

THE PROPER APPLICATION OF *DAUBERT* TO EXPERT TESTIMONY IN CLASS CERTIFICATION

by
Meredith M. Price*

Class certification is an important, if not the decisive, issue in class action lawsuits. This Comment explores the current approach by certain courts to permit the use of testimony and evidence during class certification that is excused from the rigors of evidentiary rules applied at trial. In particular, the rule from Daubert v. Merrell Dow Pharmaceuticals, Inc. established that a judge must ensure that evidence admitted at trial is not only relevant, but also reliable. Critics of applying Daubert at class certification have argued that Daubert is meant to serve as a gatekeeping function for the jury, not a judge ruling on a class certification motion. This argument rings hollow. A judge who would exclude evidence at trial should not have to invent a new, potentially malleable standard to determine whether evidence is reliable at class certification. The purpose of this Comment is to establish why Daubert provides the best and clearest standard for federal courts to apply to evidence used during class certification.

Part I of this Comment explores the class certification requirements under Rule 23 of the Federal Rules of Civil Procedure and the circuit split surrounding the application of Daubert at class certification. Part II of this Comment will provide a basic overview of the varying interpretations of Daubert in class certification. Next, a thorough explanation of how Daubert operates and applies at class certification will be detailed. Finally, this Comment will address the risk that meticulous adherence to Daubert during class certification may have on efficient discovery. Part III will address in detail the current circuit split on the application of Daubert at class certification, most directly evidenced in the conflicting opinions between the Seventh Circuit and Eighth Circuit. Ultimately, this Comment will demonstrate that the Eighth Circuit's dismissal of a full application of Daubert is both incorrect and based on a cursory and misplaced review of the Daubert test. Moreover, this Comment will explain why the application of Daubert is an important question separate and apart from the requirement that district courts rigorously analyze a motion for class certification. This Comment concludes that the Supreme Court should adopt the full Daubert standard as a necessary duty that a district court must

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undertake when analyzing expert testimony used to certify a class and should hold that for a district court to forgo this analysis is itself a dereliction of the court's duty.

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I. INTRODUCTION

Rule 23 of the Federal Rules of Civil Procedure provides an important mechanism through which unnamed members of a class can adjudicate their claims in one proceeding.¹ In order for potential litigants to qualify as a class and receive certification, they must meet the Rule 23 requirements.² First, a class must satisfy the four requirements in Rule 23(a), specifically:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;

¹ See ROBERT H. KLONOFF, CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION IN A NUTSHELL 14 (3d ed. 2007) [hereinafter KLONOFF, NUTSHELL]. The class action device is not alone in providing a mechanism for multiple parties to adjudicate claims in one action. *Id.* A few of the other mechanisms under the Federal Rules of Civil Procedure include: Rule 20 joinder, Rule 14 impleader, Rule 24 intervention, Rule 22 interpleader, and Rule 42(a) consolidation. *Id.*; see also ROBERT H. KLONOFF ET AL., CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION: CASES AND MATERIALS ch. 12 (3d ed. 2012).

² FED. R. CIV. P. 23.

- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class.³

Second, in addition to satisfying Rule 23(a), a class must be certified under one of the four potential Rule 23(b) class action devices.⁴ The Rule 23(a) and (b) requirements serve two goals, first, “to ensure that the representative class members and class counsel will effectively represent the absent class members’ interests,” and second, “to ensure that a class action will be more efficient and manageable than alternative methods for adjudicating the claims.”⁵

The outcome of a motion for class certification can have drastic effects on the settlement value of a case.⁶ Because of this, class certification is the apex of class action litigation. Judge Scirica explained that certification is critical because “it may sound the ‘death knell’ of the litigation on the part of plaintiffs,”⁷ or conversely, “create unwarranted pressure to settle nonmeritorious claims on the part of defendants,”⁸ making the procedures applied by district courts of particular importance.⁹ The Supreme Court has clarified that a district court must do more than make a cursory assessment of the evidence presented by a party seeking class certification.¹⁰ However, two important questions about the treatment of expert testimony remain unanswered: first, to what extent a district court must apply the *Daubert* test of admissibility to

³ FED. R. CIV. P. 23(a)(1)–(4).

⁴ FED. R. CIV. P. 23(b)(1)–(3).

⁵ KLONOFF, NUTSHELL, *supra* note 1, at 16.

⁶ See ARTHUR R. MILLER, AN OVERVIEW OF FEDERAL CLASS ACTIONS: PAST, PRESENT, AND FUTURE 12 (2d ed. 1977) (“In terms of the dynamics and economics of class actions . . . lawyers believe that whether the [class] will be certified . . . is the single most important issue in the case. All the lawyers’ weapons and all of the litigants’ resources tend to be mobilized to deal with that question. Defense lawyers believe that their ability to settle the case advantageously or to convince the plaintiff to abandon the case depends on blocking certification. Conversely, plaintiffs’ lawyers believe that their ability to obtain a large settlement turns on securing certification.”).

⁷ *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 162 (3d Cir. 2001); see also Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1255 (2002) (noting that the pressure to avoid class certification creates an “intense pressure for defendants to settle, and this settlement leverage makes the class action attractive to plaintiffs with frivolous and weak claims”).

⁸ *Newton*, 259 F.3d at 162.

⁹ See Stephen B. Burbank, *The Bitter with the Sweet: Tradition, History, and Limitations on Federal Judicial Power—A Case Study*, 75 NOTRE DAME L. REV. 1291, 1292–93 (2000) (arguing that “procedure is power, whether in the hands of lawyers or judges”).

¹⁰ See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (holding that “Rule 23 does not set forth a mere pleading standard,” but instead requires that “[a] party seeking class certification . . . affirmatively demonstrate his compliance with the Rule”).

expert testimony used to support a motion for class certification; and second, how much a district court must investigate and resolve issues relating to the merits of a case at class certification.¹¹ This Comment seeks to address the former question—the proper evidentiary standard to apply to expert testimony used to satisfy Rule 23 requirements at class certification. The lack of definitive guidance from the Supreme Court on the application of expert testimony to class certification has led to disparate treatment between federal circuits,¹² and even between some district courts.¹³

¹¹ See *infra* Parts II.A, III; see also *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 309 (3d Cir. 2008) (holding that “[c]lass certification is proper only ‘if the trial court is satisfied, after a rigorous analysis, that the prerequisites’ of Rule 23 are met” after a “thorough examination of the factual and legal allegations” (quoting *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982); *Newton*, 259 F.3d at 166) (internal quotation mark omitted)).

¹² This paper focuses on the circuit split between the Seventh Circuit’s decision in *American Honda Motor Co. v. Allen*, 600 F.3d 813, 815–16 (7th Cir. 2010) (requiring a full *Daubert* inquiry into expert testimony necessary to certify a class), and the Eighth Circuit’s decision in *In re Zurn Pex Plumbing Products Liability Litigation*, 644 F.3d 604, 614 (8th Cir. 2011) (adopting a focused *Daubert* analysis rather than following the Seventh Circuit’s approach in *American Honda*), *petition for cert. filed*, *Zurn Pex, Inc. v. Cox*, No. 11-740 (U.S. Dec. 15, 2011).

¹³ Within the Ninth Circuit, there has been no definitive ruling after *Dukes v. Wal-Mart Stores, Inc.* as to whether a full *Daubert* inquiry should be required. 603 F.3d 571, 602 n.22 (9th Cir. 2010) (en banc), *rev’d on other grounds*, 131 S. Ct. 2541 (2011). After the Supreme Court’s reversal of *Dukes*, and its indication that a full *Daubert* inquiry ought to apply, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2554 (2011), district courts in the Ninth Circuit have been giving the issue disparate treatment. *Compare Fosmire v. Progressive Max Ins. Co.*, 277 F.R.D. 625, 628–29 (W.D. Wash. 2011) (citing the Ninth Circuit’s opinion in *Dukes* for the proposition that “[t]he Ninth Circuit . . . has not yet resolved whether a full analysis under Federal Rule of Evidence 702 and *Daubert* is required at the class certification stage”), and *Pryor v. Aerotek Scientific, LLC*, 278 F.R.D. 516, 534 n.63 (C.D. Cal. 2011) (declining to utilize *Daubert* to resolve a challenge to expert testimony proffered for class certification and concluding that “[t]he court need not resolve [the *Daubert*] issue”), with *Cholakyan v. Mercedes-Benz USA*, 281 F.R.D. 534, 541, 547 (C.D. Cal. 2012) (applying a full *Daubert* inquiry, “[b]efore addressing the merits of [a class] certification motion,” to the defendant’s expert, and excluding the expert’s “declarations in their entirety for purposes of determining whether certification of a class is warranted”). The perceived conflict within the Ninth Circuit may have been resolved in *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970 (9th Cir. 2011). Judge Smith upheld the district court’s application of *Daubert* to a “battle of the experts” staged by the parties, reasoning that “[u]nder *Daubert*, the trial court must act as a ‘gatekeeper’ to exclude junk science that does not meet Federal Rule of Evidence 702’s reliability standards by making a preliminary determination that the expert’s testimony is reliable.” *Id.* at 982. The Ninth Circuit’s decision in *Ellis* was issued prior to the district court ruling in *Fosmire*, which adopted a deferential approach to the Eighth Circuit’s application of *Daubert* in *Zurn Pex. Fosmire*, 277 F.R.D. at 629. The *Ellis* decision did not specifically resolve the question of whether a full *Daubert* inquiry, rather than the truncated version applied in the Eighth Circuit, is required by a district court. *Ellis*, 657 F.3d at 982. Despite this, and the easy resolution to the *Daubert* question that the *Ellis* question could signify, the cases addressing *Daubert* and class certification appear inconsistent.

Due to the split between the circuits, and even among district courts within the circuits, the ultimate standard applied to expert testimony will depend upon the forum, resulting in the incongruent application of scrutiny to expert testimony.¹⁴ The unpredictable treatment of expert testimony is a pernicious phenomenon in light of the important role this evidence plays in certain areas of law involving putative (b)(3) classes—including employment, antitrust, consumer protection, and securities—leaving certification to hinge on “the court’s assessment of expert submissions about the ability of plaintiffs to show that their claims” satisfy the class certification requirements.¹⁵ Given the expense and complication involved in evaluating expert testimony,¹⁶ the proper test to apply to expert testimony in class certification is one of the most contested and important unresolved questions in class action case law.¹⁷

Part II of this Comment will provide a basic overview of the varying interpretations of *Daubert* in class certification. Next, a thorough explanation of how *Daubert* operates and applies at class certification will be detailed. Finally, this Part will address the risk that meticulous adherence to *Daubert* during class certification may have on efficient discovery.

Part III will address in detail the current circuit split on the application of *Daubert* at class certification, most directly evidenced in the conflicting opinions between the Seventh Circuit and Eighth Circuit. Ultimately, this Part will demonstrate that the Eighth Circuit’s dismissal of a full application of *Daubert* is both incorrect and based on a cursory and misplaced review of the *Daubert* test. Moreover, this Part will explain why the application of *Daubert* is an important question separate and

¹⁴ See *infra* Parts II.A, III.

¹⁵ 1 JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS: LAW AND PRACTICE § 3:14, at 449 (8th ed. 2011).

¹⁶ See Dana G. Deaton, *The Daubert Challenge to the Admissibility of Scientific Evidence*, in 60 AM. JUR. TRIALS 1, § 27 (1996) (noting that “[b]ecause of the expense involved in utilizing experts, careful consideration should be made with regard to whether the benefits outweigh the costs”).

¹⁷ Compare Edward R. Becker & Aviva Orenstein, *The Federal Rules of Evidence After Sixteen Years—The Effect of “Plain Meaning” Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, 60 GEO. WASH. L. REV. 857, 863 (1992) (arguing before *Daubert* that the circuit split in the treatment of expert testimony was the “most controversial and important unresolved question” in federal evidence law), with Mary Kay Kane, *The Supreme Court’s Recent Class Action Jurisprudence: Gazing into a Crystal Ball*, 16 LEWIS & CLARK L. REV. 1015, 1041 (2012) (opining that “[a]pplying the new Rule 23(a)(2) commonality standard advanced by the majority in *Wal-Mart* raises additional class certification barriers and questions,” including whether “a full *Daubert* hearing [is] now . . . part of all class-certification proceedings” (footnote omitted)), and Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. (forthcoming 2013) (manuscript at 25), available at <http://ssrn.com/abstract=2038985> (explaining that where a plaintiff or defendant is relying on expert testimony for class certification, “the propriety of class certification will depend heavily on what approach the court uses in assessing such testimony”).

apart from the requirement that district courts rigorously analyze a motion for class certification. This Part concludes that the Supreme Court should adopt the full *Daubert* standard as a necessary duty that a district court must undertake when analyzing expert testimony used to certify a class and should hold that for a district court to forgo this analysis is itself a dereliction of the court's duty.

II. DUELING CIRCUITS AND CONFLICTING STANDARDS—HOW *DAUBERT* FUNCTIONS IN CLASS CERTIFICATION

A. *The Varying Interpretations of Daubert*

The level of scrutiny applied to expert testimony at the class certification stage is in a state of flux. The Seventh¹⁸ and Eleventh¹⁹ Circuits have either explicitly held or intimated that the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*²⁰ is applicable at class certification. However, the Eighth Circuit²¹ has declined to adopt the formal requirements of *Daubert*.²² Further, the Ninth Circuit has indicated it would not require a full *Daubert* analysis.²³ The court explained in *Dukes* that the application of *Daubert* is different at the class certification stage, reasoning that "reliable evidence tending to show that a common question of fact—i.e., 'Does Wal-Mart's policy of decentralized, subjective employment decision making operate to

¹⁸ 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 . . . a district court must conclusively rule on any challenge to the expert's qualifications or submissions prior to ruling on a class certification motion. . . . [T]he district court must perform a full *Daubert* analysis before certifying the class if the situation warrants.").

¹⁹ Sher v. Raytheon Co., 419 F. App'x 887, 890 (11th Cir. 2011) ("The *American Honda* court found that, if the situation warrants, the district court must perform a full *Daubert* analysis before certifying the class. . . . We agree."). The Eleventh Circuit joined the Seventh Circuit by predicating its decision on the gatekeeping function a district court judge serves. *Id.* ("A district court is the gatekeeper. It must determine the reliability of the expert's experience and training as well as the methodology used.").

²⁰ 509 U.S. 579, 589 (1993) (explaining that a "trial judge [is not] disabled from screening . . . evidence," and instead that a "trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable").

²¹ *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 629 (8th Cir. 2011).

²² *Id.*; see also *Jackson v. Unocal Corp.*, 262 P.3d 874, 886 (Colo. 2011) (en banc) (declining to adopt the *American Honda* standard, stating: "[w]e do not mandate such a requirement for trial courts in Colorado," and instead reinforcing the local test's "flexible, fact-specific . . . analysis" to ensure that expert testimony meets the state's Rule 23 requirements).

²³ *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 602 n.22 (9th Cir. 2010) (en banc) ("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. However, even assuming it did, the district court here was not in error. Thus we need not resolve this issue here." (citation omitted)).

discriminate against female employees?’—exists with respect to all members of the class” was enough.²⁴ However, Justice Scalia noted, albeit in dictum, in his majority opinion in *Wal-Mart Stores, Inc. v. Dukes* that the Ninth Circuit’s conclusion that *Daubert* did not apply was likely erroneous, but separate and apart from whether the expert testimony itself advanced the respondents’ case.²⁵

Even after the Supreme Court’s clear indication in *Wal-Mart* that *Daubert* ought to apply to class certification, there are inconsistent rulings within the Ninth Circuit, with some courts concluding that a truncated application of *Daubert* similar to the approach in the Eighth Circuit is sufficient, and others conducting a full *Daubert* hearing when warranted at class certification.²⁶ Beyond the district court judges who have concluded that there remains an open question about *Daubert* at class certification, there also appears to be divergent interpretations as to whether the Supreme Court’s dictum in *Wal-Mart* ought to be binding on the lower courts.²⁷

²⁴ *Id.* at 603.

²⁵ *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2553–54 (2011) (explaining “[w]e doubt that is so” that “*Daubert* [does] not apply to expert testimony at the certification stage of class-action proceedings”).

²⁶ *See supra* note 13; *see also* *Rix v. Lockheed Martin Corp.*, No. 09-CV-2063 MMA (NLS), 2011 WL 890744, at *2 (S.D. Cal. Mar. 14, 2011) (finding that it is “premature to issue a final ruling [on the expert] testimony, as it remains to be seen what use Plaintiff will make of this evidence going forward”); *Hovenkotter v. Safeco Ins. Co.*, No. C09-0218JLR, 2010 WL 3984828, at *4 (W.D. Wash. Oct. 11, 2010) (upholding and applying the standard that “the court should simply conduct a full and rigorous analysis of the admissibility of the expert’s opinions as they relate to class certification issues and leave for trial the admissibility of their opinions as they relate to the merits of the underlying claims”).

²⁷ *See Foscire v. Progressive Max Ins. Co.*, 277 F.R.D. 625, 629 n.5 (W.D. Wash. 2011) (rejecting the notion that the Supreme Court’s dictum is necessarily binding and explaining that “[t]he Ninth Circuit has advised that although Supreme Court dicta bear greater weight than dicta from other courts, such pronouncements are still not binding on lower courts” (citing *United States v. Montero-Camargo*, 208 F.3d 1122, 1132 n.17 (9th Cir. 2000))). The *Foscire* court committed itself to the *Zurn Pex* court’s interpretation of *Daubert*, finding that “[i]t honors the Supreme Court’s dictum in [*Wal-Mart*] by applying *Daubert* at class certification, but it does so in a manner that recognizes the specific criteria under consideration, as well as the differing stage of discovery and state of the evidence, at the class certification stage.” *Id.* at 629. *Contra* *Eddings v. Health Net, Inc.*, No. CV-10-1744-JST (RZx), 2011 WL 4526675, at *1 (C.D. Cal. July 27, 2011) (acknowledging the Supreme Court’s dictum from *Wal-Mart*, but ultimately rejecting the need to apply *Daubert* because the court did “not base certification of either the Rule 23 or FLSA class on the [expert] [r]eport”); *Pryor v. Aerotek Scientific, LLC*, 278 F.R.D. 516, 534 n.63 (C.D. Cal. Nov. 15, 2011) (noting the Supreme Court’s dictum in *Wal-Mart* and declining to “resolve th[at] issue”).

B. How Daubert Operates and Applies in Class Certification

Rule 702 of the Federal Rules of Evidence provides specific threshold standards for the use of expert testimony as evidence.²⁸ The debate between the Seventh and Eighth Circuits centers on whether the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*²⁹ is applicable at the point of class certification, or instead, is limited to a full application during the merit portion of a trial. In *Daubert*, Justice Blackmun announced a standard for the treatment of expert testimony under Rule 702 of the Federal Rules of Evidence.³⁰ The inquiry is meant to first ensure that the "reasoning or methodology underlying the testimony is scientifically valid" and to second consider "whether that reasoning or methodology properly can be applied to the facts in issue."³¹ A court presented with expert testimony should consider several nonexclusive factors in making an admissibility determination. These include whether the theory or technique can be tested, whether it has been subjected to peer review and publication, the potential for error, and the existence and maintenance of standards controlling the technique's operation.³² This preliminary inquiry is meant to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable" for jury consideration.³³

The underlying policy for applying the *Daubert* rule to expert testimony that will be presented to the jury is evident in the text of the rule and its drafting history. For example, the 1972 Advisory Committee said that the basis for the rule was to determine "[w]hether the situation is a proper one for the use of expert testimony" and to "assist[] the trier" in only admitting reliable testimony.³⁴ The rule was meant to exclude evidence that is unhelpful, and ultimately "superfluous and a waste of time."³⁵ Contrary to the fear expressed by the *Zurn Pex* court, Rule 702 itself is meant to provide a flexible test.³⁶ The rule was not meant to

²⁸ "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." FED. R. EVID. 702.

²⁹ 509 U.S. 579 (1993).

³⁰ *Id.* at 589.

³¹ *Id.* at 592-93.

³² *Id.* at 593-94.

³³ *Id.* at 589.

³⁴ FED. R. EVID. 702 advisory committee's note.

³⁵ *Id.*

³⁶ See FED. R. EVID. 702 advisory committee's note to 2000 amendments ("*Daubert* itself emphasized that the factors were neither exclusive nor dispositive. Other cases have recognized that not all of the specific *Daubert* factors can apply to every type of expert testimony."). The Eighth Circuit in *Zurn Pex* upheld the decision of the district

definitively find that one expert vis-à-vis another was “more correct;” rather, the text of the rule was framed to be “broad enough to permit testimony that is the product of competing principles or methods in the same field of expertise.”³⁷ These underlying principles should be applied, to their full extent, at class certification for several reasons. First, the flexible approach inherent in a *Daubert* proceeding guarantees that there is no risk of a district court not having the proper discretion to manage a *Daubert* motion. Second, the very fact that cases often settle based on the outcome of a class certification motion means that it is exceedingly important for the court to completely and properly analyze an expert at the first opportunity.

I. Daubert’s Flexibility Gives District Courts Proper Discretion

Daubert is a flexible standard that does not require a district court judge to make a final determination between two or more conflicting experts.³⁸ Courts that reject applying *Daubert* assume that the test itself forecloses a flexible approach, and instead adopt an abridged, ad hoc version of *Daubert* that is less than a full hearing.³⁹ The flexibility inherent in *Daubert* is different from the truncated version of the *Daubert* test applied by the Eighth Circuit. The Supreme Court explained when establishing the *Daubert* test that it is not so rigid that it would not afford a court “broad latitude” to tailor facts relevant to the test.⁴⁰ This does not mean that a district court can fail to undergo a full *Daubert* hearing where expert testimony is validly challenged under Rule 702. Justice Breyer explained for the majority in *Kumho Tire Co. v. Carmichael* that the Rule 702 inquiry under *Daubert* is a “flexible one” and that the only *Daubert* factors that must be evaluated are those that are “tied to the facts” and relevant in a particular case.⁴¹ The distinction between the flexibility inherent in the *Daubert* test and what the Eighth Circuit has advocated

court to conduct 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.” *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 614 (8th Cir. 2011).

³⁷ FED. R. EVID. 702 advisory committee’s note to 2000 amendments.

³⁸ *See Daubert*, 509 U.S. at 597.

³⁹ *See, e.g., In re Zurn Pex Plumbing Prods.*, 644 F.3d at 619–20 (applying a relaxed *Daubert* inquiry, in part because the civil rules “allow for flexibility” if the court later finds a class is improperly certified after merits discovery); *Fosmire v. Progressive Max Ins. Co.*, 277 F.R.D. 625, 629 (W.D. Wash. 2011) (adopting the *Zurn Pex* court’s approach to scrutinizing expert testimony because of “the differing stage of discovery and state of the evidence”); *Jackson v. Unocal Corp.*, 262 P.3d 874, 886 (Colo. 2011) (en banc) (declining to adopt the *American Honda* standard, stating “[w]e do not mandate such a requirement for trial courts in Colorado,” and instead reinforcing the local test’s “flexible, fact-specific . . . analysis” to ensure that expert testimony meets state’s Rule 23 requirements). These courts go beyond the flexibility permissible under *Daubert*, and instead require less rigor than required under a full *Daubert* hearing.

⁴⁰ *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 142 (1999).

⁴¹ *Id.* at 150 (quoting *Daubert*, 509 U.S. at 594, 591).

doing is subtle, yet critically important. Whereas, under a traditional application of *Daubert*, a district court in evaluating the reliability of expert testimony may find one factor more dispositive than another,⁴² the truncated version of *Daubert* declines “to engage in a full *Daubert* analysis at the class certification stage” and instead only considers “whether the expert testimony is helpful in determining whether the requisites of class certification have been met.”⁴³ The latter approach goes beyond the latitude permitted by the Supreme Court’s jurisprudence on Rule 702 and simply ignores the mandate of the *Daubert* test.

The courts that have declined to undergo a full *Daubert* hearing at class certification have justified this delay on the potential to later have a full *Daubert* hearing at trial.⁴⁴ This sort of reasoning is faulty foremost in its assumption that the class action will go to trial,⁴⁵ and second because at no point should a court punt its responsibilities and use intrinsically unreliable evidence, whether to prove the merits of a case or satisfy the Rule 23 requirements for class certification.⁴⁶ If a class is certified on the basis of an expert’s testimony, the defendant’s hope that faulty expert testimony will later be excluded is cold comfort. This point is buttressed

⁴² See *id.* at 151 (explaining that the “general acceptance factor” may not be helpful where an expert’s “discipline itself lacks reliability, as, for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy”).

⁴³ *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 267 F.R.D. 549, 556 (D. Minn. 2010), *aff’d*, 644 F.3d 604 (8th Cir. 2011).

⁴⁴ See, e.g., *Hovenkotter v. Safeco Ins. Co.*, No. C09-0218JLR, 2010 WL 3984828, at *4 (W.D. Wash. Oct. 11, 2010) (a court must “simply conduct a full and rigorous analysis of the admissibility of the expert’s opinions *as they relate to class certification issues* and leave for trial the admissibility of their opinions as they relate to the merits of the underlying claims”).

⁴⁵ See *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (equating the power of class certification to “blackmail settlements” that put a defendant “under intense pressure to settle”); Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 FORDHAM L. REV. 1177, 1184 (2009) (documenting the “large number of high-dollar aggregate settlements” and the strength of the plaintiffs’ bar in the United States); Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 958 (1995) (noting that class certification creates insurmountable pressure on defendants to settle, which means a class action may never go to trial).

⁴⁶ See *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 814 (7th Cir. 2012), *reh’g denied*, 2012 U.S. App. LEXIS 4778 (7th Cir. Feb. 28, 2012) (holding that *Daubert* applied to its full extent to evidence offered by both the defendant and the plaintiff). The Court in *Messner* reasoned that “[t]he fact that a defendant is not required to present evidence to defeat class certification does not give that defendant license to offer irrelevant and unreliable evidence.” *Id.* The logic is that any evidence used by a party to either defeat or prove class certification must at the very least be admissible, separate and apart from whether it persuasively satisfies the Rule 23 requirements.

by a textual analysis of the Rule 23(c) certification order requirements.⁴⁷ Rule 23(c) itself supports an early assessment of expert testimony.⁴⁸ The 2003 amendment to Rule 23(c) “removes any doubt that the filing of a dispositive motion and the taking of some discovery may be proper before class certification is decided.”⁴⁹ Class certification, whether or not expert evidence is at issue, will inevitably reach issues on the merits.⁵⁰

2. *The Determinative Effect of Class Certification Requires an Early, Full Analysis of Expert Testimony*

The outcome of class certification has a significant influence over whether and on what terms a class action suit may settle.⁵¹ Judge Scirica has commented prominently on this issue, opining that “certification decisions may have a decisive effect on litigation” by either sounding the “death knell” of the litigation or “creat[ing] unwarranted pressure to settle nonmeritorious claims on the part of defendants.”⁵² Because of the importance of class certification, the district court has an obligation to delve into the merits as far as may be necessary to ensure that the evidence itself is valid.⁵³ Despite this obligation, “courts have accepted a

⁴⁷ See FED. R. CIV. P. 23(c)(1)(A) (“Time to Issue. 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.”).

⁴⁸ See FED. R. CIV. P. 23 advisory committee’s note to 2003 amendments (“Subdivision (c)(1)(A) is changed to require that the determination whether to certify a class be made ‘at an early practicable time.’ The ‘as soon as practicable’ exaction neither reflects prevailing practice nor captures the many valid reasons that may justify deferring the initial certification decision.”).

⁴⁹ Steig D. Olson, “Chipping Away”: *The Misguided Trend Toward Resolving Merits Disputes as Part of the Class Certification Calculus*, 43 U.S.F. L. REV. 935, 947 (2009).

⁵⁰ Heather P. Scribner, *Rigorous Analysis of the Class Certification Expert: The Roles of Daubert and the Defendant’s Proof*, 28 REV. LITIG. 71, 110–11 (2008) (“Courts normally enter an order limiting discovery to facts relevant to Rule 23’s requirements; in practice this leaves few facts on the table for post-certification discovery, because the Rule 23 facts are so intertwined with facts relevant to the substantive claims.”).

⁵¹ See MILLER, *supra* note 6, at 12 (explaining that “[d]efense lawyers believe that their ability to settle the case advantageously or to convince the plaintiff to abandon the case depends on blocking certification”); see also Mandi L. Williams, Note, *The History of Daubert and Its Effect on Toxic Tort Class Action Certification*, 22 REV. LITIG. 181, 201 (2003) (“A *Daubert*-like inquiry into the admissibility of scientific evidence is vital and should be allowed in class action certifications. Such an inquiry plays a substantial role in determining whether a class action will consist of twenty or two thousand class members. *Daubert* factors should be used by opposing counsel to challenge, and possibly discredit, any expert scientific evidence offered to prove that a plaintiff should be part of a class and that the class meets the requirements of Rule 23.”).

⁵² *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 310 (3d Cir. 2008) (quoting *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 167, 162 (3d Cir. 2001)) (internal quotation mark omitted).

⁵³ Julie Slater, Comment, *Reaping the Benefits of Class Certification: How and When Should “Significant Proof” Be Required Post-Dukes?*, 2011 BYU L. REV. 1259, 1272–73.

range of testimony based on standards far more lenient than *Daubert*.⁵⁴ In the context of considering a motion for summary judgment, the Seventh Circuit, in an opinion authored by Judge Easterbrook, found that expert affidavits were not to be lightly accepted because a rank command “in the guise of expertise is a plague in contemporary litigation.”⁵⁵ This warning regarding expert testimony has equal application in the consideration of expert testimony used to certify a class. While the underlying policy in *Daubert* was for a trial judge to serve as a “gatekeeper” in order to protect juries, the Supreme Court also recognized that the Rules of Evidence are “designed not for the exhaustive search for cosmic understanding but for the particularized resolution of legal disputes.”⁵⁶ Not applying *Daubert* at class certification then only serves to “encourage[] parties to submit unreliable and overreaching expert evidence in support of or in opposition to class certification.”⁵⁷

While *Daubert* may appear as an unsolvable enigma, the Seventh Circuit has shown that the test can be fully applied to a particularized legal dispute. A judge executing this gatekeeping function at the certification stage without jury involvement really uses a back-to-basics approach under the Rules of Evidence.⁵⁸ This is evident in the important role a judge has in judicial management of a class action suit, including “appointing class counsel, awarding attorney’s fees, and approving settlements.”⁵⁹ Scrutiny of expert testimony makes sense in part because judges themselves cannot be experts in all fields. There is no justification for a judge to accept expert testimony because it is “seemingly reasonable.”⁶⁰ The judicial gatekeeping discretion granted to the court over expert testimony should be applied in its entirety once the issue

⁵⁴ Elizabeth Chamblee Burch, *Introduction: Dukes v. Wal-Mart Stores, Inc.*, 63 VAND. L. REV. EN BANC 91, 96 (2010), <http://www.vanderbiltlawreview.org/articles/2010/10/Burch-Introduction-to-Dukes-Roundtable-77-Vand.-L.-Rev.-En-Banc-10-2010.pdf>.

⁵⁵ *Mid-State Fertilizer Co. v. Exch. Nat’l Bank of Chi.*, 877 F.2d 1333, 1340 (7th Cir. 1989).

⁵⁶ *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993).

⁵⁷ Gregory Mitchell, *Good Causes and Bad Science*, 63 VAND. L. REV. EN BANC 133, 134 (2010), <http://www.vanderbiltlawreview.org/content/articles/2010/11/Mitchell-Good-Causes-and-Bad-Science-63-Vand.-L.-Rev.-En-Banc-133-2010.pdf>.

⁵⁸ Richard Marcus, *Reviving Judicial Gatekeeping of Aggregation: Scrutinizing the Merits on Class Certification*, 79 GEO. WASH. L. REV. 324, 327 (2011).

⁵⁹ *Id.* at 343. Professor Marcus documents the judicial management tools in other aggregation contexts, such as joinder, consolidation, and multidistrict consolidation. *Id.* at 328–29. A closely analogous area of law where judges exercise a broad range of discretion in judicial management is with regard to the summary judgment motion. *See, e.g.*, EDWARD BRUNET & MARTIN H. REDISH, SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE § 8:11, at 263 (3d ed. 2006) (noting that “[s]ummary judgment involves a trial-like process that invites consideration of evidence, including expert affidavits, as long as the evidence in question satisfie[s] admissibility standards”).

⁶⁰ Scribner, *supra* note 50, at 106.

becomes relevant to promote fairness and consistency,⁶¹ even if that is before a full trial on the merits.

C. *Applying Daubert and Promoting Efficient Discovery*

One of the primary concerns against applying *Daubert* at class certification is that class certification occurs earlier than a traditional *Daubert* hearing, which is used to screen evidence prior to it being presented to a jury.⁶² A reluctance to apply the full evidentiary standards of *Daubert* is based on a concern that since full discovery on the merits has not occurred, the application of *Daubert* will somehow become unmanageable for the court.⁶³ Moreover, the *Daubert* test itself is not easy to apply and expert testimony may receive vastly different treatment depending upon the judge's understanding and the court's rules on *Daubert*.⁶⁴ Any confusion among judges in applying *Daubert* is surely better than no decision-making framework whatsoever.⁶⁵ Despite the difficulties

⁶¹ 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, 1065 (2004) (advocating the use of the Federal Rules of Evidence in the admission of expert testimony at class certification to promote fairness and consistent treatment); see also LLOYD DIXON & BRIAN GILL, CHANGES IN THE STANDARDS FOR ADMITTING EXPERT EVIDENCE IN FEDERAL CIVIL CASES SINCE THE *DAUBERT* DECISION xvi–xvii (2001) (explaining that “[t]he closer scrutiny given to expert evidence caused an increase in the proportion of challenged evidence excluded after *Daubert*,” resulting in “parties proposing evidence” to “not propose . . . evidence . . . not meeting the new standards, or better tailor[] the evidence they did propose to fit the new standards.”).

⁶² Chamblee, *supra* note 61, at 1077 (explaining that “some may argue that summary judgment’s evidentiary procedures [such as *Daubert* and the Rules of Evidence] should not apply during class certification because the plaintiff has not completed discovery”).

⁶³ See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 600–01 (1993) (Rehnquist, C.J., concurring in part and dissenting in part) (doubting that the Rule “imposes on [judges] either the obligation or the authority to become amateur scientists in order to perform that role”); Edward K. Cheng & Albert H. Yoon, *Does Frye or Daubert Matter? A Study of Scientific Admissibility Standards*, 91 VA. L. REV. 471, 505 (2005) (explaining that the “*Daubert* decision itself had a substantial effect on the treatment of scientific evidence in federal courts and beyond . . . [because of] its educative function”); Brooks E. Harlow & Roy W. Spencer, *An Inconvenient Burden of Proof? CO₂ Nuisance Plaintiffs Will Face Challenges in Meeting the Daubert Standard*, 32 ENERGY L.J. 459, 475 (2011) (“Judges may be inadequately prepared to deal with certain types of expert evidence, particularly complex scientific evidence.”).

⁶⁴ Sophia I. Gatowski et al., *Asking the Gatekeepers: A National Survey of Judges on Judging Expert Evidence in a Post-Daubert World*, 25 LAW & HUM. BEHAV. 433, 452 (2001) (“[A]lthough the judges surveyed reported that they found the *Daubert* criteria useful for determining the admissibility of proffered expert evidence, the extent to which judges understand and can properly apply the criteria when assessing the validity and reliability of the proffered scientific evidence was questionable at best.”).

⁶⁵ See, e.g., Catharine Wells, *Situated Decisionmaking*, 63 S. CAL. L. REV. 1727, 1745 (1990) (demonstrating that “structured reasoning ultimately presupposes a variety of contextual judgments and contextual judgments, [which] in turn are not truly useful

in evaluating expert testimony under a *Daubert* proceeding, there are discovery techniques that can guarantee that the work of the court is not unguided. Given that discovery on class certification often implicates issues on the merits, it is far from clear that applying a full *Daubert* hearing at class certification would be a drastic change beyond current litigation tactics.⁶⁶

The *Manual for Complex Litigation* anticipates that a *Daubert* proceeding may be a part of the precertification process.⁶⁷ By conducting the *Daubert* analysis early, a court promotes judicial efficiency by conducting rulings on “threshold dispositive motions.”⁶⁸ While this occurrence at an early stage in the litigation’s proceedings may seem daunting, a court should utilize general discovery limitation techniques.⁶⁹ Class certification discovery, like “discovery in all federal civil cases,” is “governed by Rules 26 through 37 of the Federal Rule[s] of Civil Procedure.”⁷⁰ Under Rule 26, the scope of discovery includes material that is “relevant to the subject matter involved in the action.”⁷¹ Rule 26’s “relevancy” requirement has led some courts to limit discovery by considering: “(1) the court’s needs; (2) the amount of time discovery would entail; and (3) the probability that discovery would be helpful in resolving the issue of class certification.”⁷²

Additional tools to limit discovery include setting time limits and schedules for discovery, limiting the quantity of depositions, interrogatories, and the volume of requests for production, conducting a phased discovery focusing on pivotal issues first that may make other discovery unnecessary, and setting a sequence for particular forms of

unless they are incorporated into a framework that imposes a structure on the surrounding terrain”). In essence, without some base framework binding and guiding a district court’s decision-making procedures, the *Daubert* motion devolves into a frustrating game of “Calvinball,” where the rules are never the same. 3 BILL WATTERSON, *THE COMPLETE CALVIN AND HOBBS* 432 (2005).

⁶⁶ Scribner, *supra* note 50, at 111 (class certification will inevitably implicate the merits because “Rule 23 facts are so intertwined with facts relevant to the substantive claims”); see also KLONOFF, NUTSHELL, *supra* note 1, at 119–21 (noting that the discovery process at class certification is “crucial,” that courts “usually do not grant or deny class certification without discovery,” and that “[a]ggressive, thorough discovery is frequently decisive in class certification battles”).

⁶⁷ MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.21 (2004). The judge is the trier of fact at the class certification stage—the *Manual for Complex Litigation* provides that Rule 702 and *Daubert* have “always required that expert testimony ‘assist the trier of fact’ to understand evidence or resolve issues in the case” *Id.* at § 23.25.

⁶⁸ *Id.* § 21.133, at 253.

⁶⁹ *Id.* § 11.422.

⁷⁰ KLONOFF, NUTSHELL, *supra* note 1, at 126.

⁷¹ FED. R. CIV. P. 26(b)(1). The court, for example, can narrow the scope of discovery to determine what is “relevant” at a class certification hearing through “stipulations, requests for admission, affidavits, or declarations.” MANUAL FOR COMPLEX LITIGATION, *supra* note 67, § 21.21.

⁷² KLONOFF, NUTSHELL, *supra* note 1, at 127.

discovery.⁷³ A judge can take these measures and require joint briefings on certification and *Daubert* to ensure that there is no repetition and discovery only occurs on the relevant issues.⁷⁴ Thus, the consideration of expert testimony can be functionally incorporated into the initial case-management orders at the certification stage of a lawsuit.⁷⁵

Courts promote judicial efficiency in particular if it turns out that the expert testimony should be excluded.⁷⁶ Where an essential claim of the party's cause of action is unsupported without the expert testimony, there would be a basis for summary judgment.⁷⁷ For example, Judge Posner, after considering an appeal from a district court's denial of expert testimony and subsequent grant of summary judgment, noted that the decision of the district court was consistent with the principles underlying *Daubert*.⁷⁸ Judge Posner explained that if the expert testimony met the appropriate level of rigor it would be "admissible even if the particular methods [the expert has] used in arriving at [his or her] opinion [were] not yet accepted as canonical in their branch of the scientific community."⁷⁹ In conducting and initiating a *Daubert* inquiry,

⁷³ MANUAL FOR COMPLEX LITIGATION, *supra* note 67, § 11.422; *see, e.g.*, Magistrate Judge John D. Love, E.D. Tex., Standing Order Regarding Letter Briefs, Summary Judgment Motions, Motions to Strike Expert Testimony/*Daubert* Motions, Motions *in Limine*, Exhibits, Deposition Designations and Witness Lists, *available at* http://www.txed.uscourts.gov/cgi-bin/view_document.cgi?document=19741 (mandating that prior to filing a *Daubert* motion or motion to strike, "the parties must submit a letter-brief . . . seeking permission to file the motion. . . . The opening letter brief in each [motion] shall be no longer than 3 pages and shall be filed with the Court no later than 60 days before the deadline for filing Motions to Strike or *Daubert* Motions. Answering letter briefs shall be no longer than 3 pages and filed with the Court no later than 14 days thereafter. Reply briefs shall be no longer than 2 pages and filed with the Court no later than 5 days thereafter.").

⁷⁴ *See, e.g., In re Ready-Mixed Concrete Antitrust Litig.*, 261 F.R.D. 154, 158 (S.D. Ind. 2009) ("In anticipation of challenges to Dr. Beyer's testimony under *Daubert*, the parties in consultation with the Magistrate Judge agreed that the schedule as it then existed would have generated separate and extensive briefing of both the class certification issue and the *Daubert* contentions advanced by both parties, a process that clearly would be cumbersome, potentially duplicative, and protracted. The parties sought to streamline the briefing schedule due to their shared concern over never-ending or ever-changing expert opinions. Accordingly, pursuant to a joint motion by the parties, on December 12, 2007, the Magistrate Judge amended the case management plan to require combined briefing of these two issues by Defendants.") (citations omitted).

⁷⁵ MANUAL FOR COMPLEX LITIGATION, *supra* note 67, § 21.11 (noting that a judge should "guide the parties in presenting the judge with the information necessary to make the certification decision and permit the orderly and efficient development of the case").

⁷⁶ *Id.* § 23.35.

⁷⁷ *Id.*

⁷⁸ *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 317–18 (7th Cir. 1996) (approving excluding expert testimony under *Daubert* and "dismiss[ing] [the suit] on summary judgment for want of an adequate showing of a causal connection between the patch and the heart attack").

⁷⁹ *Id.* at 318.

courts are not required to proceed under the formality of Rule 104(a) of the Federal Rules of Evidence.⁸⁰ Before initiating a full *Daubert* hearing a court can determine what role the expert testimony plays in the class certification motion, and what issues of reliability are relevant.⁸¹ If after this initial review a court determines that there are issues that need to be fully explored, the court can hold a full hearing under Rule 104(a) of the Federal Rules of Evidence.⁸²

The separate *Daubert* inquiry is also consistent with the current practice of conducting limited discovery to certify a class. The *Manual for Complex Litigation* explicitly considers that in an initial case management conference under Rule 16, a judge will set out the timing and discovery associated with threshold motions, such as a motion to dismiss for a failure to state a claim or a motion for summary judgment.⁸³ Precertification discovery generally occurs when facts relevant to certification are disputed or when the opposing party questions the Rule 23 predominance requirement.⁸⁴ Because the application of *Daubert* is consistent with other common proceedings in class action litigation, the *Manual* effectively endorses the application of *Daubert* to expert testimony used in class certification.⁸⁵

III. RESOLVING THE CIRCUIT SPLIT—WHY IT MAKES SENSE TO SUBJECT EXPERT TESTIMONY TO A FULL *DAUBERT* HEARING PRIOR TO CERTIFICATION

Comparing the Seventh Circuit's decision in *American Honda*⁸⁶ with the Eighth Circuit's decision in *Zurn Pex*⁸⁷ most directly evidences the circuit split on the proper application of the *Daubert* standard. 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.

⁸⁰ MANUAL FOR COMPLEX LITIGATION, *supra* note 67, § 23.351.

⁸¹ *Id.*; *see, e.g.*, *Eddings v. Health Net, Inc.*, No. CV-10-1744-JST (RZx), 2011 WL 4526675, at *1 (C.D. Cal. July 27, 2011) (declining to consider the *Daubert* motion because the court assessed the role the expert testimony would play in certification and found reliance on the expert testimony was not necessary).

⁸² MANUAL FOR COMPLEX LITIGATION, *supra* note 67, § 23.353.

⁸³ *Id.* § 21.11.

⁸⁴ *Id.* § 21.14.

⁸⁵ *Id.* § 21.21.

⁸⁶ *Am. Honda Motor Co. v. Allen*, 600 F.3d 813 (7th Cir. 2010) (per curiam).

⁸⁷ *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604 (8th Cir. 2011).

A. *The Seventh Circuit's Application of Daubert Provides an Ideal Framework to Analyze Expert Testimony Essential to Class Certification*

In *American Honda*, the Seventh Circuit in a per curiam opinion determined that a district court must apply the *Daubert* test to expert testimony used in class certification.⁸⁸ The plaintiffs in *American Honda* alleged that the Honda Gold Wing GL 1800 motorcycle had a design defect that “prevents the adequate damping of ‘wobble,’ that is, side-to-side oscillation of the front steering assembly about the steering axis.”⁸⁹ The plaintiffs sought to prove this common defect and certify a class pursuant to Rule 23(b)(3), which 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.”⁹⁰ Among the defendants’ objections to certifying the plaintiffs’ proposed class was the position that the plaintiffs had failed to meet the predominance requirement of Rule 23(b)(3).⁹¹ The plaintiffs provided the court with the expert testimony of Mark Ezra in order to prove that the Gold Wing motorcycle had a uniform defect that affected all members of the class.⁹² While the district court conceded that a *Daubert* analysis was appropriate at the class certification stage, and that it had “definite reservations about the reliability” of the expert’s standard, the “court decline[d] to exclude the report in its entirety at this early stage of the proceedings.”⁹³

American Honda Motor Company and Honda of America Manufacturing appealed the district court’s grant of class certification pursuant to Rule 23(f).⁹⁴ *American Honda* was a case of first impression in the circuit on the question of whether *Daubert* applies at class certification.⁹⁵ The Seventh Circuit held that “when an expert’s report or testimony is critical to class certification . . . a district court must conclusively rule on any challenge to the expert’s qualifications or submissions prior to ruling on a class certification motion.”⁹⁶ Thus, a full *Daubert* analysis must be applied by district courts when reliance on

⁸⁸ *Am. Honda*, 600 F.3d at 815–16.

⁸⁹ *Id.* at 814.

⁹⁰ *Id.* at 814; FED. R. CIV. P. 23(b)(3).

⁹¹ *Allen v. Am. Honda Motor Co.*, 264 F.R.D. 412, 423 (N.D. Ill. 2009), *vacated*, 600 F.3d 813 (7th Cir. 2010).

⁹² *Id.* at 416, 423.

⁹³ *Id.* at 425–28.

⁹⁴ *Am. Honda*, 600 F.3d at 814. Rule 23(f) grants a court of appeals discretionary authority to review class certification, specifically: “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 14 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.” FED. R. CIV. P. 23(f).

⁹⁵ *Am. Honda*, 600 F.3d at 815.

⁹⁶ *Id.* at 815–16.

expert testimony is necessary to prove class certification.⁹⁷ The formal adoption of the *Daubert* test for class certification was predicated on the court's role as a "gatekeeper" and the need to determine the "reliability" of expert testimony.⁹⁸ While expert testimony is traditionally assailable during the merits portion of the trial, the court reasoned that unreliable evidence should not be admitted, even at an early stage in the litigation.⁹⁹

The lower court's decision was reversed because, although the district court "started off on the right foot," the court ultimately declined, without fully enunciating a valid justification, to exclude the use of Ezra's testimony.¹⁰⁰ The Seventh Circuit made clear that when a district court is applying the *Daubert* standard and finds ample justification that the expert testimony does not meet the test, it should not permit the evidence merely because class certification occurs at an early stage of the litigation.¹⁰¹ The *American Honda* court predicated its decision on two foundational cases from the circuit. First, in *West v. Prudential Securities, Inc.* the court rejected the notion that a plaintiff should have the power to "obtain class certification just by hiring a competent expert."¹⁰² The court in *West* noted that it would "amount[] to a delegation of judicial power to the plaintiffs," and that "[t]ough questions must be faced and squarely decided, if necessary by . . . choosing between competing perspectives."¹⁰³ Second, the court reinforced its decision from *Szabo v. Bridgeport Machines, Inc.*, that factual and legal inquiries necessary to ensure Rule 23 requirements are met must be decided before certifying a class.¹⁰⁴

The underlying test adopted by the court was based on two policy justifications. First, the court noted that a district court serves a gatekeeping function in evaluating expert testimony. Second, the court found that it was an abuse of discretion for the district court to not

⁹⁷ *Id.* at 816.

⁹⁸ *Id.*

⁹⁹ *Id.* at 818–19.

¹⁰⁰ *Id.* at 816.

¹⁰¹ *Id.* The court acknowledged all the deficiencies identified by the district court, including "Ezra's failure to 'establish the minimal amplitude required for a rider to detect an oscillation,' his failure to 'verif[y] whether a lesser or greater percentage of decay would also provide an appropriate margin of safety,' the fact that his wobble decay standard was developed 'to assist with a lawsuit and was not conceived through the logical flow of independent research,' the questionable peer-review process that his article underwent, the engineering community's lack of acceptance of his proposed standard, and his test sample size of one used GL1800." *Id.* (quoting *Allen v. Am. Honda Motor Co.*, 264 F.R.D. 412, 426–28 (N.D. Ill. 2009)).

¹⁰² *Id.* at 815 (citing *West v. Prudential Sec., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002)).

¹⁰³ *West*, 282 F.3d at 938.

¹⁰⁴ *Am. Honda*, 600 F.3d at 815 (citing *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 676 (7th Cir. 2001)). The *Szabo* decision was noteworthy because it endorsed a "rigorous review of the evidence, but also the *resolution* of conflicting evidence bearing on the merits." Klonoff, *supra* note 17 (manuscript at 22).

exercise discretion. With regard to the gatekeeping function, the court said it was the district court's duty to "determine reliability in light of the proposed expert's full range of experience and training as well as the methodology used to arrive at a particular conclusion."¹⁰⁵ The goal of the district court is to determine whether the defendant "successfully debunked the plaintiffs' claim that a class-wide approach can be used to prove impact and damages."¹⁰⁶ What makes the application of this policy difficult is that "the usual concerns of the rule—keeping unreliable expert testimony from the jury—are not present" in the class certification stage.¹⁰⁷ Despite this difficulty, it would be inconsistent to allow a class to be certified on unreliable evidence that could not be presented to a jury because the expert testimony would fail *Daubert*. In essence, the court is maintaining its duty of gatekeeping at an earlier time, but not for a different purpose. Ultimately, conclusory statements from a self-proclaimed expert fail to adequately meet a court's gatekeeping function.¹⁰⁸

Moreover, the *American Honda* court found it to be an abuse of discretion for the district court to not exercise its discretion over the expert testimony.¹⁰⁹ The court found that "expert testimony that is not scientifically reliable should not be admitted, even 'at this early stage of the proceedings.'"¹¹⁰ Where the district court erred was that it never actually decided whether Ezra's report was reliable enough to support class certification, and thus it abrogated its duty in making the necessary factual findings prior to class certification.¹¹¹ The district court in the *American Honda* case did precisely what the *Hydrogen Peroxide* court refused to do—where the court is presented with expert testimony that is irreconcilable with a necessary element needed for Rule 23 certification, the court cannot turn a blind eye or refuse to resolve a conflict.¹¹²

¹⁰⁵ *Am. Honda*, 600 F.3d at 816 (quoting *Allen*, 264 F.R.D. at 423) (internal quotation marks omitted).

¹⁰⁶ *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 256 F.R.D. 82, 96 (D. Conn. 2009).

¹⁰⁷ *Metavante Corp. v. Emigrant Sav. Bank*, 619 F.3d 748, 760 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 1784 (2011).

¹⁰⁸ *Id.* (quoting *Gayton v. McCoy*, 593 F.3d 610, 616 (7th Cir. 2010). The gatekeeping function ensures that the expert testimony is not afforded undue weight by the jury. *See also* *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 813 (7th Cir.), *reh'g denied*, No. 10-2514, 2012 U.S. App. LEXIS 4778 (7th Cir. Feb. 28, 2012) ("Given the importance of [the expert's] opinions, the district court needed to rule conclusively on plaintiffs' challenge to her opinions [in addition to any *Daubert* challenges by the defendant] before it turned to the merits of plaintiffs' motion for class certification.").

¹⁰⁹ *Am. Honda*, 600 F.3d at 816.

¹¹⁰ *Id.* at 819 (quoting *Allen*, 264 F.R.D. at 428).

¹¹¹ *Id.* at 816–17.

¹¹² *Id.* at 817; *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 314 (3d Cir. 2008); *accord In re Sulfuric Acid Antitrust Litig.*, 847 F. Supp. 2d 1079, 1082 (N.D. Ill. 2011) ("A district judge may not duck hard questions by observing that each side has

Evidence presented by the defendant at class certification is subject to the same level of scrutiny as affirmative evidence presented by the plaintiff, thus a *Daubert* inquiry is “necessary under *American Honda* . . . if the witness’s opinion is ‘critical’ to class certification.”¹¹³

A central aspect of the *American Honda* decision is that *Daubert* is only relevant when “an expert’s report or testimony is critical to class certification.”¹¹⁴ This means that a court in the Seventh Circuit will not invoke the *Daubert* inquiry where it is not necessary. For example, in *McReynolds v. Lynch*, the Northern District of Illinois declined to engage in a *Daubert* analysis pursuant to a motion by the defense.¹¹⁵ There, the plaintiffs had brought forth a claim against Merrill Lynch alleging racial discrimination.¹¹⁶ The plaintiffs sought to certify a (b)(2) class on behalf of African-American financial advisors employed in the retail brokerage unit.¹¹⁷ The court, without analyzing the expert testimony provided by the plaintiff, found that significant proof had not been provided to establish a discriminatory culture.¹¹⁸ Admittedly, the district court was reversed on the grounds that the denial of class certification was a misapplication of *Wal-Mart*,¹¹⁹ but the framework set up, whereby *Daubert* is not evoked unless it is established to be essential to class certification, shows that the inquiry itself has limited application.

B. The Eighth Circuit’s Relaxed Application of Daubert Contravenes the Federal Rules of Evidence and Creates Imprecision in Class Certification

The Eighth Circuit’s decision in *Zurn Pex* explicitly rejected the full application of *Daubert* as used by the *American Honda* court and instead

some support, or that considerations relevant to class certification also may affect the decision on the merits.” (quoting *West v. Prudential Sec., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002)) (internal quotation marks omitted).

¹¹³ *Messner*, 669 F.3d at 814.

¹¹⁴ *Am. Honda*, 600 F.3d at 815.

¹¹⁵ *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, No. 05 C 6583, 2010 WL 3184179, at *6 n.3 (N.D. Ill. Aug. 9, 2010), *reconsideration denied*, No. 05 C 6583, 2011 WL 658155 (N.D. Ill. Feb. 14, 2011), *rev’d on other grounds*, 672 F.3d 482 (7th Cir. 2012) (“In the instant case, however, plaintiffs are unable to establish the requirements for the class certification, even with their experts’ reports and testimony. Therefore, there is no reason to reach defendant’s motion to strike, and it is denied as moot.”).

¹¹⁶ *Id.* at *1.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at *4–5 (finding that commonality was likely not met where the corporation engaged in “discretionary decisions of over 15,000 FAs, over 600 branch office managers, 135 complex directors, 30 Regional Managing Directors and 5 Divisional Managers situated across the entire United States”).

¹¹⁹ *McReynolds*, 672 F.3d at 490 (“The district judge exaggerated the impact on the feasibility and desirability of class action treatment of the fact that the exercise of discretion at the local level is undoubtedly a factor in the differential success of brokers, even if not a factor that overwhelms the effect of the corporate policies on teaming and on account distributions.”).

granted district courts greater leeway in analyzing the validity of expert testimony in class certification.¹²⁰ The primary controversy in the appeal was whether the expert testimony presented by the plaintiffs was reliable.¹²¹

The defendants at the district court argued that a full *Daubert* analysis should be applied to determine whether the expert testimony offered by the plaintiffs was reliable.¹²² The plaintiffs relied on two experts to prove that Zurn used fittings in cross-linked polyethylene (pex) plumbing systems that caused the systems to leak, resulting in damage to property.¹²³ The first expert, Dr. Wallace Blischke, conducted “an analysis of Zurn’s warranty claims data and estimated that millions of Zurn’s brass fittings would fail within the twenty-five year warranty period.”¹²⁴ The defendants critiqued Dr. Blischke’s analysis because rather than calculating the mean time for product failure, he simply assumed a mean time to failure of 40 years.¹²⁵ The second expert, Dr. Roger Staehle, calculated the likelihood that the Zurn products would suffer “stress corrosion cracking.”¹²⁶ The defendants challenged Dr. Staehle’s calculation of plastic strain in that one method of his testing was subject to an “artificially-inflated level of strain.”¹²⁷ Despite these criticisms, the district court declined to view them as evidence of unreliability of the experts’ testimony, and instead as a dispute regarding the accuracy of the tests results.¹²⁸

The Eighth Circuit on appeal categorized the district court’s decision as “chart[ing] a middle course between the positions urged by the parties.”¹²⁹ Where the plaintiffs urged the court to accept the expert testimony so long as it was not “so flawed it [could not] provide any information as to whether the requisites of class certification have been met,” the defendants urged the court to apply the full *Daubert* analysis before certifying a case that is reliant upon expert testimony.¹³⁰ The court was squarely presented with whether it should follow the Seventh Circuit’s approach in *American Honda* and ultimately declined to do so.¹³¹ The court was skeptical that *Daubert* provided the “most workable [test] in complex litigation or that it would serve case management better than

¹²⁰ *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 612 (8th Cir. 2011).

¹²¹ *Id.* at 610.

¹²² *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 267 F.R.D. 549, 555 (D. Minn. 2010).

¹²³ *Id.*

¹²⁴ *Id.* at 554, 556.

¹²⁵ *Id.* at 556.

¹²⁶ *Id.* at 554, 557.

¹²⁷ *Id.* at 557.

¹²⁸ *Id.* at 556–57.

¹²⁹ *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 610 (8th Cir. 2011).

¹³⁰ *Id.*

¹³¹ *Id.* at 611–12.

the one followed by the district court here.”¹³² Instead, the panel affirmed the district court’s application of a “focused” or “tailored” *Daubert* analysis that “examined the reliability of the expert opinions in light of the available evidence and the purpose for which they were offered.”¹³³

The Eighth Circuit, in adopting this position, found that the district court’s test was not inconsistent with the *Wal-Mart* decision.¹³⁴ The court reasoned that “[t]he main purpose of *Daubert* exclusion [was] to protect juries from being swayed by dubious scientific testimony.”¹³⁵ However, this adamant denial of the need for gatekeeping at class certification because “the judge is the decision maker,” incorrectly analyzes *Daubert*’s gatekeeping function. This argument is less persuasive than the Seventh Circuit’s analysis of the *Daubert* issue, in that it takes a myopic view of the expert evidence. Ultimately, by certifying expert testimony used to prove an essential element of Rule 23’s requirements, such as commonality, the judge is permitting the use of evidence that might later be excluded under *Daubert* and thus never be presented to the jury.¹³⁶ The point of applying *Daubert* here is not predicated on a concern that district court judges risk being glamoured by an expert witness’s impressive curriculum vitae, but rather, on a consistent application of the Federal Rules of Evidence.¹³⁷

Judge Gruender in his dissent argued that the majority misapplied circuit precedent.¹³⁸ The majority relied on *Blades v. Monsanto Co.* to stand for the proposition that expert disputes should only be resolved “to the extent ‘necessary to determine the nature of the evidence that would be sufficient, if the plaintiff’s general allegations were true, to make out a prima facie case for the class.’”¹³⁹ The dissent noted that the case actually “addressed the scope of the district court’s fact finding with respect to conflicting expert testimony, not whether the testimony should have been admitted in the first place.”¹⁴⁰ The dissent afforded deference to the Supreme Court’s dictum in *Wal-Mart* that *Daubert* should be applied to

¹³² *Id.* at 612.

¹³³ *Id.*

¹³⁴ *Id.* at 612 n.5.

¹³⁵ *Id.* at 613.

¹³⁶ *Id.*; *cf.* *United States v. Brown*, 415 F.3d 1257, 1268–69 (11th Cir. 2005) (reasoning that the application of *Daubert* in a bench trial was different because “[t]here is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself”). The *Zurn Pex* court relied on *Brown* to support the limited application of *Daubert* in class certification, but failed to explain how class certification is necessarily analogous to a bench trial. *See In re Zurn Pex Plumbing Prods.*, 644 F.3d at 613.

¹³⁷ *See infra* Part III.C for a discussion of how the jury context is not different for purpose of the relevancy of the rule.

¹³⁸ *In re Zurn Pex Plumbing Prods.*, 644 F.3d at 620 (Gruender, J., dissenting).

¹³⁹ *Id.* at 611 (quoting *Blades v. Monsanto Co.*, 400 F.3d 562, 567 (8th Cir. 2005)).

¹⁴⁰ *Id.* at 627 (Gruender, J., dissenting).

expert testimony.¹⁴¹ The majority's response to this critique was simply that the district court did not fail to apply *Daubert* entirely, but instead "conduct[ed] a focused inquiry into expert reliability in light of the available evidence."¹⁴²

However, the heart of the dissent's critique of the majority opinion goes unanswered. Judge Gruender would join the Seventh and Eleventh Circuits and require a full *Daubert* analysis for two reasons. First, because the 2003 amendments to Rule 23 disallowed conditional certification, the dissent argued that requiring a full *Daubert* analysis is a "natural extension" of a rigorous application of the rule's requirements.¹⁴³ Second, the dissent noted it was "counterintuitive" to permit inadmissible expert testimony to be used at class certification when it would later be excluded if presented to the jury.¹⁴⁴

In avoiding a full *Daubert* analysis, the Eighth Circuit's approach may have benefits. The primary benefit is in limiting discovery and promoting effective case management by avoiding the formality and procedural requirements of a *Daubert* proceeding.¹⁴⁵ It is not clear that the *Zurn Pex* court had grounds to rely on this risk of onerous evidentiary standards given that within the Eighth Circuit, an expert's testimony is only excluded by a *Daubert* inquiry if it "is so fundamentally unsupported that it can offer no assistance to the jury."¹⁴⁶ The specter of complicating the class certification proceedings is built up as a bigger impediment than it need be. Justifications for a limited or modified application of *Daubert* also erroneously assume that the merits will not be implicated at class certification¹⁴⁷—a position that was squarely rejected in *Wal-Mart*.¹⁴⁸

¹⁴¹ *Id.*

¹⁴² *Id.* at 612 n.5 (majority opinion).

¹⁴³ *Id.* at 628 (Gruender, J., dissenting).

¹⁴⁴ *Id.* at 628–29. The dissent relied on the holding from *Blades v. Monsanto Co.*, that "[t]he closer any dispute at the class certification stage comes to the heart of the claim, the more cautious the court should be in ensuring that it must be resolved in order to determine the nature of the evidence the plaintiff would require." *Id.* at 628 (quoting *Blades*, 400 F.3d at 567).

¹⁴⁵ See, e.g., Harvey Brown, *Eight Gates for Expert Witnesses*, 36 HOUS. L. REV. 743 (1999) (outlining eight "gates" expert testimony must satisfy in order to be deemed admissible); Victor E. Schwartz & Cary Silverman, *The Draining of Daubert and the Recidivism of Junk Science in Federal and State Courts*, 35 HOFSTRA L. REV. 217, 226 (2006) (explaining that "*Daubert* and its progeny 'changed [the] deference-to-the-field approach . . . [and] brought [a] scientific culture to the courtroom'" (alterations and omissions in original) (quoting David L. Faigman et al., *How Good is Good Enough?: Expert Evidence Under Daubert and Kumho*, 50 CASE W. RES. L. REV. 645, 655–56 (2000))); Cassandra H. Welch, Note, *Flexible Standards, Deferential Review: Daubert's Legacy of Confusion*, 29 HARV. J.L. & PUB. POL'Y 1085, 1097 (2006) (citing David Crump, *The Trouble with Daubert–Kumho: Reconsidering the Supreme Court's Philosophy of Science*, 68 MO. L. REV. 1, 1–2 (2003)).

¹⁴⁶ *Larson v. Kempker*, 414 F.3d 936, 941 (8th Cir. 2005) (quoting *Loudermill v. Dow Chem. Co.*, 863 F.2d 566, 570 (8th Cir. 1988)).

¹⁴⁷ *Schafer v. State Farm & Fire Cas. Co.*, No. 06-8262, 2009 WL 799978, at *2 (E.D. La. Mar. 25, 2009) (finding that "a less stringent *Daubert* analysis is appropriate

Moreover, the *Zurn Pex* flexible approach makes even less sense where there is no overlap between the expert testimony and the merits because evaluation at class certification could potentially be the district court's only opportunity to review the evidence, but the Eighth Circuit's approach does not anticipate this nuance.¹⁴⁹

The circuit split regarding the application of *Daubert* is pronounced and ripe for resolution by the Supreme Court.¹⁵⁰ The notion that *Daubert* should only be applied in a flexible and limited context during class certification is grounded in reasoning that misinterprets the Federal Rules of Evidence, overextends the meaning of *Eisen v. Carlisle & Jacquelin*,¹⁵¹ and unsatisfactorily makes distinctions between class certification and other trial proceedings.

C. The Application of Daubert Is Antecedent to, Rather than Predicated upon, the Supreme Court's Decision in Wal-Mart

Multiple circuits predicate the application of the *Daubert* test on the requirement for "rigorous analysis" at the class certification stage.¹⁵²

at the class certification stage where the court is not addressing the merits"); *Natchitoches Parish Hosp. Serv. Dist. v. Tyco Int'l, Ltd.*, 247 F.R.D. 253, 270 (D. Mass. 2008) (holding that "a court need not plunge into the weeds of an expert dispute about potential technical flaws in an expert methodology" and that at class certification the question to be answered is "whether after a sneak preview of the issues, the expert approach appears fundamentally flawed" (quoting *In re Pharm. Indus. Average Wholesale Price Litig.*, 230 F.R.D. 61, 90 (D. Mass. 2005))). In one case, even after conceding that the merits are relevant at class certification, the court declined to apply a full *Daubert* analysis. See *Sibley v. Sprint Nextel Corp.*, 254 F.R.D. 662, 670 & n.7 (D. Kan. 2008) (conceding that a court must evaluate the Rule 23 factors even if they overlap with issues on the merits, yet applying the *Daubert* test limitedly in class certification).

¹⁴⁸ *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) ("Frequently [a Rule 23(a)] 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim.").

¹⁴⁹ *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 613 (8th Cir. 2011) (grounding a limited *Daubert* test on the notion that a "motion for class certification is 'tentative,' 'preliminary,' and 'limited,'" not that evidence itself may not relate to the merits (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.11 (1978); *Blades v. Monsanto Co.*, 400 F.3d 562, 566 (8th Cir. 2005))).

¹⁵⁰ See Petition for Writ of Certiorari at 10, *Zurn Pex, Inc. v. Cox*, No. 11-740 (U.S. Dec. 15, 2011).

¹⁵¹ 417 U.S. 156 (1974); see *infra* notes 161–68 and accompanying text.

¹⁵² See, e.g., *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 322–23 (3d Cir. 2008) (finding that the district court's denial of the *Daubert* motion was one aspect of the court's duty to rigorously analyze the evidence at class certification, explaining that "[e]xpert opinion with respect to class certification, like any matter relevant to a Rule 23 requirement, calls for rigorous analysis" (citing *West v. Prudential Sec., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002))); *Unger v. Amedisys Inc.*, 401 F.3d 316, 320–21, 323 n.6, 325 (5th Cir. 2005) (explaining that under the "rigorous analysis" standard, "expert testimony may be helpful because of the utility of statistical event analysis," and ultimately reversing the district court's certification order because the court must "base its ruling on admissible evidence").

Further, there is now a consensus that a “court must resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits—including disputes touching on elements of the cause of action.”¹⁵³ The district court’s burden to conduct rigorous analysis at the class certification stage, however, is separate and distinct from the issue of applying *Daubert* to expert testimony at class certification. This distinction can be evidenced threefold: first, because the proper application of the Federal Rules of Evidence is a question apart from the level of scrutiny to be applied by a district court; second, the *Wal-Mart* decision only directly ruled on a district court’s ability to scrutinize evidence relating to the merits, not the *admissibility* of the evidence itself; and third, an analysis of the *admissibility* of expert testimony implicates the merits in a more nuanced manner than a traditional merits-based inquiry at trial.

First, under Rule 101, the Federal Rules of Evidence (FRE) “apply to *proceedings* in United States courts.”¹⁵⁴ The FRE are exempted from application in certain circumstances.¹⁵⁵ However, class certification is notably absent from the list of specifically exempted proceedings, and it seems too commonplace and rudimentary to be causally categorized as a “miscellaneous proceeding.”¹⁵⁶ The language of Rule 101 itself is dispositive because the applicability of the rules is not “based on whether the motion is dispositive or not, but based on a limited set of exceptions set forth in Rule 1101.”¹⁵⁷ Moreover, a limited reading of the FRE directly conflicts with the Supreme Court’s ruling in *Daubert*, which found that a district court “must ensure that any and all . . . evidence” is relevant and reliable.¹⁵⁸ There are courts that have found that federal rules have limited applicability at the class certification stage.¹⁵⁹ However, these pre-

¹⁵³ *In re Hydrogen Peroxide*, 552 F.3d at 307; see also *Wal-Mart*, 131 S. Ct. at 2551 (explaining “[f]requently th[e] ‘rigorous analysis’ will entail some overlap with the merits of the plaintiff’s underlying claim”).

¹⁵⁴ FED. R. EVID. 101(a) (emphasis added).

¹⁵⁵ FED. R. EVID. 1101(d) (exempting hearings on preliminary questions of fact regarding admissibility, grand jury proceedings, and “miscellaneous proceedings,” examples of which are exclusively criminal proceedings).

¹⁵⁶ See *id.*; see also *Lewis v. First Am. Title Ins. Co.*, 265 F.R.D. 536, 544 (D. Idaho 2010) (finding that the Federal Rules of Evidence have full applicability at the class certification stage).

¹⁵⁷ *Lewis*, 265 F.R.D. at 544.

¹⁵⁸ *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993).

¹⁵⁹ See, e.g., *Mazza v. Am. Honda Motor Co.*, 254 F.R.D. 610, 616 (C.D. Cal. 2008) (reasoning that, because “the court makes no findings of fact and announces no ultimate conclusions on Plaintiffs’ claims . . . [o]n a motion for class certification,” the FRE do not apply because the certification itself is a preliminary matter), *vacated* 666 F.3d 581 (9th Cir. 2012); *Fisher v. Ciba Specialty Chems. Corp.*, 238 F.R.D. 273, 279 (S.D. Ala. 2006) (holding that because no merit-based determinations are made at class certification, the FRE “are not stringently applied at the class certification stage because of the preliminary nature of such proceedings”); *Thompson v. Bd. of Educ.*, 71 F.R.D. 398, 401 n.2 (W.D. Mich. 1976) (explaining that the FRE “need not be viewed as binding during a hearing on such preliminary matters as class

Wal-Mart decisions relied on the notion that a district court cannot make merits-based determinations at class certification,¹⁶⁰ and not on a textual interpretation of the rule itself.

Second, both the *Hydrogen Peroxide*¹⁶¹ and *Wal-Mart*¹⁶² decisions were a rejection of a broad interpretation of *Eisen v. Carlisle & Jacquelin* that barred any analysis by a district court that touched upon issues on the merits.¹⁶³ For example, in *Hydrogen Peroxide*, Judge Scirica found that the need for rigorous analysis under Rule 23 was a sufficient reason to apply the Supreme Court's test from *Daubert*.¹⁶⁴ The overbreadth of *Eisen* was soundly rebutted in the seminal piece by Professor Nagareda on class action aggregation where he clarified that the bar on conducting a full *Daubert* inquiry was predicated on an over-reading of *Eisen*.¹⁶⁵ This over-reading of *Eisen* was subtle and "emphasized that the class certification determination is a preliminary procedural ruling (not a decision on the merits) and that the merits remain for the factfinder to decide in the event of a trial."¹⁶⁶ That Professor Nagareda isolates this false application of *Eisen*—treating certification as a procedural ruling—as separate and

certification," by predicating its analysis on the then-perceived bar from *Eisen* on reviewing the merits at class certification), *rev'd on other grounds*, 709 F.2d 1200 (6th Cir. 1983).

¹⁶⁰ See *supra* note 153 and accompanying text.

¹⁶¹ *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 322 (3d Cir. 2008) (noting it was "erroneous" for the court to have "assumed it was barred from weighing" expert testimony).

¹⁶² *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2552 n.6 (2011).

¹⁶³ 417 U.S. 156 (1974). The Supreme Court in *Eisen* stated in dicta that "[w]e find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Id.* at 177. As the Second Circuit explained, that statement "led some courts to think that in determining whether any Rule 23 requirement is met, a judge may not consider any aspect of the merits, and has led other courts to think that a judge may not do so at least with respect to a prerequisite of Rule 23 that overlaps with an aspect of the merits of the case." *In re Initial Public Offerings Sec. Litig.*, 471 F.3d 24, 27 (2d Cir. 2006).

¹⁶⁴ See *In re Hydrogen Peroxide*, 552 F.3d at 323 ("Expert opinion with respect to class certification, like any matter relevant to a Rule 23 requirement, calls for rigorous analysis" and thus "[i]t 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."). *Hydrogen Peroxide* is most notable for holding that a district court must rigorously analyze the evidence, even where implicating the merits; the *Daubert* question was not directly appealed to the court. *Id.* at 315 n.13. Despite not being directly presented with the question, Judge Scirica discussed the *Daubert* rule and opined that it is a question subsumed in a district court's obligation to rigorously evaluate whether the Rule 23 requirements are satisfied. *Id.* at 323.

¹⁶⁵ See Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 112 (2009).

¹⁶⁶ *Id.*

distinct from a bar on the merits-based inquiry is informative.¹⁶⁷ Thus, where a court posits that it has “no authority to weigh competing expert submissions on the class certification question, even—indeed, especially—when the disagreement between the experts overlapped with the merits,” it bases its lack of authority on an imaginary barrier.¹⁶⁸ The perceived bar on weighing evidence was therefore predicated on a broad reading of *Eisen* that is now irrelevant.

While the *Daubert* question and the issue of a court’s scrutiny of evidence regarding class certification are closely related, and were once both artificially barred by an over-reading of *Eisen*, they ask separate questions. Based on the *Wal-Mart* decision, it now appears clear that a rigorous analysis, which may include looking at the merits, in class certification is the rule. However, the application of *Daubert* should not be tied to this doctrine in part because it remains unclear whether the doctrine itself will persist in light of recent criticism. Many commentators have noted that this approach can be pernicious.¹⁶⁹ For example, Dean Michael Kaufman and Professor John Wunderlich have critiqued what often amounts to a “mini-trial” in certifying a class based on a security fraud cause of action.¹⁷⁰ They argue that the risk of “*in terrorem* settlements” has been addressed separately by Congress, and notably this was not done by imposing additional hurdles relating to certification.¹⁷¹ Moreover, Kaufman and Wunderlich have been joined by both the Third Circuit and Dean Robert H. Klonoff in critiquing the application of a merits-based inquiry at class certification as a violation of the Seventh Amendment’s guarantee of jury trial.¹⁷²

¹⁶⁷ See *id.* Professor Nagareda’s point evidences that analyzing the *Daubert* standard separately from the merits-based issue makes analytical sense.

¹⁶⁸ *Id.*

¹⁶⁹ See Michael J. Kaufman & John M. Wunderlich, *The Unjustified Judicial Creation of Class Certification Merits Trials in Securities Fraud Actions*, 43 U. MICH. J.L. REFORM 323, 323 (2010) (critiquing federal courts for “convert[ing] the class certification process into a premature trial on the merits, thereby precluding victims of securities fraud from pursuing otherwise valid claims of financial wrongdoing”); Klonoff, *supra* note 17 (manuscript at 27–28) (noting that the heightened evidentiary standard imposed by *Szabo* and *Hydrogen Peroxide* necessitate prolonged discovery, delaying the class certification ruling in contravention of the sequencing set forth in Rule 23, and ultimately “usurp[ing] the jury’s role to weigh and adjudicate conflicting evidence”); Olson, *supra* note 49, at 939 (arguing that merits disputes at the class certification have a significant impact on the course of the litigation because it makes “class certification a more onerous and less efficient process for litigants and the court; with voluminous briefing, competing expert reports (often from multiple experts), and even extensive evidentiary hearings; the certification decision is sometimes taking the form and complexity of a mini-trial”).

¹⁷⁰ Kaufman & Wunderlich, *supra* note 169, at 340.

¹⁷¹ *Id.* at 344–35.

¹⁷² See *id.* at 354–60; see also *Behrend v. Comcast Corp.*, 655 F.3d 182, 199–200 (3d Cir. 2011) (noting that such a reading “runs dangerously close to stepping on the toes of the Seventh Amendment by preempting the jury’s factual findings with our own”); Klonoff, *supra* note 17 (manuscript at 29, 31).

Third, while addressing the credibility of an expert witness does implicate the merits of a class action suit, it does so in a more nuanced and subtle way. This difference was noted in *Hydrogen Peroxide*, where the court found that “[a] court’s determination that an expert’s opinion is persuasive . . . does not preclude a *different view at the merits stage* of the case.”¹⁷³ If the goal of a district court at the class certification stage is to determine whether an “impact is plausible in theory,” and is “susceptible to proof at trial through available evidence common to the class,” then the ultimate underlying question of whether the expert testimony is reliable enough to evidence the required Rule 23 considerations should be the real focus of a court’s evaluation of expert testimony.¹⁷⁴

Commentators have further muddled this issue by linking the *Daubert* test governing admissibility of expert testimony to the notion that a district court must resolve conflicting expert testimony that is admissible at the class certification stage.¹⁷⁵ In *Hydrogen Peroxide*, the Third Circuit did not by a mere utterance of the “rigorous analysis” standard mean to evoke such an extreme position.¹⁷⁶ Instead, the expert testimony presented to the court was “irreconcilable” because there was a question as to whether or not the plaintiffs’ expert’s methods were, in isolation, valid.¹⁷⁷ Thus, even if a court grants a motion for class certification where there is conflicting, yet admissible, expert testimony, it is feasible for the jury to render an alternative judgment on the merits in deciding whether or not the evidence itself proves the elements of a class action claim.¹⁷⁸

The Third Circuit reaffirmed this limited view of *Hydrogen Peroxide* by clarifying that a full-blown trial on the merits is not the necessary requirement that was established.¹⁷⁹ In *Behrend v. Comcast Corp.*, Judge Aldisert issued a majority opinion for the panel, consisting of Judge

¹⁷³ *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 324 (3d Cir. 2008) (emphasis added).

¹⁷⁴ *Id.* at 325.

¹⁷⁵ See, e.g., Sarah Rajski, Comment, *In Re Hydrogen Peroxide: Reinforcing Rigorous Analysis for Class Action Certification*, 34 SEATTLE U. L. REV. 577, 586 (2011) (arguing that a *Daubert* inquiry is subsumed in the resolution of a merits-based analysis under *Hydrogen Peroxide*); Slater, *supra* note 53, at 1276 (predicating the application of *Daubert* on the requirement after *Wal-Mart* that a plaintiff support certification with “significant proof”).

¹⁷⁶ See *In re Hydrogen Peroxide*, 552 F.3d at 320 (explaining the district court’s burden in exercising proper discretion when deciding whether to certify a class, includes resolv[ing] factual disputes by a preponderance of the evidence and mak[ing] findings that each Rule 23 requirement is met or is not met, having considered all relevant evidence and arguments presented by the parties”).

¹⁷⁷ *Id.* at 314.

¹⁷⁸ See *id.* at 324.

¹⁷⁹ See *Behrend v. Comcast Corp.*, 655 F.3d 182, 199–200 (3d Cir. 2011) (noting that such a reading “runs dangerously close to stepping on the toes of the Seventh Amendment by preempting the jury’s factual findings with our own”), *cert. granted*, 2012 WL 113090 (June 25, 2012).

Jordan and Judge Fisher.¹⁸⁰ Following the Third Circuit's decision in *Hydrogen Peroxide*, the defendant Comcast made a motion to reconsider the certification decision, focusing its objection on the predominance question under Rule 23(b)(3).¹⁸¹ The plaintiff class was based on an antitrust injury, asserting that a Philadelphia television company eliminated actual or potential competition by making swaps and acquisitions within the market.¹⁸² The district court had held that the "antitrust impact is capable of proof at trial through evidence that is common to the class."¹⁸³ While the parties did not appeal the *Daubert* question, Judge Jordan, in his partial concurrence and dissent, parted from the majority because he opined that class-wide proof of damages, predicated on expert testimony, "lack[ed] fit," and could not "constitute common evidence of damages."¹⁸⁴ The majority responded to Judge Jordan's critique by noting that a district court at class certification need only "evaluate expert models to determine whether the theory of proof is plausible."¹⁸⁵ This is consistent with the panel's narrow reading of *Hydrogen Peroxide*, finding that:

We allow *preliminary* merits inquiries when *necessary* for Rule 23 because of the potentially "decisive effect on litigation" of a certification decision, but those inquiries remain limited and non-binding on the merits at trial. Nothing in *Hydrogen Peroxide* requires plaintiffs to *prove* their case at the class certification stage; to the contrary, they must establish by a preponderance that their case is one that meets each requirement of Rule 23. To require more contravenes *Eisen* and runs dangerously close to stepping on the toes of the Seventh Amendment by preempting the jury's factual findings with our own.¹⁸⁶

The *Behrend* panel provides a coherent reading of *Hydrogen Peroxide* that avoids the issue of directly ruling on the merits at class certification. However, the *Behrend* decision may, in the long-term, be viewed merely as a failed Hail Mary pass, and time will tell whether this more limited view is adopted or rejected as being inconsistent with the broad mandate of *Hydrogen Peroxide*.¹⁸⁷ The Supreme Court granted certiorari in *Comcast v.*

¹⁸⁰ *Id.* at 185. The only similarity in the *Hydrogen Peroxide* and *Behrend* panels is Judge Fisher, who signed onto the *Behrend* opinion in its entirety. *See id.*; *In re Hydrogen Peroxide*, 522 F.3d at 307.

¹⁸¹ *Behrend*, 655 F.3d at 188.

¹⁸² *Id.*

¹⁸³ *Behrend v. Comcast Corp.*, 264 F.R.D. 150, 154 (E.D. Pa. 2010).

¹⁸⁴ *Behrend*, 655 F.3d at 215 (Jordan, J., concurring in part and dissenting in part).

¹⁸⁵ *Id.* at 204 n.13 (majority opinion).

¹⁸⁶ *Id.* at 199–200 (citations omitted).

¹⁸⁷ Dean Robert H. Klonoff has taken the position that the *Behrend* panel's interpretation of the rigorous analysis requirement is divergent from *Hydrogen Peroxide* and evidences that "not all judges have agreed with the Hydrogen Peroxide approach." Klonoff, *supra* note 17 (manuscript at 28–29). This Author concedes that reconciling *Hydrogen Peroxide* and *Behrend* requires a close parsing of words that is generally not adopted by the academy. *Id.* at 29. Nonetheless, there is language in

Behrend to determine “[w]hether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis.”¹⁸⁸ The narrow scope of the question focuses more on the evidentiary question at bar in *Zurn Pex*, rather than meaning of the “rigorous analysis” standard at issue from *Hydrogen Peroxide*. In granting the petition for certiorari, however, the Supreme Court may resolve this ongoing ambiguity regarding *Hydrogen Peroxide*, or at least provide dicta for the academy to ponder.

In sum, a full *Daubert* analysis in class certification stands on its own. It is itself consonant with the Supreme Court’s decision in *Wal-Mart*. This is both because the majority made clear that a district court must do more than certify a class based on mere reflex and because in dictum it found the lower court’s conclusion that *Daubert* does not apply to be dubious.¹⁸⁹ The point in applying *Daubert* is to ensure the plaintiff, by a preponderance of the evidence, has presented *reliable* evidence that satisfies each applicable Rule 23 requirement.¹⁹⁰

IV. CONCLUSION

While Justice Scalia’s majority opinion in *Wal-Mart* did not rule *nostra sponte* on the application of *Daubert* to expert testimony at class certification, his dictum was powerful and direct.¹⁹¹ It is also clear that after *Wal-Mart*, in order for expert evidence to be sufficient, it must “show that an ultimate trial can be accomplished based on common evidence” and a rigorous analysis of the Rule 23 requirements.¹⁹² Justice Scalia’s dictum, however, has proven insufficient to guide courts as to whether a “tailored” *Daubert* application is sufficient at class certification, or if a full *Daubert* inquiry must be applied by trial courts.¹⁹³ The lack of rigor applied by the *Zurn Pex* majority seems to ignore the duty a district court must *eventually* undertake if it permits the expert testimony at trial.¹⁹⁴ Worse, a loose application of *Daubert* at class certification runs the risk of never even being challenged at trial due to the high probability of settlement after class certification.¹⁹⁵ The Supreme Court granted a

Hydrogen Peroxide that is far from clear in guaranteeing that full scrutiny of the merits at class certification is required. See *supra* notes 173–79.

¹⁸⁸ Comcast Corp. v. Behrend, No. 11-864, 2012 WL 113090, at *1 (U.S. June 25, 2012).

¹⁸⁹ Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2552, 2554 (2011).

¹⁹⁰ 1 MCLAUGHLIN, *supra* note 15, § 3:14, at 460–61.

¹⁹¹ *Wal-Mart*, 131 S. Ct. at 2554.

¹⁹² Kane, *supra* note 17, at 1046.

¹⁹³ See *supra* Part II.B.

¹⁹⁴ See *supra* Part III.B.

¹⁹⁵ See Blair v. Equifax Check Servs., Inc., 181 F.3d 832, 835 (7th Cir. 1999) (noting that in certification the “stakes are large and the risk of a settlement or other disposition [may] not reflect the merits of the claim”); *In re Rhone-Poulenc Rorer*

petition for certiorari to resolve a narrow question directly on point with the issues discussed in this Comment.¹⁹⁶ The exact contours of *Daubert* were not necessarily squarely at play in the Third Circuit's *Behrend* case, and the pending petition for certiorari from the *Zurn Pex* litigation would have provided the clearest context for the Supreme Court to resolve this conflict.¹⁹⁷ At this point, however, *Behrend* is the best opportunity to unmask the underlying meaning of *Daubert* as applied to class certification. The Court should resolve this split by adopting the Seventh Circuit's approach in *American Honda* in its entirety. Simply put, expert testimony that fails *Daubert* is valueless because it is neither reliable nor relevant.

Inc., 51 F.3d 1293, 1299 (7th Cir. 1995) (noting that many defendants may be "forced by fear of the risk of bankruptcy to settle even if they have no legal liability").

¹⁹⁶ Comcast Corp. v. Behrend, No. 11-864, 2012 WL 113090 (U.S. June 25, 2012). As noted above, despite the primary issue in *Behrend* originally turning on the "rigorous analysis" requirement from *Hydrogen Peroxide*, it appears the Court is poised to resolve the *Daubert* question raised by *American Honda* and *Zurn Pex*.

¹⁹⁷ Petition for Writ of Certiorari at 11, *Zurn Pex, Inc. v. Cox*, No. 11-740 (U.S. Dec. 15, 2011).