

“WE DOUBT THAT IS SO”: EXPERT WITNESS CERTIFICATION AFTER *WAL-MART* AND *COMCAST*

By Steven Messer*

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INTRODUCTION

Over the last fifteen years, courts and rule makers have increasingly focused on the procedures surrounding the class certification hearing.¹ This increased focus has stemmed from a growing realization that the settlement pressures that come from certification of a nationwide class action are so strong that certification often effectively ends the litigation.² Because certification is so key to the outcome of the suit,³ certification hearings have begun to look more and more like mini-trials, sometimes requiring the submission of affidavits, competing expert testimony, and the introduction of documents.⁴

As this evolution has occurred, questions have naturally begun to arise about the extent to which the procedural rules governing normal trials apply to these so-called mini-trials. In 2013, the Supreme Court in *Comcast Corporation v. Behrend* granted certiorari over one such question: Must a court resolve objections to the admissibility of expert testimony at the certification hearing, when that evidence is used to show that Rule 23's requirements for certification are met?⁵

This procedure, commonly known as a *Daubert* ruling, requires the judge to examine whether proffered expert testimony is sufficiently reliable and probative as to be admissible, given a number of factors.⁶ The *Comcast* Court, however, did not actually decide whether courts must make *Daubert* rulings, because the Petitioners had failed to raise the issue below.⁷ It thus remains an open issue in class certification litigation. The issue is an important one because expert witness testimony is routinely used to show that class certification is proper.⁸

This Comment examines the *Daubert* issue through the lens of the Supreme Court's recent decisions in *Wal-Mart Stores, Inc. v. Dukes* and *Comcast*, and concludes that courts must now resolve *Daubert* objections at the class certification stage. Part I of this comment gives a brief history of the procedures surrounding class certification, discussing the Court's

1. See *infra* Part III.a.

2. See *infra* Part III.a.

3. See *infra* Part III.a.

4. See Steven F. Griffith, *Certification Hearings and Decisions*, in A PRACTITIONER'S GUIDE TO CLASS ACTIONS 89, 90-91 (Marcy Hogan Greer ed., 2010) (discussing the necessity and procedure of an evidentiary hearing in deciding class certification); WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS 12 (5th ed. 2013) (stating that while district courts have discretion as to whether to hold an evidentiary hearing in deciding class certification, most courts chose to hold such a hearing).

5. 133 S. Ct. 1426, 1431 n.4 (2013).

6. See *infra* Part II.a.

7. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1431 n.4 (2013).

8. Rubenstein, *supra* note 4, at 126-138.

seemingly permissive approach in *Eisen v. Carlisle & Jacquelin* and the clarification of its approach in *General Telephone Company v. Falcon*. Part II examines the requirements of *Daubert* expert witness certification and explains how pre-*Wal-Mart* and *Comcast* courts dealt with these requirements at class certification. Part III examines the Court’s decisions in *Wal-Mart* and *Comcast* and shows how these cases solidified a heightened level of scrutiny for class certification. Part IV argues that under *Wal-Mart* and *Comcast*, Courts must conclusively rule on *Daubert* at class certification.

I. *EISEN AND FALCON*: WHAT TO DO WITH OVERLAPPING MERITS ISSUES.

In order to certify a class action, a district court must find that both the elements of Rule 23(a)⁹ and all the requirements of one of the categories of class actions in Rule 23(b) are met.¹⁰ The court often determines whether these requirements have been met through a certification hearing where testimony and evidence are presented.¹¹ Before the Supreme Court’s decision in *Wal-Mart*, courts disagreed about the extent to which they were permitted to decide merits issues at these hearings when those issues overlapped with the requirements for certification under Rule 23.¹² This disagreement stemmed from seemingly conflicting language in two Supreme Court cases: *Eisen* and *Falcon*.¹³

In *Eisen*, the plaintiffs had filed a class action on behalf of odd-lot traders on the New York Stock Exchange, alleging that defendant brokerage firms had violated federal antitrust laws.¹⁴ Prior to certification, the plaintiffs requested that defendants be made to share the costs of notice.¹⁵ The district court conducted a hearing on the merits of plaintiffs’ antitrust claims, and after determining that the plaintiffs were likely to prevail on the merits of those claims, ordered that costs of notice be shifted

9. The 23(a) requirements are that:
(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; (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.

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

10. FED. R. CIV. P. 23(b).

11. Rubenstein, *supra* note 4, at 12-22.

12. *See infra* Part II.b.

13. *See infra* pp. 4-7.

14. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 160 (1974).

15. *Id.* at 166-167.

to the defendant.¹⁶

The Supreme Court reversed the district court's decision to shift costs, reasoning that the language of Rule 23 precluded the shifting of costs of notice.¹⁷ The Court also condemned the district court's decision to determine the plaintiff's likelihood of prevailing on the merits, stating:

We 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 In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.¹⁸

Citing this language, many courts after *Eisen* determined that they lacked the authority to decide merits issues that overlapped with the requirements for certification under Rule 23.¹⁹

This interpretation of *Eisen* was probably wrong.²⁰ In explaining why the lower court's merits determination was incorrect, the *Eisen* Court stated that "such a procedure contravenes the Rule by allowing a representative plaintiff to secure the benefits of a class action without first satisfying the requirements for it."²¹ In other words, what upset the Court was not that merits had been examined, but that the district court had used a determination that plaintiffs were likely to win, by way of a merits examination, to disregard the notice requirements of Rule 23.²²

The Supreme Court sought to clarify the confusion caused by *Eisen* when it decided *Falcon* eight years later. In *Falcon*, the district court had certified a 23(b)(3) class under Title VII where the class representative alleged race-based discrimination in *promotion*, but sought to represent a

16. *Id.* at 168.

17. *Id.* at 175-77.

18. *Id.* at 177-178.

19. See David S. Evans, *Class Certification, the Merits, and Expert Evidence*, 11 GEO. MASON L. REV. 1, 8 (2002) (examining lower courts use of this language to forbid merits inquiries).

20. As discussed in Part III.b., *infra*, the court in *Wal-Mart* explicitly rejected this interpretation of *Eisen*.

21. *Eisen*, 417 U.S. at 177-78.

22. See *id.* at 178 (describing the district court's approach as "directly contrary to the command of subdivision (c)(1) that the court determine whether a suit denominated a class action may be maintained as such as soon as practicable after the commencement of the action." (internal quotations omitted)). Further support for this interpretation is found from the court's remark that the district court's examination of the merits was unfair to defendants, not plaintiffs. *Id.* at 178-179.

class of employees who were discriminated against in *hiring*.²³ The district court had found that Rule 23(b)(3)'s requirement that common questions predominate over individual questions was met, because discrimination suits “are often by their very nature class suits, involving class-wide wrongs,” and “[c]ommon questions of law or fact are typically present.”²⁴

The Supreme Court rejected this approach, holding that courts may only certify a class if, “after a rigorous analysis,” they are convinced that the requirements of Rule 23 are actually met, not just presumably so.²⁵ The Court acknowledged that this might sometimes require a court to “probe behind the pleadings before coming to rest on the certification question,” because the class certification decision “generally involves considerations that are ‘enmeshed in the factual and legal issues comprising the plaintiff’s cause of action.’”²⁶ Thus for the *Falcon* Court, deciding merits issues when they overlap with certification requirements was not just permissible, it was *required*.

Despite this statement by *Falcon*, *Eisen*’s seemingly conflicting language produced uncertainty in the lower courts as to the proper scope of their inquiry.²⁷ The Seventh Circuit, for example, read *Falcon* to mean that courts must not only hear evidence from plaintiffs on overlapping issues, but must also weigh competing evidence on those issues from the defense.²⁸ The Second Circuit, on the other hand, held that while overlapping merits issues could be considered, competing defense evidence was not to be examined.²⁹ Citing to *Eisen*, the Second Circuit reasoned that courts were not permitted to “conduct a preliminary inquiry into the merits of a suit in order to determine whether [the case] may be maintained as a class action.”³⁰ As discussed in Part II.b., *infra*, this confusion has been a

23. *General Tel. Co. v. Falcon*, 457 U.S. 147, 153-154 (1982).

24. *Falcon*, 457 U.S. at 157 (quoting *E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 405 (1977)).

25. *Falcon*, 457 U.S. at 161.

26. *Falcon*, 457 U.S. at 160 (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978)).

27. Rubenstein, *supra* note 4, at 117-126; Evans, *supra* note 19, at 10.

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

29. *Caridad v. Metro-N. Commuter R.R.*, 191 F.3d 283, 291 (2d Cir. 1999), *overruled by In re IPO Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006).

30. *Caridad*, 191 F.3d at 291. The Second Circuit later backed off this approach, holding in *In re IPO Sec. Litig.* that a court must consider competing evidence. *In re IPO Sec. Litig.*, 471 F.3d at 27. Other courts, while acknowledging that consideration of merits issues was necessary, admonished against turning the class certification hearing into a mini-trial on the merits. See *Madison v. Chalmette Refining, LLC*, 637 F.3d 551, 555 (5th Cir. 2011) (noting that class certifications should not be “mini-trials” on the merits, while also acknowledging that overlapping merits issues must be considered); see also *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 581 (9th Cir. 2010), *rev’d* 131 S. Ct. 2541 (2011) (“[Rigorous analysis] does not mean that a district court must conduct a full-blown trial on

substantial contributor to the differing approaches of courts in dealing with *Daubert* objections at the class certification stage.

II. *DAUBERT*: ITS REQUIREMENTS AND HOW PRE-*WAL-MART* AND *COMCAST* COURTS DEALT WITH THOSE REQUIREMENTS.

In the context of a trial, the *Daubert* test requires judges to examine the reliability of expert testimony and to rule on its admissibility at the outset.³¹ Before the Court's decision in *Wal-Mart*, there was disagreement between the circuits on the scope of a judge's *Daubert* inquiry at the class certification stage.³² Some courts held that a full and conclusive *Daubert* analysis was required, while other courts were less exacting, requiring general scrutiny but not a conclusive ruling on admissibility.³³ These different approaches stemmed in part from disagreement about the scope of the court's class certification inquiry under *Eisen* and *Falcon*.³⁴

A. *The Daubert Test*

The *Daubert* test is an application of Federal Rule of Evidence ("FRE") 702, which governs expert testimony at trial. Witnesses are generally forbidden from testifying as to opinions, and non-expert witnesses may only offer opinions when they are tied to the witness's actual observations or helpful in understanding first-hand observations.³⁵ This restrictive approach reflects the pervasive philosophy of the common law that first-hand observations are the most reliable source of information.³⁶ Expert witness testimony, which allows the expert to testify in the form of an opinion despite a lack of personal observation,³⁷ thus

the merits prior to certification.").

31. See *infra* Part II.a.

32. See *infra* Part II.b.

33. See *infra* Part II.b.

34. See *infra* Part II.b.

35. See FED. R. EVID. 701(a)-(b) ("If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue.").

36. See FED. R. EVID. 701 advisory committee's note to 1972 Proposed Rules ("The rule retains the traditional objective of putting the trier of fact in possession of an accurate reproduction of the event."); *id.* ("[Testimony] rationally based on the witness's perception . . . is the familiar requirement of first-hand knowledge or observation."); *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592 (1993) (noting that first-hand knowledge was deemed to be the most reliable source of information under the common law).

37. See FED. R. EVID. 702 (stating the grounds on which an expert may testify);

represents a departure from the FRE’s general approach to opinion testimony.³⁸

Because expert testimony is a departure from usual notions of reliability, the Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* held that in order to be admissible, expert testimony must “have a reliable basis in the knowledge and experience of [the expert’s] discipline.”³⁹ In the context of testimony about scientific information, this meant that in order to be reliable, the expert’s testimony needed to be “ground[ed] in the methods and procedures of science” and derived from the scientific method.⁴⁰ The expert him or herself must have sufficient “knowledge, skill, experience, training, or education.”⁴¹

The Court also imposed what might initially seem like an unremarkable requirement: the expert evidence must be relevant, meaning that it “assist the trier of fact to understand the evidence or to determine a fact in issue.”⁴² A requirement that evidence be relevant seems unremarkable, because relevance is a prerequisite to the admission of any evidence under the FRE.⁴³ However, in the context of expert testimony, relevance means it is not enough for the expert to present scientific evidence and opine that such evidence is probative of a fact in issue.⁴⁴ Instead, it must be shown that the expert’s “reasoning or methodology properly can be applied to the facts in issue.”⁴⁵ Later courts elaborated that not only must the methodology of the expert be reliable, but the methodology’s application to the facts must also be reliable.⁴⁶

Daubert, 509 U.S. at 592 (“[A]n expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation.”).

38. *Daubert*, 509 U.S. at 591-592.

39. *Id.* at 592. *Daubert* itself dealt with *scientific* expert evidence, but the court later extended its holding to all expert testimony. See *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147 (1999).

40. *Daubert*, 509 U.S. at 590.

41. FED. R. EVID. 702.

42. *Daubert*, 509 U.S. at 591 (citing FED. R. EVID. 702).

43. FED. R. EVID. 402.

44. *Daubert*, 509 U.S. at 591 (“The study of the phases of the moon, for example, may provide valid scientific “knowledge” about whether a certain night was dark, and if darkness is a fact in issue, the knowledge will assist the trier of fact. However (absent creditable grounds supporting such a link), evidence that the moon was full on a certain night will not assist the trier of fact in determining whether an individual was unusually likely to have behaved irrationally on that night.”).

45. *Id.* at 593.

46. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 144 (1997). The test is flexible, giving judges latitude to decide which factors are relevant in determining the reliability of testimony in a particular case. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 150 (1999). Decisions to admit or exclude expert testimony are reviewed on an abuse of discretion standard. *Gen. Elec.*, 522 U.S. 136.

Daubert itself dealt with expert testimony linking ingestion of the drug Bendectin to birth defects. Applying the newly announced *Daubert* test on remand, the Ninth Circuit excluded expert testimony that purported to show a causal link between ingestion of Bendectin during pregnancy and eventual birth defects.⁴⁷ The experts in *Daubert* testified that Bendectin could cause birth defects, because statistics showed that women who ingested Bendectin had a higher incidence of birth defects.⁴⁸ The court held, however, that mere correlation was not sufficient to show but-for causation, and thus was not relevant.⁴⁹ In order to show causation, the experts needed to show that Bendectin more than doubled the incidence of birth defects in the general population or use statistical techniques to isolate other potential causes.⁵⁰ Therefore, even though the expert evidence showed Bendectin increased the incidence of birth defects, it was not probative of a fact in issue, and therefore not admissible.⁵¹

Under *Daubert*, the judge must determine at the outset whether the expert testimony is sufficiently reliable, before the jury hears the testimony.⁵² The test thus places the judge in a “gatekeeping” role.⁵³ This gatekeeping role is justified on the grounds that experts enjoy testimonial privileges including the ability to offer opinions not tied to first-hand knowledge.⁵⁴ Juries may also be unduly swayed by expert testimony, as they will view it as scientific, and thus infallible.⁵⁵ Because *Daubert* is about gatekeeping, many courts have held that it becomes less important in bench trials, since there is no jury to protect.⁵⁶ The Seventh Circuit in

47. *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1319 (9th Cir. 1995).

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592 (1993).

53. *Daubert*, 509 U.S. at 597.

54. *Daubert*, 509 U.S. at 592; *Kumho*, 526 U.S. at 147.

55. Cassandra H. Welch, Note, *Flexible Standards, Deferential Review: Daubert's Legacy of Confusion*, 29 HARV. J.L. PUB. POL'Y 1085, 1102 (2006); Robert J. Goodwin, *Fifty Years of Frye in Alabama: The Continuing Debate over Adopting the Test Established in Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 35 CUMB. L. REV. 231, 247 (2005). The *Daubert* gatekeeping role has been criticized on several grounds. Some argue that it requires federal judges to become “amateur scientists,” *Daubert*, 509 U.S. at 601 (Rehnquist, J., dissenting), and question whether judges are actually better at determining the reliability of technical evidence than juries; Frank R. Emmerich Jr., Note, *The Supreme Court Strengthens the Discretionary Powers of the District Courts in Admitting Expert Scientific Testimony: Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 3 WIDENER J. PUB. L. 1051, 1083 (1994).

56. See *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 613 (8th Cir. 2011) (“The main purpose of *Daubert* exclusion is to protect juries from being swayed by dubious scientific testimony. That interest is not implicated . . . where the judge is the decision

Metavante Corp. v. Emigrant Sav. Bank, for example, noted that “the usual concerns of the rule—keeping unreliable expert testimony from the jury—are not present in such a setting, and our review must take this factor into consideration.”⁵⁷

B. Daubert at the Certification Stage in the Pre-Wal-Mart Era

Given the weakening of *Daubert* when no jury is present, and given their interpretation of *Eisen* as disallowing consideration of the merits at the class certification stage, some pre-*Wal-Mart* courts decided that they need not rule conclusively on *Daubert* objections when deciding whether to certify a class, or concluded they need only conduct a limited *Daubert* inquiry.⁵⁸ Other courts, however, held that *Daubert* objections did need to be decided, and some courts went even further, holding that competing defense expert testimony must be considered.⁵⁹

The group that subscribed to a limited *Daubert* inquiry believed that while a court generally must verify the quality of expert testimony, it need not, as a general rule, definitively decide *Daubert* objections.⁶⁰ The Ninth Circuit, for example, took the approach that “as a general rule, district courts are not required to hold a *Daubert* hearing before ruling on the admissibility of scientific evidence.”⁶¹ While a court may have needed to examine certain elements of an expert’s testimony, particularly the

maker.”); *Whitehouse Hotel Ltd. P’ship v. Comm’r of Internal Revenue*, 615 F.3d 321, 330 (5th Cir. 2010) (“[T]he importance of the trial court’s gatekeeper role is significantly diminished in bench trials, as in this instance, because, there being no jury, there is no risk of tainting the trial by exposing a jury to unreliable evidence”); *Attorney Gen. of Oklahoma v. Tyson Foods, Inc.*, 565 F.3d 769, 779 (10th Cir. 2009) (“[T]he usual concerns regarding unreliable expert testimony reaching a jury obviously do not arise when a district court is conducting a bench trial.”); *United States v. Brown*, 415 F.3d 1257, 1269 (11th Cir. 2005) (“There is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself.”) (internal quotations omitted).

57. 619 F.3d 748, 760 (7th Cir. 2010). Commentators also question whether juries actually do give undue weight to expert testimony. Neil Vidmar & Shari Seidman Diamond, *Juries and Expert Evidence*, 66 BROOK. L. REV. 1121 (2001).

58. See *infra* pp. 9-10

59. See *infra* p. 11. Though differences clearly existed between circuits on how *Daubert* should be handled at the class certification stage, it might be too harsh to call these differences a “split.” The circuits that did not require conclusive rulings on *Daubert* still examined the methodology of the expert, and in some cases compared it to competing expert testimony from the defense. See *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 605-08 (9th Cir. 2010) (examining closely the plaintiff expert’s methodology); *Blades v. Monsanto Co.*, 400 F.3d 562, 569-71 (8th Cir. 2005) (declining to rule definitively on *Daubert* but also considering and weighing competing expert testimony from defense).

60. Rubenstein, *supra* note 4, §7:24.

61. *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 573 (9th Cir. 2010) (internal quotations omitted).

methodology, a court was generally not required to decide whether an expert's testimony was sufficiently probative.⁶² According to the Ninth Circuit, the probative value of expert testimony was an issue for the ultimate fact finder, and ruling on such unnecessarily involved the court in merits determinations in violation of *Eisen*.⁶³

The Eighth Circuit similarly believed that a full *Daubert* inquiry was not necessary because certification "disputes may be resolved only insofar as resolution is necessary to determine the nature of the evidence that would be sufficient."⁶⁴ In *Blades v. Monsanto Co.*, the Eight Circuit upheld a district court's decision not to definitively rule on a *Daubert* objection to expert testimony.⁶⁵ Although the district court did examine the methodology of the expert, the court declined to conclusively rule on such evidence, reasoning that it was "appropriate for [the court] . . . to consider all evidence at this stage of the proceedings."⁶⁶ This language in *Monsanto* could be taken as an acknowledgement of the reduced importance of the gatekeeper role of a court at the class certification hearing given that the judge, and not the jury, decides class certification motions. In other words, the court decided it was proper to hear "all evidence" because at the class certification hearing, there was no jury to protect. This language could also be taken to mean that a definitive ruling on evidence exclusion was improper at class certification because class certification is preliminary, and courts should not be making definitive rules if they will overlap with the merits.⁶⁷

In contrast to the Ninth and Eighth Circuits, the Seventh Circuit held in *American Honda Motor Company v. Allen* that when expert testimony is critical to class certification, a district court is required to conduct a full *Daubert* analysis and conclusively rule on admissibility.⁶⁸ The district court in *American Honda* had done a partial *Daubert* analysis, examining the witness's methodology closely, but refusing to exclude the expert testimony "at this early stage of the proceedings," despite doubts about its reliability.⁶⁹ Thus, like the court in *Monsanto*, the district court viewed the certification stage as preliminary, or perhaps possessed an *Eisen*-like

62. *Id.* at 602-03

63. *Id.*

64. *Blades*, 400 F.3d at 567. The Second Circuit was also in the limited *Daubert* group until the overruling of *Caridad v. Metro-N. Commuter R.R.*, 191 F.3d 283, 291 (2d Cir. 1999) by *In re IPO Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006).

65. *Blades*, 400 F.3d at 567.

66. *Id.* at 569.

67. As discussed in Part III.b., *infra*, the Eight Circuit confirmed post-*Wal-Mart* that both these considerations were in play.

68. *Am. Honda Motor Co., Inc. v. Allen*, 600 F.3d 813, 815-16 (7th Cir. 2010)

69. *Allen v. Am. Honda Motor Co., Inc.*, 264 F.R.D. 412, 428 (N.D. Ill. 2009)

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hesitancy towards merits determinations.⁷⁰

The Seventh Circuit reversed, saying that “a district court must make the necessary factual and legal inquiries and decide all relevant contested issues prior to certification” and may not take a “provisional approach.”⁷¹ Thus, unlike the Eighth and Ninth Circuits, the Seventh Circuit did not view the combination of *Eisen* and *Falcon* as mandating a tentative approach to overlapping merits issues. Instead, a “rigorous analysis” meant that courts must actually decide overlapping merits issues.⁷² Since these overlapping issues were to be actually decided,⁷³ the court should use its normal tools of procedural protections, including *Daubert*, to ensure that only reliable evidence was used.⁷⁴

III. *WAL-MART* AND *COMCAST*: AFFIRMING *FALCON* AND ITS RIGOROUS ANALYSIS

In the late 1990s and early 2000s, lower courts and rule makers began to address concerns about the ability of the structural pressures of class certification to compel settlement.⁷⁵ Then in 2011 and 2013, respectively, the Court decided *Wal-Mart* and *Comcast*, which came firmly down on the side of *Falcon*, explicitly stating that *Eisen* had been misinterpreted.⁷⁶ The combination of these developments has greatly changed the landscape of

70. See *Am. Honda Motor Co., Inc.*, 600 F.3d at 817 (“The district court’s actions here were more akin to the provisional approach that we rejected in *Szabo*.”) (internal quotation omitted).

71. *Am. Honda Motor Co., Inc.*, 600 F.3d at 817.

72. See *id.* at 817 (“A district judge may not duck hard questions by observing that each side has some support Tough questions must be faced and squarely decided.”) (internal quotations omitted).

73. The fact that the court decided an overlapping merits issue does not mean a later fact finder is bound by the court’s determination of that issue at the certification stage. In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 318 (2009).

74. See *Am. Honda Motor Co., Inc.*, 600 F.3d at 817 (“Ezra’s testimony is necessary to show that Plaintiffs’ claims are capable of resolution on a class-wide basis and that the common defect in the motorcycle predominates over the class members’ individual issues. Therefore, by failing to clearly resolve the issue of its admissibility before certifying the class, the district court erred.”). The Third Circuit was a notable exception to this generalization in that it dictated a searching review at class certification, but did not require a full *Daubert* analysis. See *Behrend v. Comcast Corp.*, 655 F.3d 182 (3d Cir. 2011) (applying the Third Circuit standard that the certification requirements be proven by a preponderance of the evidence, but not requiring a final ruling on a *Daubert* objection). It might be the case, however, that *Behrend* was incorrectly decided under the Third Circuit’s decision in *Hydrogen Peroxide*. See *Behrend*, 655 F.3d at 214-15 (Jordan, J., dissenting) (“[The Expert’s] testimony is irrelevant and should be inadmissible at trial, pursuant to . . . *Daubert* Thus, it cannot constitute common evidence of damages.”)

75. See *infra* Part III.a.

76. See *infra* Part III.b.

class certification.

A. *Pre-Wal-Mart and Comcast Developments*

In the decade preceding the Court's decisions in *Wal-Mart* and *Comcast*, courts and rule makers increased the procedural protections surrounding class certification. These increases stemmed in part from concerns about the ability of certification to force defendants to settle.⁷⁷ As noted by the Third Circuit in *In re Hydrogen Peroxide Antitrust Litigation*, class certification was generally the whole ball game in class actions,⁷⁸ because certification "may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability."⁷⁹

These concerns led the Federal Rules Committee to amend Rule 23(f) in 1998 to allow for permissive interlocutory appeal of class certification decisions. Prior to this amendment, a party seeking to appeal a certification decision could generally only do so after going to trial and losing.⁸⁰ Given the danger and cost of going to trial, this rarely happened.⁸¹ Thus the district court's certification decision, though truly pivotal, was effectively unappealable.⁸² Interlocutory appeal of certification decisions was designed to remedy this harsh outcome.⁸³

The rules committee also amended Rule 23(c)(1)(A) in 2003, which dealt with the timing of the certification decision. The language of the rule was changed from requiring certification "as soon as practicable" to "at an early practicable time."⁸⁴ This change was made, according to the rules

77. See *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 310 (3d Cir. 2008) (expressing concerns about the settlement pressures caused by certification); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 ("Judge Friendly, who was not given to hyperbole, called settlements induced by a small probability of an immense judgment in a class action 'blackmail settlements.'" (quoting HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 120 (1973))).

78. See *In re Hydrogen Peroxide*, 552 F.3d at 310 ("[D]enying or granting class certification is often the defining moment in class actions.") The *Hydrogen Peroxide* court also acknowledged, albeit with less discussion, that class certification was the whole ball game for plaintiffs, saying denial generally sounded the "death knell" for plaintiffs. *Id.* Though not stated, the court in *Hydrogen Peroxide* was likely referring to so called "negative value suits," where the cost of bringing an individual claim outweighs any possible recovery from that claim.

79. *In re Hydrogen Peroxide*, 552 F.3d at 310 (quoting FED. R. CIV. P. 23 advisory committee's note, 1998 Amendments).

80. Rubenstein, *supra* note 4, §7:41.

81. *Id.*

82. *Id.*

83. *Id.*

84. FED. R. CIV. P. 23(c) advisory committee's note, 2003 Amendments.

committee, in order to allow for more time to gather information relevant to the certification decision through discovery.⁸⁵ In the same package of amendments, Rule 23(c)(1)(C) was amended to remove language asserting that class certification was conditional.⁸⁶ Looked at together, these amendments give rise to a clear implication: certification is not a tentative preliminary ruling based on limited facts—it is a critical outcome determinative decision that requires close scrutiny.⁸⁷

Around the time of these amendments, courts began to clarify or raise the standard for certification in acknowledgement of the concerns about settlement pressure, and perhaps belatedly in recognition of the fallacy of a conflict between *Eisen* and *Falcon*. In 2006, the Second Circuit, which had been one of the more merits-adverse circuits, reversed course in *IPO Securities Litigation*, holding that it was no longer enough for a court to certify a class on “some showing” that Rule 23’s requirements are met.⁸⁸ Instead, the court must make a “ruling” or “determination” that the requirements of Rule 23 are met by a “preponderance of the evidence.”⁸⁹ In 2008, the Third Circuit similarly held in *Hydrogen Peroxide* that factual determinations necessary for determination of Rule 23, even those that overlapped with the merits, must be shown by a “preponderance of the evidence.”⁹⁰ This meant that a court “must find that the evidence more likely than not establishes each fact necessary to meet the requirements of Rule 23.”⁹¹

85. *See id.* (“Time may be needed to gather information necessary to make the certification decision.”)

86. *Id.* Prior to this amendment, courts had been certifying classes on the condition that Rule 23’s provisions be met at some point before trial. *In re Hydrogen Peroxide*, 552 F.3d at 319-20. This amendment eliminated this possibility, requiring courts to ensure the requirements of Rule 23 were met before certification. FED. R. CIV. P. 23(c) advisory committee’s note, 2003 Amendments (“A court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met.”).

87. *See In re IPO Sec. Litig.*, 471 F.3d at 39 (2d Cir. 2006) (stating that that the 2003 amendments “arguably combine to permit a more extensive inquiry into whether Rule 23 requirements are met than was previously appropriate”); *In re Hydrogen Peroxide*, 552 F.3d at 320 (“While these amendments do not alter the substantive standards for class certification, they guide the trial court in its proper task—to consider carefully all relevant evidence and make a definitive determination that the requirements of Rule 23 have been met before certifying a class.”).

88. *In re IPO Sec. Litig.*, 471 F.3d at 40.

89. *Id.* at 37, 40. Although *IPO* mentioned the preponderance of the evidence standard, it was not clear that the court had adopted this standard until the court in *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.* confirmed that it had. 546 F.3d 196, 202 (2d Cir. 2008). The Second Circuit analogized to a ruling on jurisdiction, which would require the court to make rulings on factual and legal issues. *In re IPO Sec. Litig.*, 471 F.3d at 40.

90. *Hydrogen Peroxide*, 552 F.3d at 320.

91. *Id.*

B. *Wal-Mart*

In *Wal-Mart*, the Court considered the certification of a nationwide 23(b)(2) injunctive class composed of female Wal-Mart employees that alleged sex-based discrimination in pay and promotion in violation of Title VII.⁹² Plaintiffs alleged that while Wal-Mart's official employment policies forbid discrimination, its decentralized system of decisionmaking, where local managers made decisions on promotion and pay, had the effect of discriminating against women.⁹³ Plaintiffs also alleged that Wal-Mart had a strong corporate culture that permitted bias against women and that this culture infected the decisions of local managers.⁹⁴

In order to prove their allegations, plaintiffs presented expert testimony from a sociology professor.⁹⁵ The expert used a social framework analysis to show that Wal-Mart had a strong corporate culture that made it vulnerable to gender bias.⁹⁶ The defendants had disputed in the district court whether the expert's testimony was admissible under *Daubert* standards, but the district court had declined to rule conclusively on this issue, thinking such a ruling unnecessary at the class certification stage.⁹⁷

The Supreme Court reversed the lower court's certification of the class, holding that the requirement of commonality under 23(a) had not been met.⁹⁸ The Court noted that there was significant overlap in this case between 23(a) commonality and Title VII's pattern or practice discrimination.⁹⁹ The fact that the court would thus have to decide a merits issue in order to determine a certification issue gave the Court no pause. Citing *Falcon*, the Court asserted that a court must engage in a "rigorous analysis" when deciding if Rule 23's requirements are met.¹⁰⁰ This is so even if merits issues overlap.¹⁰¹ Such overlap "cannot be helped."¹⁰² In a footnote, the Court expressly rejected the idea that *Eisen* forbid merits inquiries, saying that *Eisen* merely rejected looking at the merits in order to circumvent Rule 23's notice requirements.¹⁰³ The Court did not set forth a standard of proof for determining if Rule 23's requirements were met, such

92. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2547 (2011).

93. *Id.* at 2548.

94. *Id.*

95. *Id.* at 2553; *Faculty Profile of William Bielby*, UNIVERSITY OF ILLINOIS AT CHICAGO, <http://soc.uic.edu/sociology/people/faculty/wbielby> (last visited Apr. 15, 2014).

96. *Wal-Mart*, 131 S. Ct. at 2553.

97. *Id.*

98. *Id.* at 2556-57.

99. *Id.* at 2552.

100. *Id.* at 2551.

101. *Id.*

102. *Id.*

103. *Id.* at 2552 n.6.

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as the “preponderance of the evidence” proposed by the Second and Third Circuits. The Court did note, however, that Rule 23’s requirements must be met “*in fact*,”¹⁰⁴ and that plaintiffs “must affirmatively demonstrate [their] compliance”¹⁰⁵ with “significant proof.”¹⁰⁶

Regarding the lower court’s assertion that the *Daubert* inquiry was not required at the certification stage, the Court said in dictum, “[w]e doubt that is so,” but did not actually decide the issue.¹⁰⁷ The Court then went on to examine closely the probative value of the expert’s testimony, ultimately finding that the testimony failed to prove a practice or procedure of discrimination for purposes of Title VII and for commonality under Rule 23(a).¹⁰⁸ The problem for the Court was that the expert’s theory asserted that corporate culture caused discrimination through stereotyped thinking, but the expert could not determine what percentage of pay and promotion decisions were actually caused by such thinking.¹⁰⁹ The testimony thus was not probative of a fact at issue.¹¹⁰

C. Comcast

In *Comcast*, decided two years after *Wal-Mart*, the district court had certified a 23(b)(3) consumer class action against Comcast, a cable television provider.¹¹¹ Plaintiffs alleged that Comcast had violated federal antitrust laws by attempting to monopolize the Philadelphia television market.¹¹² In order to meet their burden under 23(b)(3) to establish that common questions predominated over individual ones, the plaintiffs sought to show that damages were capable of common proof through the expert testimony of an economist.¹¹³ The defendants had challenged the

104. *Id.* at 2551 (emphasis in original).

105. *Id.*

106. *Id.* at 2553 (quoting *General Tel. Co. v. Falcon*, 457 U.S. 147, 159 (1982)). The court also cited *Falcon* for the proposition that actual, not presumed, compliance with Rule 23 is required. *Wal-Mart*, 131 S. Ct. at 2551 (citing *Falcon*, 457 U.S. at 161).

107. *Wal-Mart*, 131 S. Ct. at 2554.

108. *Id.*

109. *Id.* at 2254.

110. *Wal-Mart*, 131 S. Ct. at 2254 (stating that the expert testimony “d[id] nothing to advance respondents’ case.”).

111. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1429-30 (2013).

112. *Comcast*, 133 S. Ct. at 1430.

113. *Id.* As the dissent in *Comcast* points out, it is highly questionable that the plaintiff actually needed to show commonality of damages. *See id.* at 1437 (Ginsberg, J., & Breyer, J., dissenting) (“Recognition that individual damages calculations do not preclude class certification under Rule 23(b)(3) is well nigh universal.”). The Court noted, however, that respondent plaintiffs had not challenged that assertion at the certiorari stage. *See id.* at 1430 (“The District Court held, and it is uncontested here, that to meet the predominance requirement respondents had to show . . . that the damages resulting from [the] injury were

methodology of this expert, both directly and through competing expert testimony. The Third Circuit, however, citing to *Eisen*, ruled that such challenges were “attacks on the merits of the methodology that have no place in the class certification inquiry.”¹¹⁴

The Supreme Court granted certiorari on the issue of whether a court must rule on *Daubert* objections.¹¹⁵ The Court declined to decide the *Daubert* issue, however, because defendants had not properly raised it below.¹¹⁶ Nonetheless, as in *Wal-Mart*, the Court decided it had the duty to scrutinize the expert’s testimony, because the failure to object to *Daubert* admissibility does not preclude examination of whether Rule 23’s requirements were met by that testimony.¹¹⁷

In reversing, the Court held that the Third Circuit’s treatment of the defense’s attacks on the methodology of the expert directly contradicted the Court’s statement in *Wal-Mart* that courts must conduct a rigorous analysis, even if it entailed overlapping merits issues.¹¹⁸ The Court rejected the Third Circuit’s assertion that it need not determine whether the methodology of the expert was a “just and reasonable inference or speculative,” reasoning that under such a rule, “any method of measurement is acceptable so long as it can be applied class-wide, no matter how arbitrary the measurements may be.”¹¹⁹ In other words, just because an expert’s model says it shows class-wide damages, does not mean Rule 23 has been satisfied. Instead, the model must actually show class-wide damages based on a reliable methodology.¹²⁰

measurable ‘on a class-wide basis’ through use of a ‘common methodology.’” (quoting *Behrend v. Comcast Corp.*, 264 F.R.D. 150, 154 (E.D. Pa. 2010)).

114. *Behrend v. Comcast Corp.*, 655 F.3d 182, 207 (3d Cir. 2011) *rev’d*, 133 S. Ct. 1426 (2013). The Third Circuit reasoned that defendants’ challenges were merits inquiries because the challenges would only change the amount of damages, not the district court’s holding that damages were capable of proof on a common basis. *Behrend*, 655 F.3d at 207.

115. *See Comcast*, 133 S. Ct. at 1431 n.4 (“Whether 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.”).

116. *Id.*

117. *Id.* at 1432 n.4 (“Such a forfeit would make it impossible for petitioners to argue that Dr. McClave’s testimony was not ‘admissible evidence’ under the Rules; but it does not make it impossible for them to argue that the evidence failed to show that the case is susceptible to awarding damages on a class-wide basis.”) (internal quotations omitted).

118. *Id.* at 1432-33.

119. *Id.* at 1433 (quoting *Behrend*, 655 F.3d at 206).

120. *See id.* (“[I]t is clear that, under the proper standard for evaluating certification, respondents’ model falls far short of establishing that damages are capable of measurement on a classwide basis. Without presenting another methodology, respondents cannot show Rule 23(b)(3) predominance”). The Court’s reasoning seems to reflect concerns by other commentators, that uncritical acceptance of expert reports at the certification stage “han[ds]

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The Court then went on to reject the probative value of the expert's report. The expert had used a statistical regression model to show what prices would have been but-for Comcast's anticompetitive behavior.¹²¹ The difference between this model's calculations and actual prices was purported to be the damages from the anticompetitive behavior.¹²² The problem with this model, according to the Court, was that the plaintiffs had originally alleged four theories of antitrust impact from which damages could flow, but the court below rejected all but one.¹²³ The expert's model failed to isolate damages from the one remaining theory.¹²⁴ Thus, it could not be shown that the damages alleged were actually from the one remaining theory, and not another rejected theory.¹²⁵ Therefore, because the expert's model failed to show that damages were capable of proof on a class-wide basis, the class was improperly certified.¹²⁶

D. *How Daubert has been Handled by Courts Post-Wal-Mart and Comcast*

After *Wal-Mart* and *Comcast*, courts continued to diverge on the issue of *Daubert* at class certification. The Eighth Circuit in *In re Zurn Pex Plumbing Products Liability Litigation* affirmed its pre-*Wal-Mart* stance that a full and conclusive *Daubert* ruling was not necessary at the class certification stage.¹²⁷ It reasoned that certification is inherently tentative and that the judge's *Daubert* gatekeeper role is not as important at class certification where there is no jury.¹²⁸ The Seventh Circuit, however, in *Messner v. Northshore University Health System* concluded that the district court must make a conclusive ruling on any challenges to an expert's testimony.¹²⁹

off to experts” the “decision as to whether the elements are susceptible to common proof.” Kermit Roosevelt III, *Defeating Class Certification in Securities Fraud Actions*, 22 REV. LITIG. 405, 425 (2003). This quote was used by the *Comcast* petitioners in their brief to the court. Brief for Petitioners at 41, *Comcast*, 133 S. Ct. 1426.

121. *Comcast*, 133 S. Ct. at 1434.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 1434, citing *Behrend v. Comcast Corp.*, 655 F.3d 182, 216 (3d Cir. 2011) (Jordan, J. dissenting).

126. *Id.* at 1433.

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

128. *Id.* at 613.

129. *Messner v. Northshore Univ. Health Sys.*, 669 F.3d 802, 812 (7th Cir. 2012).

IV. THE IMPACT OF *WAL-MART* AND *COMCAST*

Although courts have continued to diverge somewhat on the issue of *Daubert* at class certification, the Court's decisions in *Wal-Mart* and *Comcast* probably settle the issue in favor of those circuits requiring a full and conclusive *Daubert* ruling. These decisions, in conjunction with developments before those decisions were handed down, have undermined many of the arguments advanced against a conclusive *Daubert* ruling and leave little room for the limited *Daubert* analysis that some courts have engaged in.

A. *The Falcon Supremacy*

After *Wal-Mart* and *Comcast*, there is no doubt that courts must consider merits issues that overlap with the requirements for certification. Citing to *Falcon*, *Wal-Mart* explicitly rejected the interpretation of *Eisen* that said courts cannot look at merits issues, saying that *Eisen* was about not circumventing Rule 23's requirements via a merits examination.¹³⁰ *Comcast* affirmed this understanding.¹³¹ *Wal-Mart* also did not suggest that courts must walk on eggshells when considering overlapping merits issues. Instead, it remarked that such overlap "[could not] be helped" and that a court's consideration of certification requirements must nonetheless be "rigorous."¹³²

This interpretation of *Eisen* eliminates one of the major objections to *Daubert* at class certification. As mentioned in Part III.b., *supra*, confusion about *Eisen*'s meaning was a major source of disagreement about whether *Daubert* objections had to be decided. Courts that rejected the idea that a conclusive and full *Daubert* analysis must be made often cited to *Eisen*'s prohibition against merits inquiries.¹³³ These courts reasoned that to rule on *Daubert* was to rule on merits issues like the probative value of the expert's testimony.¹³⁴ With the mistaken *Eisen* interpretation out of the way, this concern should no longer apply.

Comcast's treatment of expert testimony demonstrates this result. In

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

131. *Comcast*, 133 S. Ct. at 1432-33 ("By refusing to entertain arguments against respondents' damages model that bore on the propriety of class certification, simply because those arguments would also be pertinent to the merits determination, the Court of Appeals ran afoul of our precedents requiring precisely that inquiry.>").

132. *Wal-Mart*, 131 S. Ct. at 2551.

133. See *supra* Part III.b (discussing the overlap between Rule 23 commonality and the merits of a case for certifying plaintiff classes).

134. See *supra* Part II.b (discussing the need to rule on *Daubert* objections at the certification stage).

Comcast, the Court closely scrutinized the methodology of the expert’s statistical model in a *Daubert*-like manner, asking not only whether it purported to prove damages on a common basis, but also whether it actually did so through good inferences and assumptions.¹³⁵ The Third Circuit had considered such an inquiry an improper consideration of the merits.¹³⁶ The Court explicitly rejected this argument, saying courts were required to test the methodology of experts, even without a *Daubert* objection to such testimony.¹³⁷

The Court’s recent opinion in *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds* does not affect this reasoning. In *Amgen*, the Court upheld the certification of a 23(b)(3) securities class action where plaintiffs sought to meet 23(b)(3)’s requirement of predominance through a fraud-on-market presumption, but had not yet shown materiality.¹³⁸ The Court held, however, that materiality did not need to be proven at the class certification stage because determination of materiality was capable of resolution on a class-wide basis.¹³⁹ The Court also noted that merits issues may be “considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied.”¹⁴⁰ This language does not reverse *Wal-Mart*’s rejection of the erroneous *Eisen* interpretation, and instead clarifies that 23(b)(3) predominance can be met if an element of the cause of action will either succeed or fail on a class-wide basis, even if that key issue is a prerequisite to making other issues provable on a class-wide basis.¹⁴¹

B. Tentative No More

Pre-*Wal-Mart* developments, as well as *Wal-Mart* itself and *Comcast*, have significantly reduced the extent to which a class certification is considered tentative, and thus have eliminated another major objection to

135. *Supra* Part III.c.

136. *Supra* Part III.c.

137. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1431 n.4. (2013).

138. *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1190-91 (2013). Materiality is a prerequisite to the fraud-on-the-market presumption, but it is not a prerequisite to class certification. *Id.* at 1202.

139. *Id.*

140. *Id.* at 1195 (emphasis added).

141. *Id.* at 1196 (“[T]he failure of proof on the element of materiality would end the case for one and for all; no claim would remain in which individual reliance issues could potentially predominate.”) See Oral Argument at 15:15-25, *Haliburton Co. v. Erica P. John Fund, Inc.*, ___ S. Ct. ___ (2014) (Kagan, J.) (“[Amgen] said . . . when you rule on a question like materiality, which leaves all members of the class in the exact same position, either with a viable claim or with no claim, and it doesn’t split the class in the way that the efficient markets theory do, that’s the difference.”)

full *Daubert* at certification. The idea that class certification is tentative, and thus that a conclusive ruling on *Daubert* is inappropriate, comes from a footnote in the Court's opinion in *Coopers & Lybrand v. Livesay*, where the Court said that certification is "inherently tentative."¹⁴² The issue in *Coopers* was whether a class certification decision was a "final decision," and thus appealable as of right.¹⁴³ In holding it was not, the court cited to the version of Rule 23(c)(1) in existence at the time, which said that certification orders could be modified prior to trial.¹⁴⁴

Much has changed since *Coopers*. As mentioned in Part III.a., *supra*, serious concerns about the settlement pressures that flow from a certified class led rule makers to enact changes to Rule 23. First, interlocutory appeal, whose unavailability made the Court's holding in *Coopers* necessary, is now available via Rule 23(f). Second, the rule cited to by *Coopers* for the proposition that certification is tentative, Rule 23(c)(1), has been changed such that conditional certification is no longer available.¹⁴⁵ Third, Rule 23(c)(1)(A) was amended to allow for more flexibility in the timing of the class certification, with the idea being that certification was an important decision that needed to be made with sufficient information.¹⁴⁶

Wal-Mart and *Comcast* also undermine notions of tentativeness. Both these cases engage in lengthy discussion about the scope of a court's review in certifying a class and scrutinize expert witness testimony used in certification.¹⁴⁷ The word "tentative," however, appears nowhere in either case.¹⁴⁸ The Court also uses strong language in those cases inconsistent with a tentative approach. To say that something is tentative is to say it is "uncertain" or "not fully worked out."¹⁴⁹ This understanding is hard to reconcile with *Wal-Mart*'s statement that plaintiffs must "affirmatively demonstrate . . . compliance with the Rule," showing they are "*in fact*" satisfied.¹⁵⁰

142. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.11 (1978).

143. *Id.* at 464-65.

144. *Id.* at 465.

145. *See supra* Part III.a. Although the *Coopers* court did not cite this portion of 23(c)(1), the elimination of conditional certification nonetheless weakens this provision generally as support for the tentative nature of certification by requiring that certification, and thus the provisions of Rule 23, be conclusively decided.

146. *See supra* Part III.a.

147. *See supra* Part Part III.b-c.

148. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

149. *Tentative Definition*, Merriam-Webster.com, <http://www.merriam-webster.com/dictionary/tentative> (last visited Apr. 15, 2014).

150. *Wal-Mart*, 131 S. Ct. at 2551 (emphasis in original). The court also quoted *Falcon*, writing that "[a]ctual, not presumed, conformance with Rule 23(a) remains . . . indispensable." *Id.* (citing *General Tel. Co. v. Falcon*, 457 U.S. 147, 160 (1982)).

The non-tentative nature of certification also undermines the argument that *Daubert* at certification is improper, because merits discovery has not yet been completed at certification. The court in *In re Zurn* put forward this argument, reasoning that certification happens at a time when full merits discovery has not been completed, but *Daubert* analysis is often incomplete without the information that full merits discovery provides.¹⁵¹ A *Daubert* ruling would thus be premature.¹⁵²

As noted above, however, Rule 23(c)(1)(A) was expressly amended so as to allow more information gathering before the certification hearing.¹⁵³ The committee notes also point out that it is very difficult to distinguish between merits and certification discovery in the first place.¹⁵⁴ Thus, in light of these amendments and the non-tentative nature of certification generally, the solution in *In re Zurn* should not have been to relax the *Daubert* analysis, but to fulfill the purpose of the 23(c)(1)(A) amendment by allowing for full merits discovery.

The fact that certification is less tentative also strengthens the case for full *Daubert* inquiry by way of analogy to summary judgment. When considering a summary judgment motion, which finally decides issues in the case, a court may only consider admissible evidence.¹⁵⁵ Parties arguing for full *Daubert* inquiry have thus argued that because the certification decision effectually decides issues, that decision must also be made on only admissible evidence; i.e., *Daubert*-worthy evidence.¹⁵⁶ Objectors have countered, however, that summary judgment is inapposite, because unlike summary judgment, class certification is tentative.¹⁵⁷ Thus, if certification is not really tentative, then the analogy to summary judgment is a much more persuasive one.

C. *Standard of Conduct: Rigorous Analysis*

The idea that courts must conduct a “rigorous analysis” provides support for the idea that courts must conclusively decide *Daubert*

151. See *In re Zurn Pex Plumbing Prods. Liability*, 644 F.3d 604, 613 (8th Cir. 2011) (holding that “[defendant]’s desire for an exhaustive and conclusive *Daubert* inquiry before the completion of merits discovery cannot be reconciled with the inherently preliminary nature of pretrial evidentiary and class certification rulings”). For example, in *In re Zurn*, the court had bifurcated discovery between discovery necessary for merits determinations and discovery necessary for certification. *Id.* at 609.

152. *Id.* at 613.

153. See *supra* Part III.a.

154. FED. R. CIV. P. 23(c) advisory committee’s note, 2003 Amendments.

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

156. *In re Zurn*, 644 F.3d at 613.

157. *Id.*

objections, when viewed in context of the strong language in *Wal-Mart* and *Comcast* and that language's application in those cases. *Wal-Mart* and *Comcast* both emphasized *Falcon's* requirement that courts conduct a "rigorous analysis," including a rigorous analysis of expert testimony.¹⁵⁸ *Comcast* also espoused the similar requirement of a "close look."¹⁵⁹ These requirements are not standards of decision as was *Hydrogen Peroxide's* requirement that issues be proven "by a preponderance of the evidence."¹⁶⁰ Instead, they are standards of conduct, telling the court to take more than a passing look at the certification requirements. Because they are standards of conduct, the issue for purposes of *Daubert* objections is whether a court must conclusively rule on *Daubert* objections in order for its analysis to be sufficiently rigorous.

Language in *Wal-Mart* and *Comcast* provides support for the idea that a rigorous analysis must include a conclusive *Daubert* ruling. As mentioned in Part IV.b., *supra*, *Wal-Mart* and *Comcast* remarked that the requirements of Rule 23 must be met "in fact" through an affirmative demonstration by the plaintiff. *Wal-Mart* also remarked that the plaintiff needed to put on "significant proof,"¹⁶¹ and *Comcast* went a step further, requiring "evidentiary proof."¹⁶² These statements can be combined into the following rule: *A party must show that the requirements of Rules 23 are met, in fact, through significant evidentiary proof.* Given that under this rule a party must use "significant evidentiary proof," it is hard to see how a court's approach was "rigorous," if it considered information that was not sufficiently reliable to be admissible evidence. As Judge Jordan noted in his partial dissent in *Comcast* below, "[a] court should be hard pressed to conclude that the elements of a claim are capable of proof through evidence common to a class if the only evidence proffered would not be admissible as proof of anything."¹⁶³

The Court's application of a "rigorous analysis" in *Wal-Mart* and *Comcast* to expert testimony outside of *Daubert* also supports the case for a conclusive *Daubert* ruling. In *Wal-Mart*, the Court discounted significantly the probative value of the expert sociologist's testimony, because his theory of a pervasive corporate culture could not help determine how individual employment decisions were made.¹⁶⁴ In *Comcast*, the Court waded deep into the details of the methodology behind the expert's statistical model and

158. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011).

159. *Comcast*, 133 S. Ct. at 1432.

160. Rubenstein, *supra* note 4, §7:21.

161. *Wal-Mart*, 131 S. Ct. at 2553.

162. *Comcast*, 133 S. Ct. at 1432.

163. *Behrend v. Comcast*, 655 F.3d 182, 215 (3d Cir. 2011) (Jordan, J., dissenting).

164. *Wal-Mart*, 131 S. Ct. at 2553-54.

held that the model failed to show what it purported to show.¹⁶⁵ The Court waded so deep that the dissent accused the majority of second-guessing the district court’s factual findings.¹⁶⁶

These actions by the Courts in *Wal-Mart* and *Comcast*, while technically done outside of *Daubert*, look very much like *Daubert* inquiries. *Comcast*’s scrutiny of the plaintiff’s expert testimony, for example, closely resembles the Ninth Circuit’s rejection of the plaintiff’s expert testimony on remand in *Daubert* itself. There, as in *Comcast*, the Court rejected expert testimony on the grounds that even though the expert’s statistics were properly calculated, those statistics were not probative of a fact in issue because they had failed to isolate other potential causes.¹⁶⁷ Similarly in *Wal-Mart*, the Court did not criticize the expert’s use of social framework analysis generally, but held that it lacked probative value without the ability to isolate other reasons for an employment decision.¹⁶⁸ The fact that the Court would engage in these *Daubert*-like analyses as part of its rigorous analysis, even though *Daubert* was not challenged, suggests that the full *Daubert* inquiry is required for a certification decision to be sufficiently rigorous.

D. *Twiqbal*

The procedural philosophy of *Bell Atlantic Corporation v. Twombly* and *Ashcroft v. Iqbal*, known collectively as *Twiqbal*, also supports the argument for full *Daubert* at certification. In *Twombly*, plaintiffs alleged violations of federal antitrust laws by regional telephone companies.¹⁶⁹ The Supreme Court affirmed the district court’s dismissal for failure to state a claim under Rule 12(b)(6), saying that plaintiffs had failed to plead facts that “raise a right to relief above the speculative level.”¹⁷⁰ This formulation of the pleading standard overruled the lower standard of *Conley v.*

165. *Comcast*, 133 S. Ct. at 1433-35.

166. *See Comcast*, 133 S. Ct. at 1440 (“[T]he District Court found McClave’s econometric model capable of measuring damages on a classwide basis, even after striking three of the injury theories. Contrary to the Court’s characterization, this was not a legal conclusion about what the model proved; it was a factual finding about *how* the model worked. Under our typical practice, we should leave that finding alone.”) (internal citations omitted).

167. *See supra* Part I.a.

168. *See Wal-Mart*, 131 S. Ct. at 2554 (“Bielby’s testimony does nothing to advance respondents’ case. [W]hether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking is the essential question on which respondents’ theory of commonality depends. If Bielby admittedly has no answer to that question, we can safely disregard what he has to say.”) (internal citations omitted).

169. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 549-50 (2007).

170. *Id.* at 555.

Gibson.¹⁷¹ The Court reasoned that discovery in a class action antitrust case would be expensive, and thus “a district court must . . . insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.”¹⁷² The Court was unpersuaded by other methods of weeding out unmeritorious cases such as judicial case management and summary judgment, because “the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings.”¹⁷³ The Court took a similar approach in *Iqbal*, where the Court again raised the pleading standard where proceeding with the litigation would have been burdensome.¹⁷⁴

These concerns about non-meritorious claims in *Twiqbal* are similar to those in class actions. As mentioned in Part III.a., *supra*, concerns about the structural pressures created by class certification were a concern to courts and rule makers. Regardless of the strength of the claims in a class action, the act of certification “may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.”¹⁷⁵ Thus, because the structural concerns of class certification are similar to those of *Twiqbal*, it stands to reason that the Court would seek a solution similar to that found in *Twiqbal*.

Daubert is a solution similar in approach to *Twiqbal*'s heightened pleading standards. *Twiqbal* distrusts the ability of judges to weed out bad cases through judicial management. Instead, it prefers a formal legal rule of exclusion: plaintiffs must plead more specifically, and if they do not, courts must exclude those claims. Similarly, *Daubert* distrusts the ability of judges to informally consider evidence, and proposes a formal legal rule of exclusion: expert testimony must be sufficiently reliable, and if it is not, courts must exclude that testimony.¹⁷⁶ The *Twiqbal* philosophy also counters arguments that the full *Daubert* inquiry is not necessary, because

171. Conley had only required that plaintiff's pleading “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” *Conley v. Gibson*, 355 U.S. 41, 47 (1957).

172. *Twombly*, 550 U.S. at 558 (citing *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 528 n.17 (1983)).

173. *Id.* at 559.

174. *Ashcroft v. Iqbal*, 556 U.S. 662, 697 (2009) (stating that a claim must be “plausible on its face”). In *Iqbal*, proceeding would have required investigation into the propriety of actions by the Attorney General during a time of war. *See id.* at 662 (detailing allegations of discrimination by then Attorney General John Ashcroft).

175. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 310 (3d Cir. 2008) (quoting FED. R. CIV. P. 23 advisory committee's note, 1998 Amendments).

176. Admittedly, the analogy to *Twiqbal* is weakened by the fact that the remedy for an insufficient pleading is often amendment, and not dismissal. *See* FED. R. CIV. P. 15(a)(2) (stating that leave to amend should be freely given).

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there is no jury to protect at class certification.¹⁷⁷ The Court in *Twiqbal* rejected the idea that judges did not need exclusionary pleading rules because they could manage cases; the Court did not believe judges could be their own gatekeepers.

CONCLUSION

The Court’s jurisprudence on class certification will likely continue to evolve. Many important issues remain to be decided, including, most notably, by what level of proof a plaintiff must show Rule 23’s requirements are met.¹⁷⁸ It is not perfectly clear which way the Court will come out on this and other issues, but given the Court’s decisions in *Wal-Mart* and *Comcast*, it is reasonably certain that a full and conclusive *Daubert* analysis is now required at the class certification hearing.

177. See *supra* Part III.d.

178. Rubenstein, *supra* note 4, § 7:21.

