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A L E R T

ANOTHER COURT HOLDS *DAUBERT* ANALYSIS
REQUIRED WHEN CRITICAL TO CLASS CERTIFICATION

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With a split among the Circuits, no authoritative decision from the Third Circuit, and *certiorari* already granted by the U.S. Supreme Court on the issue, another district court has concluded that a thorough *Daubert* analysis is appropriate and necessary at the class certification stage when the expert testimony at issue is critical to the determination of class certification. *In re Chocolate Confectionary Antitrust Litig.*, 08-MDL-1935 (M.D. Pa. Dec. 7, 2012).

In re Chocolate Confectionary Antitrust Litigation is a multidistrict price-fixing antitrust case brought pursuant to Section 1 of the Sherman Act, 15 U.S.C. § 1, as well as various state antitrust and consumer protection statutes. In that case, the Direct Purchasers alleged that Defendants, multi-national corporate entities who produce approximately 75 percent of America's chocolate confectionary products, conspired to implement three price increases on chocolate from 2002 through 2007. The Direct Purchasers sought to certify a class comprised of "All persons and entities who directly purchased single serving standard and King size chocolate candy for resale directly from Defendants between December 9, 2002 and December 20, 2007." Defendants argued that the diverse nature of the customer base made this matter unsuitable for class action disposition. According to Defendants, the complex mixture of promotional programs and customer-specific pricing negotiations made it impossible to determine the actual price paid for chocolate confectionary products with evidence common to the class.

Plaintiffs sought to prove predominance — that issues common to the proposed class members predominated over issues affecting individual class members, an element required for class certification under Federal Rule of Civil Procedure 23(b)(3) — through the use of expert testimony, which was based on econometric modeling and focused on the nature of the chocolate confectionary industry as purportedly conducive to price-fixing. Defendants moved *in limine* to exclude the expert opinion testimony, which testimony was critical to whether the plaintiffs could show

that issues common to the proposed class members predominated over issues affecting individual class members.

The threshold question before the District Court was whether *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and Federal Rule of Evidence 702 presented any barriers to the court's consideration of the plaintiffs' expert opinions, which were central to the class certification issue. *In dicta*, the U.S. Supreme Court, in *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011), expressed its "doubt" of the soundness of the trial court's conclusion that *Daubert* did not apply at this stage. ("The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that is so, but even if properly considered, [the expert witness's] testimony does nothing to advance respondents' case.")

The Circuits are split on the issue of whether *Daubert* is applicable at the class certification stage. The Seventh Circuit has held that when an expert's report or testimony is "critical to class certification," a district court "must perform a full *Daubert* analysis before certifying the class if the situation warrants." *American Honda Motor Co. v. Allen*, 600 F.3d 813, 815-16 (7th Cir. 2010). Similarly, the Fifth Circuit, in *Unger v. Amedisys Inc.*, 401 F.3d 316, 323 n.6 (5th Cir. 2005), held that "[i]n many cases, it makes sense to consider the admissibility" of expert testimony at the Rule 23 certification stage, because "[i]n 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."

In contrast, the Eighth Circuit, in *In re Zurn Pex Plumbing Products*, 644 F.3d 604, 612 (8th Cir. 2011), reached the opposite conclusion, noting that a full *Daubert* analysis at the class certification stage would be "impractical" because the parties had engaged in bifurcated discovery, resulting in a limited evidentiary record.

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Whether *Daubert* applies at the class certification stage is an open question in the Third Circuit. While the Court of Appeals in *Behrend v. Comcast Corp.*, 655 F.3d 182 (3d Cir. 2011), acknowledged that the issue was not before it, it nevertheless interpreted the Supreme Court's *Wal-Mart* decision "to require a district court to evaluate whether an expert is presenting a model which could evolve to become admissible evidence, and not requiring a district court to determine if a model is perfect at the certification stage." See *id.* at 204 n.13. The Supreme Court recently granted *certiorari* in *Behrend* on the issue of 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. 133 S. Ct. 24 (June 25, 2012).

Against this backdrop, after a thorough review of *Wal-Mart* and the Circuit Court decisions addressing the issue, the District Court in *In re Chocolate Confectionary Antitrust Litigation* held that a thorough *Daubert* analysis was appropriate and necessary at the class certification stage in light of the court's responsibility to apply a "rigorous analysis" to determine if the putative class had satisfied the requirements of Rule 23. The District Court was particularly persuaded by Judge Jordan's concurring and dissenting opinion in *Behrend*:

[S]imple logic indicates that a court may consider the admissibility of expert testimony at least when considering predominance. A court should be hard pressed to conclude that the elements of a claim are capable of proof through evidence common to the class if the only evidence proffered would not be admissible as proof of anything.

655 F.3d at 215, n.18. The District Court then reasoned that the expert testimony at issue in the present case was integral to the court's determination of whether the Direct Purchasers could both prove and quantify their antitrust injury with evidence common to the class because the Direct Purchasers' proof of predominance rested entirely on the shoulders of their expert witnesses.

After a full *Daubert* hearing and extensive briefing, the District Court concluded that the expert opinions pre-

sented by plaintiffs' experts met the requirements of Rule 702 and the standard announced in *Daubert*, denied defendants' motions *in limine* to exclude the expert testimony concluding that any dispute as to the bases for these opinions or the merits of the experts' conclusions went to the weight, not to the admissibility, of the expert testimony, and certified the class. ♦

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