



CLASS ACTION

R E P O R T S

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THE AUTHORITY. IN PRINT. ONLINE.

Volume 26, Number 3

Washington, D.C.

May-June 2005

Featured Decision

Dura Pharmaceuticals, Inc. v. Broudo, 125 S. Ct. 1627 (2005).

The United States Supreme Court recently ruled that investors may not rely solely on an inflated purchase price as the cause of the relevant economic loss needed to establish "loss causation." The Court of Appeals for the Ninth Circuit incorrectly held that a plaintiff may adequately allege that defendant's fraud caused an economic loss, or "loss causation", by first alleging and subsequently establishing that "the price ... on the date of purchase was inflated because of the misrepresentation." 339 F.3d 933, 938 (9th Cir. 2003) (emphasis in original).

The present securities fraud class action was filed by purchasers of Dura stock between April 15, 1997 and February 1998, against Dura and certain managers and directors, claiming that the company provided false and misleading statements regarding "both Dura's drug profits and future Food and Drug Administration (FDA) approval of a new asthmatic spray device" which led the stockholders to purchase Dura securities at an artificially inflated price.

In a fraud-on-the-market case, the presence of an inflated purchase price alone will not "constitute or proximately cause the relevant economic loss" due to the myriad of factors that may later affect the price, since the plaintiff has not suffered any loss at the time of the purchase. *Dura Pharmaceuticals*, 125 S.Ct. 1627, 1631. The Ninth Circuit's "inflated purchase price" approach is inconsistent with the common law basis of the securities fraud action (which has long held that a plaintiff must also show actual economic loss), as well as with the holdings of other courts of appeals, and the objective of the Private Securities Litigation Reform Act of 1995, which expressly shifts to plaintiffs the burden of proving that defendant's misrepresentation "caused the loss for which the plaintiff seeks to recover." § 78u-4(b)(4). The Ninth Circuit's approach would incorrectly allow a plaintiff to recover without having to prove the two traditional elements of proving proximate causation and economic loss.

In the present case, the plaintiffs' complaint is legally insufficient for failure to show that the "artificially related purchase price" is a relevant economic loss or any causal connection between the loss and the misrepresentation of Dura's "spray device."

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EXPERTS IN CLASS CERTIFICATION

by Noel M. B. Hensley and R. Thaddeus Behrens *

Class certification hearings have been active battlefields for using (or attempting to use) expert witnesses, both in support of and in opposition to class treatment. However, the uncertainty created by Supreme Court decisions has resulted in a variety of judicial approaches in deciding whether and how experts should be used and whether *Daubert* scrutiny should apply. Although no clear standard has emerged, the dilemma does not seem to have deterred experts' involvement in certification challenges, where they have played significant roles in a variety of class factors.

Standards for Experts in Class Certification

Experts in class certification have often been challenged on the basis that their use runs afoul of the Supreme Court's 1974 decision in *Eisen v. Carlisle & Jacquelin*.¹ That case held that a judge should not "conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."² Eight years afterwards, however, the Supreme Court decided *General Telephone Co. of the Southwest v. Falcon*,³ an employment discrimination case, and held that the commonality and typicality elements of Rule 23 treatment could not be presumed based on the mere allegation of racial discrimination. It directed the trial court to do a "rigorous" analysis that "generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" Although some issues might be "plain enough" from pleadings, the Court recognized that "sometimes it may be necessary for the court to probe behind the pleadings."⁴

The interplay between the *Eisen* and *Falcon* decisions has created fertile ground for disagreement over whether, and how, an expert's testimony may be considered in connection with class certification. In 2001, for example, the Second Circuit in *In re Visa Check/Mastermoney Antitrust Litigation*⁵ held that the question for the district court in considering the plaintiff's expert is whether the evidence is sufficient to demonstrate common questions of fact warranting certification of the proposed class, not whether the evidence will ultimately be persuasive.⁶ Very recently the Fifth Circuit, however, in *Unger v. Amedisys Inc.*,⁷ reversed a district court's certification of a class and remanded for further findings regarding the existence of an "efficient market," noting that expert analysis might be helpful and even suggesting advance consideration of admissibility of such expert testimony before relying on it for class certification.⁸

The significance of class action treatment and the complexity of issues associated with certification underscore the importance of the courts' decisions on whether and

when expert testimony may be put in the mix of considering Rule 23 elements. Courts have not agreed on whether to conduct a full *Daubert*⁹ analysis, or some portion, or none at all. Some courts express that their reluctance to apply a *Daubert* inquiry is due to an *Eisen* concern that they not evaluate the merits of the case. Yet experts can and have had a significant impact on the size and scope of a class, subclassing, and whether a class should be certified at all.

The result has been uncertain and diverse efforts to conduct the "rigorous analysis" directed by *Falcon* while avoiding the bar imposed by *Eisen* against conducting a preliminary determination on the merits. Notwithstanding the uncertainty of the process, it can be said that a significant number of courts have assessed the qualifications, methodology and opinions of experts in connection with determining whether to certify classes.

Consideration of Experts for Certification

Numerous areas of the law have attracted efforts to gain class treatment. These include securities, environmental, mass torts, employment discrimination, and antitrust. Plaintiffs have often submitted expert testimony to assist in meeting their burden under Rule 23 elements; defendants increasingly use experts to oppose certification. Experts have offered testimony relating to factors of numerosity, typicality, commonality, and predominance, as well as threshold issues such as standing and a number of other areas. Some recent illustrative examples:

Securities: In securities cases, class claims typically rest on fraud-on-the-market allegations, in an effort to avoid individual reliance and materiality contests. The theory is that an efficient market sets a market price for securities that reflects all material information and thus, one who buys relying on the market price also relied on the information incorporated in the market price.¹⁰ No apparent *Daubert* challenge was made.¹¹ Assessments of intra-class conflicts required in *In re Seagate Technology II Securities Litigation* include a preliminary evidentiary hearing on issues related to the merits, such as the level of price inflation and trading volumes.

Environmental: In environmental or toxic tort cases, testimony is often offered through hydrologists and toxicologists, epidemiological and various other studies to show causation.¹² In *Doerr v. Mobil Oil Corp.*,¹³ for example, the court of appeals affirmed a district court's consideration of expert testimony on the causation issue in an oil discharge case. The court of appeals ruled that the trial court had appropriately performed its "gatekeeping" role under the Louisiana counterpart to *Daubert* in admitting the expert testimony.

Employment discrimination: In *Hnot v. Willis Group Holdings Ltd.*,¹⁴ the plaintiffs in a gender discrimination case moved for class certification, proffering statistical analyses from experts regarding disparate treatment of

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women. The court rejected the defendants' *Daubert* challenge, which was supported by competing expert testimony showing that the plaintiffs' expert analyses were flawed, holding that such arguments had "minimal force at the class certification stage" and that "only a plausible position needs to be set forth."¹⁵

Antitrust: In *Blades v. Monsanto Co.*,¹⁶ the court of appeals affirmed a district court's denial of class certification in a price-fixing conspiracy case. The trial court had refused to exclude on *Daubert* grounds the testimony of the plaintiffs' expert on the issue of antitrust impact, stating its belief that "it is appropriate for me to consider all evidence at this stage of the proceedings."¹⁷ After considering the expert's testimony, however, the district court found that the expert had failed to demonstrate that antitrust impact could be demonstrated on a "class-wide basis," precluding a finding that common issues predominated under Rule 23. The court of appeals agreed and rejected the plaintiffs' contention that the district court had improperly resolved disputes between the parties' experts going to the merits of the case. According to the court of appeals, it was appropriate for the trial court to resolve, at the class certification stage, "expert disputes concerning the import of evidence concerning the factual setting [of the case]—such as economic evidence as to business operations or market transactions."¹⁸

Standing: Lack of standing will make a plaintiff atypical and inadequate representative of the class.¹⁹ Competing expert testimony on the issue of standing for 1933 Act claims was decided in connection with request to certify a plaintiff class including aftermarket purchasers in *Krim v. pcOrder.com, Inc.*²⁰ Without explicitly citing *Daubert* factors, the court of appeals affirmed the trial court's rejection of the plaintiff's expert who opined that standing could be shown through binomial statistics to show a high probability that at least one of the shares purchased in the aftermarket originated in the challenged stock offerings.

Conclusion

Even absent uniformity in the standards courts are applying for consideration of experts and for measuring admissibility of their testimony, it appears certain that experts will continue to be present in many class action hearings. †

³ 457 U.S. 147 (1982).

⁴ *Id.* at 160-61.

⁵ 280 F.3d 124 (2d Cir. 2001), *affirming* 192 F.R.D. 68, 76 (E.D.N.Y. 2000).

⁶ *Id.* at 135.

⁷ 401 F.3d 316 (5th Cir. 2005).

⁸ *Id.* at 323 n.6, citing with approval the following proposition from *Bell v. Ascendant Solutions, Inc.*, 2004 WL 1490009 (N.D. Tex. July 1, 2004): "In order to consider Plaintiffs' motion for class certification with the appropriate amount of scrutiny, the Court must first determine whether Plaintiffs' expert testimony supporting class certification is reliable."

⁹ *Daubert v. Merrell Dow Pharms., Inc.* 509 U.S. 579 (1993).

¹⁰ *See Unger v. Amedisys Inc.*, *supra*, remanding for findings and suggesting determination of market efficiency may benefit from expert testimony. *See also Oscar Private Equity Investments v. Holland*, 2005 WL 877936 (N.D. Tex. April 15, 2005), considering plaintiff's expert testimony on market efficiency, in face of challenge by defendants of insufficiency. *Id.* at *11.

¹¹ *See id.* at *13.

¹² The issue of causation, in turn, is significant to standing to sue, whether the plaintiffs have questions of fact and law in common with others, and whether a joinder of their claims is practicable. M. William, "The History of *Daubert* and its Effect on Toxic Tort Class Action Certification," 22 *Rev. Litig.* 181 (2003).

¹³ 811 So. 2d 1135, 1139-1141 (La. Ct. App. 2002).

¹⁴ 2005 WL 659475, at *5-6 (S.D.N.Y. Mar. 21, 2005).

¹⁵ *Id.* at *5.

¹⁶ 400 F.3d 562 (8th Cir. 2005).

¹⁷ *Id.* at 569 (quoting district court's opinion).

¹⁸ *Id.* at 575.

¹⁹ Fed. R. Civ. P. 23(a); *see Baffa v. Donaldson, Lufkin & Jenrette Securities Corp.*, 222 F.3d 52, 58-59 (2d Cir. 2000).

²⁰ 402 F.3d 489 (5th Cir. 2005).

ENDNOTES

¹ 417 U.S. 156 (1974).

² *Id.* at 178.