

## Unanswered *Daubert* Issue is Finally Answered

By Robert Ambrogi

Must federal courts, before deciding whether to certify a case as a class action, resolve challenges to the plaintiffs' expert witnesses?

Surprisingly, given how routinely the issue arises, no federal appellate court had squarely decided the question. District courts have answered the question in various – sometimes conflicting – ways.

The closest a federal appeals court had come to ruling on the question was in 2007, when the 9<sup>th</sup> U.S. Circuit Court of Appeals issued an opinion, *Dukes v. Wal-Mart Inc.*, saying that a full *Daubert* review is not required at the class-certification stage. Several months later, the 9<sup>th</sup> Circuit withdrew the opinion and replaced it with another that was silent on the issue.

Now, the 7<sup>th</sup> Circuit has issued a *per curiam* opinion that addresses the question directly and is unequivocal in its answer: The trial court must conclusively rule on the admissibility of an expert opinion prior to class certification.

"We hold that when an expert's report or testimony is critical to class certification, ... a district court must conclusively rule on any challenge to the expert's qualifications or submissions prior to ruling on a class certification motion," the 7<sup>th</sup> Circuit said. "That is, the district court must perform a full *Daubert* analysis before certifying the class if the situation warrants."

### A Wobbly Lawsuit

The decision, *American Honda Motor Company Inc. v. Allen*, came in a products liability case in which the trial judge expressed reservations about the reliability of the expert's conclusions, but nevertheless declined to exclude the expert "at this early stage of the proceedings."

The lawsuit alleged a design defect in Honda's Gold Wing GL1800 motorcycle that made the steering wobble excessively. The plaintiffs sought to certify a class action on behalf of the motorcycle's purchasers. To show that the defect was common to the class, the plaintiffs' primary proof was the report of a motorcycle engineering expert, Mark Ezra.

Ezra based his report on a safety standard that he devised on his own. It pertained to the time it should take for wobble in a motorcycle's steering to "decay" or dissipate. To prepare the report, he tested one used GL1800 and concluded that it failed to meet his wobble-decay standard.

In the district court, Honda moved to strike the expert's report. The judge expressed concern about the expert's conclusion, noting that the standard may not have been

supported by empirical evidence, had not been generally accepted by the engineering community, and may have required testing against a larger sample than one motorcycle. Even so, the judge denied Honda's motion "without prejudice" and granted the plaintiffs' request to certify the class.

### **'Heavily Contested' Issue**

On appeal, the 7<sup>th</sup> Circuit noted that the question of whether to rule on *Daubert* challenges prior to class certification is one that is "heavily contested" in many cases, but with different outcomes in different courts.

"Given the uncertainty surrounding the propriety of conducting a *Daubert* analysis at the class certification stage, and the frequency with which this issue arises, we find the question to be one appropriate for resolution," the court said.

After stating its holding that the *Daubert* issue should be decided if the expert's opinion is critical to the class certification, the 7<sup>th</sup> Circuit went on to criticize the lower court's ruling as an abuse of discretion.

"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," the court said. "By failing to clearly resolve the issue of its admissibility before certifying the class, the district court erred."

Based on its own examination of the expert's report, the 7<sup>th</sup> Circuit said that "exclusion is the inescapable result when the *Daubert* analysis is carried to its conclusion."

The court expressed concern that the standard that Ezra applied was one of his own invention. "There is no indication that Ezra's wobble decay standard has been generally accepted by anyone other than Ezra," it noted.

Apart from the standard's lack of general acceptance, Ezra never conducted any studies or tests to support it, the court said. "The 'principles and methodology' underlying his findings ... are questionable at best."

Also troubling to the court was the fact that Ezra tested only one motorcycle ridden by a single test rider and then extrapolated the results to the entire fleet. "A sample size of one is rarely, if ever, sufficient."

Expert evidence this unreliable should not be admitted, even at an early stage in the proceedings, the court concluded. Without that evidence, plaintiffs lacked sufficient grounds to support their claim for a class action and the trial judge was wrong to have certified it.

### **An Important Precedent**

The ruling governs lower courts only within the 7<sup>th</sup> Circuit, of course. And it still leaves courts leeway to decide whether an expert's testimony is "critical to class certification." Even so, defense lawyers say the opinion is soundly reasoned and should establish a precedent for trial and appellate courts to follow in other circuits.

The decision was "the only approach that makes any sense," Sean P. Wajert, a product-liability defense litigator with Dechert, recently wrote on his blog, [Mass Tort Defense](#). "Otherwise, the court risks certifying a class – and engaging the parties in the massive discovery and notice process that accompanies it – based on testimony that fails the *Daubert* test, is unreliable, and eventually inadmissible under the Federal Rules."

At another legal blog, Drug and Device Law, Will Sachse, also with Dechert, wrote that the decision is consistent with the direction of class-certification law generally and with the critical importance of early analysis of class-wide proofs. "Any step in that direction, even a per curiam one," Sachse wrote, "is a good result as far as we are concerned."

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