Federal Court Denies Class Certification After Daubert Analysis

February 6, 2012 by Sean Wajert

A federal court late last month declined to certify three classes of consumers in litigation claiming that a defect in Harley-Davidson Motor Co. Inc.'s motorcycles caused severe wobbling and instability. See Steven C. Bruce, et al. v. Harley-Davidson Motor Co., Inc., et al., No. 2:09-cv-06588 (C.D. Cal.).

Plaintiffs were owners of Harley-Davidson motorcycles. According to plaintiffs, beginning in or before 2002, Harley-Davidson manufactured and sold touring motorcycles that had an alleged design defect in the form of an excessively flexible chassis. According to plaintiffs, the alleged defect caused "severe wobbling, weaving and/or instability," especially occurring when riders made sweeping turns, and traveled at speeds above 55 miles per hour. Plaintiffs alleged that had they and other class members known of the defective nature of the vehicles, they would not have purchased or leased their motorcycles, or at least would have reduced the amount they were willing to pay for them. Hence, the classic alleged consumer fraud class action.

Plaintiffs moved for class certification, and relied on expert testimony to establish some of the Rule 23 elements. Specifically, plaintiffs' expert opined that a rider of a properly-designed motorcycle should not experience a weave-mode instability event when riding within the range of expected speeds. He asserted that the class-purchased cycles shared a common design defect in the form of an "excessively flexible" chassis. The vehicles allegedly failed to "damp out," or reduce, weave-mode oscillations to one half of their original amplitude within the time frame (a couple seconds) necessary to prevent them from becoming perceptible to the riders.

Defendants challenged the admissibility of that expert testimony under *Daubert,* contending that Rule 702 and *Daubert* apply with "full force" at the class certification stage. In support of this position, Harley-Davidson relied primarily on Wal-Mart Stores, Inc., v. Dukes, 131 S. Ct. 2541 (2011), and Am. Honda Motor Co. v. Allen, 600 F.3d 813, 815–16 (7th Cir. 2010) (per curiam). In *Dukes*, the Supreme Court noted that it doubted that *Daubert* did not apply at the certification stage of class-action proceedings. 131 S. Ct. at 2554. In *American Honda*, which we commented on here, the Seventh Circuit held that where 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 the class certification motion. 600 F.3d at 815–16. Earlier this month, the Seventh Circuit reaffirmed its holding in *American Honda*, ruling that it was error for a district court to decline to rule on a Daubert motion at the class certification stage. Messner v. Northshore Univ. Healthsystem, 2012 U.S. App. LEXIS 731, *17 (7th Cir. Jan. 13, 2012).

Plaintiffs argued that a full *Daubert* inquiry into the reliability of expert opinions is not required or appropriate at the class certification stage. They cited In In re Zurn Pex Plumbing Prods. Liability Litig., 644 F.3d 604, 613 (8th Cir. 2011),which we criticized here, and in which the Eighth Circuit reasoned that an "exhaustive and conclusive Daubert inquiry before the

completion of merits discovery" is not necessary due to the "inherently preliminary nature of pretrial evidentiary and class certification rulings." See also Behrend v. Comcast Corp., 655 F. 3d 182, 204 n. 13 (3d Cir. 2011) (district court need not turn class certification into a "mini-trial").

Here the district court found the approach adopted by the Eighth Circuit to be the appropriate application of *Daubert* at the class certification stage. Thus, a "tailored" or "focused" inquiry, to assess whether the experts' opinions, based on their areas of expertise and the reliability of their analysis of the available evidence, should be considered in deciding the issues relating to class certification, said the court. Especially where discovery has been bifurcated into a class phase and a merits phase, an expert's analysis may have to later adapt, as gaps in the available evidence are filled in by merits discovery. Here, the court had granted defendants' request for bifurcated discovery. Accordingly, the expert opinions would be assessed in light of the evidence currently available.

Even with a less than full inquiry, the court found that the proposed expert testimony must be excluded. In reaching this conclusion, the court decided the expert had not adequately explained the scientific basis for his proposed standard, which also had not been accepted in the field of motorcycle dynamics. While the evidence supported that the damping out of weave-mode oscillations may be an important factor for motorcycle stability, it did not establish that the expert's "rule" requiring the reduction of weave-mode oscillations to one half of their original amplitude within two seconds was scientifically valid.

The expert formed his opinions exclusively for the purposes of litigation and had not published his "rule" for peer review, providing further support for his exclusion.

Additionally, the court believed that he had not sufficiently accounted for other potential causes of the instability. He failed to consider and test for other possible causes including the use of non-specified tires and leaky shocks. See, e.g., Clausen v. M/V NEW CARISSA, 339 F. 3d 1049, 1058 (9th Cir. 2003) ("The expert must provide reasons for rejecting alternative hypotheses using scientific methods and procedures and elimination of those hypotheses must be founded on more than 'subjective beliefs or unsupported speculation.'").

Thus, plaintiffs failed to establish that common questions of law and fact predominated over individual inquiries. Once the opinions were excluded, plaintiffs failed to show that they had the ability to use common evidence by which they could demonstrate the defect. The fact that the chassis was the same for each vehicle ignored the failure to show how common evidence would ultimately be admissible to prove that they shared a common defect, and also was unavailing because it overlooked the Supreme Court's admonition that a "rigorous analysis" will often "entail some overlap with the merits of the plaintiff's underlying claim." *Dukes*, 131 S. Ct. 2551.