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Lessons On Challenging Class Plaintiffs' Expert Testimony

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Class actions are often an unpleasant, but familiar, reality for many companies.

More than 10,000 class action cases were filed in federal courts in 2023 asserting all types of claims: securities, antitrust, Employee Retirement Income Security Act, employment, consumer protection, privacy, insurance and product liability. And there have been almost 2,400 class actions already filed in federal courts in 2024.

In 2023, class action plaintiffs had a success rate of more than 70% in obtaining certification.

While the number is inflated because it includes cases where class certification was granted for settlement purposes, there are still a significant number of cases where the court granted class certification, at least in part, after contested briefing. In many of these cases, experts played a significant role in class certification.

Regardless of the merits of a class action claim, for a class to be certified, every class action must satisfy the four requirements under Rule 23(a) of the Federal Rules of Civil Procedure: numerosity, commonality, typicality and adequacy, as well as the requirements of either Rule 23(b)(1), (2), or (3).[1]

In class actions seeking damages, the plaintiff must establish that questions of law or fact common to class members predominate over questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.[2]

The predominance inquiry under Rule 23(b)(3) is more demanding than the commonality inquiry under Rule 23(a), so plaintiffs increasingly use expert opinions to make that showing. But what can class action defendants do in response?

Be prepared to bring a Daubert challenge at class certification.

In Comcast v. Behrends, the U.S. Supreme Court held in 2013 that in assessing Rule 23(b)(3) predominance at class certification, the court must conduct a rigorous analysis to ensure that any models supporting a plaintiff's damages case are consistent with its liability case.

At this stage, the court considers only whether expert evidence is useful in evaluating whether class

certification requirements have been met.

In April, the U.S. Court of Appeals for the Ninth Circuit **clarified** in Lytle v. Nutramax Laboratories Inc. that the expert need not complete an analysis or calculation at the time of class certification, as long as the expert adequately identifies the sources of information and a reliable methodology that will be applied "to show that damages are capable of determination on a class-wide basis."[3]

Therefore, while courts still evaluate challenged expert testimony under the Daubert standard, that analysis is not dispositive. Rather, the analysis scrutinizes the reliability of the expert testimony in light of the criteria for class certification and the current state of the evidence.

And as the Ninth Circuit recognized in Lytle, the Daubert analysis may vary depending on the timing of the class certification.[4] If discovery has closed and an expert's analysis is complete at the time of certification, there would be no reason to delay the assessment of the ultimate admissibility of an expert's opinion at trial.[5]

But, if the expert's work has not been completed, then only a limited Daubert analysis is necessary to determine whether the expert's methodology is reliable.[6]

Two recent decisions from the U.S. District Court for the Northern District of California highlight the importance of experts at class certification.

In Simon and Simon PC v. Align Technology Inc., the district court held a two-day evidentiary hearing regarding the experts' opinions on common impact and common damages. The court **held on Nov. 29, 2023**, that the experts' opinions were reliable and capable of providing classwide answers to questions central to the plaintiffs' claims, thereby satisfying the predominance requirement.[7]

However, the court noted that it would reconsider arguments to exclude certain portions of the expert testimony at summary judgment and pretrial, if necessary.[8]

In contrast, in UnifySCC v. Cody, the district court found on Jan. 29 that the plaintiffs' damages model satisfied the standard set forth in Comcast, and was consistent with the plaintiffs' theory of liability, but the district court granted class certification as to liability only because the proposed damages model required consideration of factors unique to each individual.

The court held that individualized determinations predominated over any common question as to class damages, and it expressly rejected the plaintiffs' argument that their expert could conduct alternative damages models for subclasses.[9]

While expert evidence was useful in obtaining class certification for the plaintiffs in both of these cases, the court's holding in UnifySCC shows that limitations in expert opinions can be leveraged to oppose certification as well.

If at first you don't succeed, try again.

As suggested by the court in Simon and Simon, even if the expert's opinion is not excluded at the class certification stage, discovery may offer additional opportunities to challenge experts.

For example, if documents or data is not available to support a damages model proposed by a plaintiff's

expert, individualized mini trials on damages may become necessary.

This is what happened in Bowerman v. Field Asset Services Inc. in the Ninth Circuit last year, where the Northern District of California granted class certification, granted partial summary judgment on liability, held a bellwether jury trial on damages, and issued an interim award of attorney fees.[10]

On appeal, the defendant again argued that the class could not meet the predominance requirement because complex, individual inquiries were needed to establish damages.[11] The Ninth Circuit reversed the district court's decision last year granting class certification in large part because the plaintiff withdrew his damages expert after the district court "raised questions about the reliability of his data and opinions concerning an aggregate damages model."[12]

The district court had further noted that "the damages phase of this class action is far messier than promised by plaintiffs' counsel when the case was certified."[13]

In the absence of common evidence to establish damages, the Ninth Circuit held that individual issues predominated over the common questions, and class certification was improper.[14]

Thus, even if an expert's opinion is allowed and relied upon at class certification, discovery may uncover additional arguments to challenge the expert in a motion to decertify the class at a later time.

Consider offering affirmative opinions at class certification, instead of just rebutting the plaintiff's experts' opinions.

Two recent Ninth Circuit opinions address the use of affirmative defensive expert opinions at class certification.

First, the dissenting opinion in DZ Reserve v. Meta Platforms Inc. in March **suggested** that class certification may not have been proper had there been an affirmative defensive expert opinion.

In DZ Reserve, the plaintiffs sought certification of a class to pursue claims for fraudulent misrepresentation, fraudulent concealment and violation of California's Unfair Competition Law, arising out of representations made to online advertisers about the potential reach of their advertisements.

The plaintiffs sought both injunctive relief and damages. In support of their motion for class certification, the plaintiffs offered multiple expert opinions, including:

- A statistics expert who measured the inflated reach associated with the challenged representation;
- An expert who conducted a conjoint survey to test the impact of the representation;
- An auction expert who calculated a price premium;
- An economist who confirmed the price premium opinion and opined that damages could be calculated on a classwide basis; and
- An expert who opined about the increased advertising budget based on the challenged representation that was used to determine the price premium.[15]

The defendant offered its own expert critiquing the plaintiffs' expert opinion that the defendant's reach representations were always significantly inflated. But, the defendant's expert did not offer his own affirmative opinions.[16]

At class certification, the defendant in DZ Reserve sought to exclude two of the plaintiffs' expert opinions, and by extension, the portions of the other experts that relied on those opinions.[17] The court excluded the last expert regarding the advertising budget on the ground that he offered nothing more than his personal interpretation of documents and evidence.[18]

As to the expert providing the conjoint analysis, the court found the defendant's objections all went to the weight and not the admissibility of the expert opinion.[19] However, the court noted that "if evidence emerges at trial that substantially impeaches [the expert's] methods and conclusions, the door may be opened to consideration of decertification."[20]

The district court found that the remaining expert opinions were sufficient to establish predominance and superiority of the class action and the Ninth Circuit affirmed.

While exclusion of one of the plaintiffs' experts ultimately did not prevent certification of the class, the dissenting opinion authored by U.S. District Judge Katherine B. Forrest emphasized the importance of competing expert opinions. The dissent stated that the plaintiff had not established predominance because:

- The objective perspective of a reasonable advertiser could not be determined for the proposed class that included "millions of advertisers of all types conducting advertising campaigns ranging from millions of dollars to tens of dollars"; and
- The defendant had provided evolving disclosures stating that its representations about reach were estimates.

In addition, the dissent emphasized that had the defendant's expert opined affirmatively that the challenged representations resulted in no inflation of reach for at least some class members, as opposed to merely critiquing the plaintiffs' expert opinion about significant inflation, there could not have been a classwide material misrepresentation.

In the eyes of the dissent, affirmative expert opinion testimony by the defendant would have defeated class certification.

Second, in Lytle v. Nutramax Laboratories in the Ninth Circuit in April, the defendant did offer affirmative expert opinions at class certification, and the decision illustrates the scrutiny the courts will apply to that opinion.[21]

In Lytle, the plaintiffs sought certification of a class to pursue a claim for violation of the California Consumers Legal Remedies Act for false and misleading advertising related to marketing products as promoting healthy joints in dogs.[22] In support of their motion for class certification, the plaintiffs offered both a damages expert and an advertising expert.[23]

The defendants also offered expert opinion from two experts: one who conducted a consumer survey

about purchasing decisions; and one who conducted a consumer choice survey similar to that proposed by the plaintiffs' expert and showed the challenged representations had no material impact on price.[24]

In Lytle, the U.S. District Court for the Central District of California found there were flaws in the defendant's expert reports that undercut their persuasiveness.[25] For example, the court found that the consumer survey on price failed to remove from the packaging the primary statement that the plaintiffs claimed was false.[26]

And while the defense expert's consumer survey on purchasing decisions showed that the most common motivations for purchasing the product was advice from a veterinarian or someone else — and not the packaging — the survey also indicated a near-universal understanding that the product's purpose was to help improve or maintain joint health.[27]

As the Ninth Circuit noted, under the CLRA, a misrepresentation need not be the sole or even the decisive cause of the purchase.[28] Therefore, the Ninth Circuit held it was not an abuse of discretion for the district court to credit the plaintiffs' experts more and grant class certification.

However, the Ninth Circuit suggested that in some cases evidence by the defense regarding consumer reliance on other sources of information may be sufficient to preclude a presumption of reliance necessary for class certification.[29]

When a plaintiff seeks certification under Rule 23(b)(3), defendants should expect plaintiffs to offer expert evidence on damages as well as the merits of the other elements of the claims.

Defendants should be prepared to both challenge the plaintiff's expert evidence and offer credible opposing expert evidence to demonstrate that individualized issues predominate over classwide issues and that the plaintiff cannot prove the claims using classwide evidence.

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[1] Fed. R. Civ. P. 23.

[2] Fed. R. Civ. P. 23(b)(3).

[3] Lytle v. Nutramax Laboratories, Inc., 2024 WL 1710663 (9th Cir. April 22, 2024).

[4] Id.

[5] Id.

[6] Id.

[7] Id.

[8] Id.

[9] Id.

[10] Bowerman v. Field Asset Services, 60 F.4th 459 (9th Cir. 2023).

[11] Id.

[12] Id.

[13] Id.

[14] Id.

[15] DZ Reserve v. Meta Platforms, Inc., 2022 WL 912890 (N.D. Cal. March 29, 2022).

[16] DZ Reserve v. Meta Platforms, Inc., 96 F.4th 1223 (9th Cir. 2024).

[17] DZ Reserve v. Meta Platforms, Inc., 2022 WL 912890 (N.D. Cal. March 29, 2022).

[18] Id.

[19] Id.

[20] Id.

[21] Lytle v. Nutramax Laboratories, Inc., 2024 WL 1710663 (9th Cir. April 22, 2024).

[22] Id.

[23] Id.

[24] Id.

[25] Id.

[26] Id.

[27] Id.

[28] Id.

[29] Id.