Packaged Foods, LLC*, No. 12-CV-01831, 2014 WL 5794873 (N.D. Cal. Nov. 6, 2014) (denying *Daubert* motion as moot in light of ruling that damages analysis failed to satisfy *Comcast*)

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- *Comcast* in the context of conjoint analysis
  - A *Comcast*-related criticism has doomed some conjoint surveys
    - *See Davidson v. Apple, Inc.*, No. 16-CV-04942, 2018 WL 2325426, at *23 (N.D. Cal. May 8, 2018) ("Boedeker's survey questions only asked respondents about a generic defect instead of one specifically affecting a phone's touchscreen. That necessarily assumed that respondents would value all defects equally. That assumption is inconsistent with *Comcast*'s requirement that damages models measure 'only those damages attributable' to the Plaintiffs' theory of liability because it "unmoors Plaintiffs' damages from the specific touchscreen defect alleged to have harmed them.") (emphasis omitted) (citation omitted).
    - *Opperman v. Kong Techs., Inc.*, No. 13-cv-00453, 2017 WL 3149295, at *12 (N.D. Cal. July 25, 2017) (rejecting conjoint analysis under *Comcast* because the conjoint analysis measured the value of "privacy generally" instead of the specific allegedly misrepresented security features at issue).

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- To perform or not to perform the conjoint study: that is the question
  - Conjoint studies are expensive to conduct, many times exceeding $100,000
  - Further, actually conducting the survey, besides being expensive, creates actual results that can be attacked more concretely than an attack based on the survey construction before it is actually run
  - Plaintiffs often face the choice of whether they want to actually run the survey
  - Defendants need to be careful in their discovery positions
  - Sometimes defendants aggressively seek to avoid producing data or other materials that plaintiffs can successfully use to justify a decision to construct but not actually run a conjoint survey

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- To perform or not to perform the conjoint study: that is the question
  - Even the mere proposal of a method has been accepted as sufficient to meet the requirements of *Comcast.*
  - *See Benson v. Newell Brands, Inc.*, No. 19 C 6836, 2021 WL 5321510, at *5 (N.D. Ill. Nov. 16, 2021) ("Their primary criticisms stem from the fact that Dubé has not yet conducted the conjoint analysis or performed the tasks it entails. This argument misses the mark because plaintiffs' burden at this juncture is not to prove their case; as to this component of predominance, it is to show that there is a method of estimating damages that applies class-wide and that method measures damages attributable to plaintiffs' theory of liability.").
  - *Sanchez-Knutson v. Ford Motor Co.,* 310 F.R.D. 529, 539 (S.D. Fla. 2015) ("[T]he Court disagrees with Defendant that Mr. Gaskin must have already performed his proposed conjoint analysis for the Court to consider the proffered methodology.").
  - *Guido v. L'Oreal US, Inc.*, 2014 WL 6603730, at *8 (C.D. Cal. July 24, 2014) (rejecting defendant's argument that the plaintiff's expert's proposed conjoint analysis testimony should be inadmissible because plaintiff's expert had not yet performed the conjoint analysis).
  - *Lytle v. Nutramax Lab'ys, Inc.*, No. EDCV190835FMOSPX, 2022 WL 1600047, at *6 (C.D. Cal. May 6, 2022) ("As explained below, see infra at § III.A.3., '[a] plaintiff is not required to actually execute a proposed conjoint analysis to show that damages are capable of determination on a class-wide basis with common proof' at the class certification stage. Bailey, 338 F.R.D. at 408 n. 14 (quoting Comcast, 569 U.S. at 34, 133 S.Ct. at 1426) (citation and emphasis omitted).").

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Thank You

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