Rigorous Analysis of the Class Certification Expert: The Roles of Daubert and the Defendant's Proof

Heather P. Scribner, John Marshall Law School
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Abstract
This Article discusses a three-way split among the federal circuit courts on class certification standards. It is common for both plaintiffs and defendants to present expert testimony at the class certification hearing. This testimony often overlaps with the parties’ claims and defenses, but it is offered at the certification hearing for a different purpose, namely, as a basis for the district court to determine whether to certify a class. The circuit courts have adopted three divergent approaches for evaluating these class certification experts. The first two approaches, which this Article calls the “No Merits” and “Daubert Only” approaches, do not permit the district court to undertake the in-depth factual and legal inquiries necessary to determine whether Rule 23’s prerequisites to class certification are satisfied. These lax certification standards have the undesirable effect of encouraging frivolous class action litigation. The “Daubert Plus” approach, on the other hand, allows the district court to conduct a rigorous analysis of all evidence that influences the propriety of class certification. The district court assesses the relative weight and credibility of all expert testimony, as well as the full range of evidence presented to the court in support of and in opposition to class certification. This Article demonstrates that Rule 23 not only permits the “Daubert Plus” approach to class certification, but indeed requires it.

Introduction
A lawsuit may not be certified as a class action unless the named plaintiff shows that the central facts of the case will be proved on a class-wide basis. The named plaintiff often attempts to meet this burden through an expert witness, who opines that the case’s material facts, which would seem to require individualized inquiries from each class member, can instead be proved through a common formula on behalf of the entire class. The defendant invariably responds with expert testimony of its own, opining that the plaintiff’s expert has oversimplified the matter, and the facts at issue cannot be proved without individualized inquiries from the class members. Two important questions arise regarding the district court’s use of expert opinion testimony at class certification stage. First, how closely should the district court scrutinize an expert’s opinion? In Daubert v. Merrell Dow Pharmaceuticals, Inc.,1 the Supreme Court emphasized that the court must look beneath the surface of expert opinions, closely examine the expert’s methodologies, and exclude testimony that is irrelevant or

unreliable. But the Supreme Court has never addressed whether the district court must subject expert testimony to Daubert’s strictures at certification stage.

Second, assuming the experts pass muster under Daubert, should the district court resolve fact disputes between the experts where class certification would be appropriate under one set of facts but not another? At first blush, the Supreme Court’s statements regarding how deeply the district court should delve into the factual underpinnings of the parties’ claims and defenses seem to conflict. In an early case, Eisen v. Carlisle & Jacquelin, the Court stated that the district court may not conduct a “preliminary inquiry into the merits” in deciding whether to certify the class. A few years later, the Court reversed course, requiring district courts to undertake a “rigorous analysis” of the facts offered at class certification stage, “prob[ing] beyond the pleadings” to discern whether the case can be effectively adjudicated as a class. These rather vague standards do not specifically address how the district court should assess competing expert testimony at class certification stage, and the Court has never focused on the issue.

In the absence of clear guidance, the federal circuit courts have adopted three different approaches to class certification where the parties present expert evidence. The first approach leans heavily on Eisen’s objection to “merits” inquiries. Courts that follow this approach refuse to subject a plaintiff’s expert to a full Daubert inquiry at class certification stage, instead conducting only a “limited” review to ensure that the expert’s opinions are not “inadmissable as a matter of law.” These courts certify the proposed class so long as the plaintiff’s evidence survives this low level of scrutiny, and will not assess counterproof offered by the defendant in opposition to class certification.

A second approach requires a Daubert analysis where the plaintiff offers expert testimony in support of class certification, but refuses to assess competing evidence offered by the defendant. This approach leaves class certification virtually automatic so long as the plaintiff’s expert passes Daubert’s requirements. A third approach recognizes that Daubert and Rule 23 have wholly different requirements and serve wholly different purposes. The Daubert analysis merely determines whether expert testimony is sufficiently relevant and reliable to be admitted into evidence. Rule 23’s requirements, on the other hand, ensure that class treatment is fair to the defendant and the absent class members alike. This approach permits an examination of the full range of evidence presented in support of and in opposition to class certification. The district court makes whatever factual and legal inquiries are necessary to determine whether common issues will predominate and whether class treatment is superior to other available methods for resolving the dispute.

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2 Id. at 592-93.
5 Eisen, 417 U.S. at 177.
6 See infra Part III.A.
7 See infra Part III.B.
8 See infra Part III.C.
The premise of this Article is that this third group of courts takes the correct view of class certification. Section I provides a brief history of class action practice. It details the requirements for class certification, and it puts *Eisen* into perspective. *Eisen* held that the district court could not disregard the burdens that Rule 23 places on the plaintiff in an effort to secure the benefits of class treatment. A court could refuse to consider the facts and law underlying the plaintiff’s claims at class certification stage only by ignoring *Eisen*’s holding and lifting its broad dicta out of context.

Section II discusses *Daubert* and its progeny, which impose upon the district court an obligation to determine whether the expert’s methodology is valid and whether the proffered testimony fits the facts of the case. Section III provides greater detail about the circuit split regarding the relationship between *Daubert* and Rule 23. Section IV explains why the court must conduct a *Daubert* analysis before relying upon expert testimony at class certification stage, and Section V shows that the *Daubert* analysis is not a sufficient basis for class certification. The district court must instead consider all evidence relevant to Rule 23’s requirements, whether offered by plaintiff or defendant, and determine whether the litigation can be manageably and fairly adjudicated as a class.

I. Class Certification Requirements

The modern class action, which allows a class representative to seek money damages on behalf of a group of persons who have not affirmatively joined the lawsuit, has a relatively short history in America. *9* Class actions began in the equity courts and originally permitted a plaintiff to seek only equitable relief on behalf of unnamed class members. *10* Because money damages were not available, the class action was a fairly weak device. A pre-1966 class action that prayed for money damages was really nothing more than a means to encourage permissive joinder in the lawsuit. *11* A final judgment in such a class action had res judicata effect on only those plaintiffs actually named in the lawsuit, either as original plaintiffs or through later intervention. *12*

Class action procedure changed dramatically with the 1966 amendments to Rule 23. *13* Reformers envisioned Rule 23 as transforming the plaintiff’s lawyer into a private attorney general, who could use the class device to enforce individual rights and deter

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*10* American class action procedure stems from the English Court of Chancery’s bill of peace, which permitted plaintiffs to sue on behalf of a larger group if those plaintiffs could show that all members of the group possessed a joint interest in the issue before the court, that the plaintiffs would adequately represent the group’s interests, and that the group was so large that joinder of each individual would be impossible or impracticable. *Id.* § 1751, 10 nn.3-6 & 14-16. Under the pre-1966 Rule 23, courts distinguished between “true” or “hybrid” class actions, on one hand, where each class member had a joint or common right in particular property or a particular fund, and “spurious” class actions, on the other hand. The spurious class action, as its derogatory name implies, had considerably less power than the true or hybrid class. Spurious class actions did not affect the substantive rights of unnamed parties.

*11* *Id.* § 1752, 31 n.50. *See also Amchem Prods., Inc. v. Windsor, 521 U.S. 592, 623 (1997)(“In the 1966 class-action amendments, . . . . Rule 23(b)(3) ‘opt-out’ class actions superseded the former ‘spurious’ class action, so characterized because it generally functioned as a permissive joinder (‘opt-in’) device.’.”).

*12* Wright, *supra* note 9 § 1752, 32 nn.52, 89.

*13* *Id.* § 1753 nn. 1-4.
wrongful acts. The central aim of the amendments was to ensure the greatest possible preclusive effect, allowing judgments to bind all who met the class definition and who had not requested exclusion by opting out of the class before entry of final judgment. The drafters also sought to expand the remedies available to class members. For the first time, money damages were available to class members that had not affirmatively joined the lawsuit. The new Rule 23 allowed named plaintiffs to collect damages on behalf of the entire class and authorized the reimbursement of attorney’s fees in successful suits.

### A. Rule 23’s Requirements for Class Certification

Rule 23(a) states four prerequisites to maintaining any class action. The putative class representative has the burden to show the following elements:

1. the class is so numerous that joinder of all members is impracticable;
2. there are questions of law or fact common to the class;
3. the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
4. the representative parties will fairly and adequately protect the interests of the class.

These basic requirements, commonly termed numerosity, commonality, typicality, and adequacy of representation, ensure that a fifth implied prerequisite is met: There must be an identifiable “class,” that is, a relatively large group of people who can be objectively ascertained and who have similar grievances against a defendant.

In addition to clearing the four initial hurdles of Rule 23(a), the plaintiff must also show that one of three qualifiers under Rule 23(b) is met. Under the first qualifier, Rule 23(b)(1), class treatment is permitted where the court determines that separate lawsuits by individual class members would have an adverse effect on either the

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14 1 MCLAUGHLIN ON CLASS ACTIONS § 1:1 nn. at 16, 21 (3d ed. 2006).
15 See id.
16 See id. at n.25.
17 1 NEWBERG ON CLASS ACTIONS § 1:6 nn. at 9-12 (4th ed.) (describing class action as being “akin to the right to maintain private attorney general litigation” and offering “remedies for injuries unreemedied by the regulatory action of government”).
19 Id.
20 A Rule 23 “class” must be “sufficiently cohesive to warrant adjudication by representation.” Amchem Prods. Inc. v. Windsor, 521 U.S. 592, 623 (1997). “The adequacy-of-representation requirement ‘tend[s] to merge’ with the commonality and typicality criteria of Rule 23(a), which ‘serve as guideposts for determining whether . . . maintenance of a class action is economical and whether the named plaintiff’s claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.’” Id. at 626 n.20 (citing Gen. Telephone Co. of Sw. v. Falcon, 457 U.S. 147, 157 n.13 (1982).
21 Id. at 614.
members of the plaintiff class or the defendants.\textsuperscript{22} For example, Rule 23(b)(1) treatment may be appropriate where separate lawsuits would place the defendant in a position where complying with one court’s order would necessarily require the defendant to violate another court’s order.\textsuperscript{23} Rule 23(b)(1) may also apply where the class members’ individual claims must be satisfied out of a limited fund that may prove insufficient.\textsuperscript{24} Under those circumstances, fairness may demand that a single court determine each claimant’s pro rata share of the fund.\textsuperscript{25}

The second qualifier, Rule 23(b)(2), permits certification of a class seeking primarily injunctive relief, rather than money damages.\textsuperscript{26} A prime example is a derivative suit alleging that a corporate officer has engaged in a self-interested transaction.\textsuperscript{27} The remedy there requires the corporate officer to disgorge the assets and profits from the transaction, which would benefit each shareholder in the same way.\textsuperscript{28}

The third qualifier, Rule 23(b)(3), was the 1966 amendments’ most radical change to class action practice.\textsuperscript{29} For the first time, Rule 23(b)(3) permitted class representatives to seek money damages on behalf of unnamed class members. Subsection (b)(3) contemplates class treatment where “the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.”\textsuperscript{30} Under Rule 23(b)(3), then, class treatment is inappropriate where adjudicating the case would require significant fact-finding regarding each class member’s claim.\textsuperscript{31}

\textsuperscript{22} \textit{Fed. R. Civ. P. 23(b)(1)} permits class treatment where “the prosecution of separate actions by or against individual members of the class would create the risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests[.]”

\textsuperscript{23} \textcite{7AA Charles Allen Wright, \textit{Fedral Practice and Civil Procedure} § 1772, 4 n.1.}

\textsuperscript{24} \textcite{See id. § 1774, 30 nn.8-9.}

\textsuperscript{25} \textcite{See Ortiz v. Fireboard Corp., 527 U.S. 815 (1999)(narrowly construing situations where 23(b)(1)(B) limited fund class is available).}

\textsuperscript{26} \textcite{See Fed. R. Civ. P. 23(b)(2). \textit{Rule 23(b)(2)} provides for class treatment where “the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole[.]”}

\textsuperscript{27} Professor Epstein believes the class device is especially well-suited for these types of lawsuits. \textcite{See Richard A. Epstein, \textit{Class Actions: Aggregation, Amplification, and Distortion}, 2003 U. Chi. Legal F. 475, 487-88 (2003).}

\textsuperscript{28} \textcite{Id.}

\textsuperscript{29} \textcite{See Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614 (1997)(“In the 1966 class-action amendments, Rule 23(b)(3) . . . was the most adventuresome innovation.”)(internal citations omitted).}

\textsuperscript{30} \textcite{Fed. R. Civ. P. 23(b)(3). Subsection (b)(3) specifies that “[t]he matters pertinent to the findings include: (A) the interest of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.”}

\textsuperscript{31} \textcite{Gen. Telephone Co. of the Sw. v. Falcon, 457 U.S. 147 (1982)(holding that individualized inquiries would not further “the efficiency and economy of litigation which is a principal purpose of the procedure.”).}
B. Supreme Court Precedent Regarding Class Certification

Rule 23 expressly requires that the plaintiff move for certification of a class, and the plaintiff bears the burden of proof on Rule 23’s requirements. But Rule 23 does not specify how the plaintiff should show, for example, that common issues in the litigation will predominate over individualized ones, or that class treatment is better than other methods for resolving the claims, and the Supreme Court has offered little guidance on what showing the plaintiff must make on each Rule 23 requirement.

1. The Eisen Myth

The Supreme Court’s first explication of the class certification burden was in Eisen v. Carlisle & Jacquelin. There the Supreme Court “expressly forbid” the trial court “from engaging in a preliminary inquiry into the merits of the case” in determining whether class certification was appropriate. A close look at the facts of the Eisen case, coupled with a discussion of subsequent Supreme Court authority, puts the Court’s objection to a “preliminary inquiry into the merits” into perspective.

The Eisen plaintiffs sued several brokerage firms and the New York Stock Exchange for allegedly violating antitrust and securities laws. Eisen was filed in 1966, the same year that Rule 23 was rewritten to permit class actions seeking money damages. The district court was obviously inexperienced with the new Rule 23 and unsure how to apply its requirements. Unlike pre-1966 class actions, the drafters of new Rule 23 envisioned that class adjudications would have full res judicata effect on class members who had not affirmatively joined the lawsuit. The Supreme Court had previously held, however, that a lawsuit could not be given res judicata effect unless the parties’ due process rights were satisfied; at a minimum, this required notice and an opportunity to be heard. To comply with these constitutional due process requirements, Rule 23 directed the plaintiff to notify absent class members of the lawsuit.

The issue in Eisen centered upon this recently adopted requirement that individual notice be provided to all class members who could be identified through reasonable efforts. The trial court was concerned that the plaintiff would be unable to afford the great expense of personal notice to the entire class. The plaintiff’s stake in the lawsuit was only $70, and the class included approximately six million individuals and institutions.

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34 Id. at 177.
35 Id. at 160.
37 See 1 MCLAUGHLIN ON CLASS ACTIONS § 1:1 nn.16, 21 (3d ed. 2006).
39 Eisen, 417 U.S. at 173-74 (citing Rule 23(c)(2) and Advisory Committee’s Notes thereto).
40 Id. at 164, 166-68.
41 Id. at 161, 166.
The trial court therefore decided to hold a preliminary evidentiary hearing. If the plaintiff could show a strong likelihood of success on the merits, then the court would order the defendants to pay the costs of notice to the plaintiff class. Following the hearing, the district court imposed 90% of notice costs on the defendants.

The Supreme Court reversed, holding that the plaintiff must bear all costs of notice. Rule 23 assigned to the plaintiff the procedural burden to notify the class of the pending action, and the Rule did not permit the district court to shift that burden to the defendants based upon a finding that the plaintiff would probably prevail on the merits. In the Court’s words, “[i]n the absence of any support under Rule 23, [plaintiff’s] effort to impose the cost of notice on [defendants] must fail. The usual rule is that a plaintiff must initially bear the cost of notice to the class. . . . [T]he plaintiff must pay for the cost of notice as part of the ordinary burden of financing his own suit.”

Eisen thus held that the procedural safeguards of Rule 23 cannot be disregarded even where the plaintiff has viable claims that may go unremedied if the class is not certified. Almost as an afterthought, the Supreme Court then cited with approval a Fifth Circuit decision “where the court rejected a preliminary inquiry into the merits of a proposed class action.” The Court found “nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action. . . . [W]e might note that a preliminary determination of the merits may result in substantial prejudice to a defendant[.]” With these words, the Eisen Court intended to protect defendants from unfair treatment, but, ironically, the Court’s words have been used to harm class action defendants ever since. Class action plaintiffs have taken this language out of context to argue that, at class certification stage, the trial court must accept the plaintiff’s evidence at face value, because Eisen forbids any “preliminary inquiry into the merits.”

2. The “Rigorous Analysis” Standard

The Supreme Court quickly and repeatedly clarified any potential misunderstanding of Eisen’s meaning. In Coopers & Librand v. Livesay, decided just four years after Eisen, the Supreme Court explained that “the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff’s

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42 Id.  
43 Id. at 168.  
44 Id.  
45 Id. at 177-78.  
46 Id.  
47 Id. at 177-78.  
48 Id. at 178 (discussing Miller v. Mackey Int’l, 452 F2d 424 (CA 1971)).  
49 Id. at 178-79 (emphasis supplied).  
50 See Robert G. Bone, Class Certification and the Substantive Merits, 51 Duke L.J. 1251, 1253 (2002)(arguing that Eisen’s “rule” that prohibits examination of the merits should be overruled); Geoffrey P. Miller, Review of the Merits in Class Action Certification, 33 Hofstra L. Rev. 51. 52 (2004) (arguing that Eisen is difficult to interpret and apply); David S. Evans, Class Certification, the Merits, and Expert Evidence, 11 Geo. Mason L. Rev. 1. 8 (2004)(showing that courts have consistently misapplied Eisen).  
51 See Bone, supra note 49, at 1253.
cause of action.”52 Far from prohibiting any exploration of the facts underlying the plaintiff’s claims, the Supreme Court expressly stated that “[e]valuation of many of the questions entering into determination of class action questions is \textit{intimately involved with the merits of the claims}. The typicality of the representative’s claims or defenses, the adequacy of the representative, and the presence of common questions of law or fact are obvious examples. The more complex determinations required in Rule 23(b)(3) class actions entail \textit{even greater entanglement with the merits}. . . .”53

A few years later, in \textit{General Tel. Co. of the Southwest v. Falcon},54 the Court once again strongly admonished district courts to look carefully at the factual underpinnings of class claims. In \textit{Falcon}, the plaintiff alleged that he had not been promoted due to his national origin.55 He sought to represent a class of Mexican-Americans who were employed or who had sought employment with the defendant General Telephone Company in Irving, Texas.56 Reversing the district court’s certification order, the Supreme Court held that plaintiff had failed to demonstrate the prerequisites of Rule 23.57 In order to show that class treatment is appropriate, the plaintiff “must prove much more than the validity of his own claim.”58 The Court explained:

Even though evidence that he was passed over for promotion when several less deserving whites were advanced may support the conclusion that [Plaintiff Falcon] was denied the promotion because of his national origin, such evidence would not necessarily justify the additional inferences (1) that this discriminatory treatment is typical of [defendant’s] promotion practices, (2) that [defendant’s] promotion practices are motivated by a policy of ethnic discrimination that pervades [defendant’s] Irving division, or (3) that this policy of ethnic discrimination is reflected in [defendant’s] other employment practices, such as hiring, in the same way it is manifested in the promotion practices.59

The Court found that the plaintiff’s pleadings offered no assurance that his claim was factually similar to the putative class members’ claims.60 Thus, it was error for the trial court to certify a class without some additional inquiry to determine whether the named plaintiff’s claims were representative of a defined class’s claims.61 The Court cautioned that “sometimes it may be necessary for the court to probe beyond the pleadings before coming to rest on the certification question.”62 If resolving the case would require fact-finding for each class member’s claim, then class treatment would be inappropriate.

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53 \textit{Id.} at 469 n.12 (emphasis supplied)(citing Charles Allen Wright et al., 15 C. \textit{FED. PRAC. AND PROC.} § 3911, 485 n.45 (1976)).
54 Gen. Telephone Co. of Sw. v. Falcon, 457 U.S. 147 (1982).
55 \textit{Id.} at 149.
56 \textit{Id.} at 151.
57 \textit{Id.} at 157.
58 \textit{Id.} at 157.
59 \textit{Id.} at 157-58.
60 \textit{Id.} at 158.
61 \textit{Id.} at 160.
62 \textit{Id.}
The *Falcon* Court explained that a class “may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.”63 *Falcon* makes clear that Rule 23 does not prohibit, but to the contrary requires, the court to consider what facts are in dispute. The district court must determine whether those facts can be proved on a common basis; if they cannot, then the factual proof would devolve into a series of separate trials to determine the facts relevant to each individual class member’s claim.64 For this reason, the Court stated, “actual, not presumed conformance” with the requirements of Rule 23 is “indispensable.”65

II. **Expert Testimony Requirements**

After *Falcon* instructed the district court to “probe beyond” class action pleadings to ensure that Rule 23’s requirements were met, it became commonplace for plaintiffs to rely upon expert witness testimony at class certification stage. The expert would propose a methodology or formula to show that the case’s key facts, which appeared to require individualized proof from class members, could in fact be proved on an aggregate basis. But the district courts were not sure how to evaluate this expert testimony. The Supreme Court had never addressed the role that expert testimony should play in the class certification decision, and so the lower federal courts looked to the case that appeared most closely analogous, the landmark decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*66

A. **Daubert v. Merrell Dow Pharmaceuticals**

Rule 702 of the Federal Rules of Evidence governs the use of expert testimony.67 In *Daubert*, the Supreme Court interpreted Rule 702 to impose a “gatekeeper” requirement upon the district court.68 The district court must closely assess the proffered expert testimony, and if the opinions are not grounded in a reliable methodology, or if

63 Id. at 161.
64 See Parks Auto. Grp., Inc. v. Gen. Motors Corp., 237 F.R.D. 567, 571-72 (D.S.C. 2006)(refusing to certify class where individualized inquiries from class members would be required); Fotta v. Trustees of United Mine Workers of Am., 319 F.3d 612, 619 (3d Cir. 2003)(holding district court did not abuse its discretion in refusing to certify class where individual determinations required to determine whether ERISA fund wrongfully withheld or delayed payments); Bieneman v. City of Chicago, 864 F.2d 463, 465 (7th Cir. 1988)(holding class certification inappropriate for 3000 residents allegedly affected by airport noise, because noise would affect landowners’ interests in different ways and could not be proved on common basis).
65 Falcon, 457 U.S. at 160.
67 Rule 702 provides as follows: “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.” Fed. R. Evid. 702.
68 Daubert, 509 U.S. at 589 n.7.
they do not fit the facts at issue in the case, then the court must exclude the opinion testimony from evidence.\textsuperscript{69}

The \textit{Daubert} plaintiffs were infants whose mothers had ingested the anti-nausea drug Benedictin during pregnancy.\textsuperscript{70} The plaintiffs sued the drug manufacturer, Merrell Dow Pharmaceuticals, alleging that Benedictin caused severe birth defects, most notably shortened limbs.\textsuperscript{71} Previously published studies had not shown a causal link between Benedictin and birth defects, but the plaintiffs presented eight experts, all with strong credentials, who opined that Benedictin can cause birth defects.\textsuperscript{72} Their conclusions were based upon (1) animal studies finding a link between Benedictin and birth defects; (2) studies demonstrating that the chemical structure of Benedictin was similar to other substances known to cause birth defects; and (3) reanalysis of the data from previous studies that had not found a link between Benedictin and birth defects.\textsuperscript{73}

The district court found that the plaintiffs had not come forward with any admissible evidence that Benedictin causes birth defects in humans, and the Ninth Circuit affirmed, based upon the \textit{Frye} test.\textsuperscript{74} Under \textit{Frye}, an expert opinion was admissible only if it was based on a scientific technique “generally accepted” as reliable within the relevant scientific community.\textsuperscript{75} But the plaintiffs’ expert evidence was not “generally accepted,” because it had been generated solely for use in litigation, whereas the original published studies that found no causal link between Benedictin and birth defects were subjected to peer review and verification.\textsuperscript{76}

The Supreme Court reversed, holding that \textit{Frye}’s strict “general acceptance” test had been superseded by the Federal Rules of Evidence.\textsuperscript{77} Under the Rules, “[a]ll relevant evidence is admissible,” and “relevant evidence” is defined as anything that shows “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”\textsuperscript{79} This definition, the Court explained, is “a liberal one” and is at odds with \textit{Frye}’s rigid requirement of “general acceptance” in the relevant scientific community.\textsuperscript{80}

The Supreme Court then examined Federal Rule of Evidence 702, which governs the admissibility of expert testimony.\textsuperscript{81} Rule 702 then provided as follows.\textsuperscript{82}

\textsuperscript{69} Id. at 592-93.  
\textsuperscript{70} Id. at 582.  
\textsuperscript{71} Id. at 583.  
\textsuperscript{72} Id.  
\textsuperscript{73} Id.  
\textsuperscript{74} Id. at 582.  The \textit{Frye} test is named for the District of Columbia Circuit Court’s 1923 decision that established it.  \textit{Frye} v. United States, 293 F. 1013, 1014 (D.C. 1923).  
\textsuperscript{75} \textit{Daubert}, 509 U.S. at 584.  
\textsuperscript{76} Id.  
\textsuperscript{77} Id. at 587.  
\textsuperscript{78} Id. at 586 (citing \textit{Fed. R. Evid.} 402).  
\textsuperscript{79} Id. at 587.  
\textsuperscript{80} Id.  
\textsuperscript{81} Id. at 588.  
\textsuperscript{82} Id.  Following the \textit{Daubert} decision, Rule 702 was revised to incorporate expressly \textit{Daubert}'s standards.
If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.\(^3\)

The Court explained that Rule 702’s use of the “adjective ‘scientific’ implies a grounding in the methods and procedures of science. Similarly, the word ‘knowledge’ connotes more than subjective belief or unsupported speculation.”\(^4\) Thus, “in order to qualify as ‘scientific knowledge,’ an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation — i.e., ‘good grounds,’ based on what is known.”\(^5\)

In addition to reliability, Rule 702 required that the expert testimony “assist the trier of fact to understand the evidence or to determine a fact in issue.”\(^6\) The Court observed that expert testimony, like any other evidence used in a court of law, must meet the basic requirement of relevance: “Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful.”\(^7\) The Court described this requirement as “fit.” Based on this analysis, the Court formulated a new test:

Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology can properly be applied to the facts in issue.\(^8\)

B. Subsequent Supreme Court Authority

The Supreme Court later held that it is not enough for an expert to utilize a methodology that is, at some high level of abstraction, an accepted one in the relevant community of experts.\(^9\) General Electric Co. v. Joiner teaches that even where an expert uses accepted methodologies or techniques, the court has a duty to ensure that the expert used them properly in the particular case.\(^10\) In Joiner, an electrician alleged he had contracted lung

\(^3\) Daubert, 509 U.S. at 588 (citing Fed. R. Evid. 702).
\(^4\) Id. at 590.
\(^5\) Id.
\(^6\) Id. at 591.
\(^7\) Id.
\(^8\) Id. at 592-93. The Daubert Court provided a non-exhaustive list of factors for the trial court to consider in making its determination. First, has the expert’s hypothesis been tested? Id. at 594. Second, has the expert’s opinion been peer reviewed and or published? Id. Third, what is the known or potential rate of error? Id. Finally, Frye’s “general acceptance” test could bear on the issue. Wide acceptance of the expert’s methods and conclusions may properly make the trial court more confident in admitting the evidence. Id.
\(^10\) Id.
cancer due to his workplace exposure to polychlorinated biphenyls ("PCBs"). He relied on expert witnesses to establish the element of causation. The experts’ testimony was based in part upon animal studies where rats developed a different cancer after massive injections of PCBs. Their testimony was also based upon four studies of human populations. Two of these studies analyzed lung cancer rates of ex-employees at different PCB production plants. While these studies found somewhat elevated incidences of lung cancer among ex-employees, the increases were not statistically significant. The studies’ authors found no causal link between PCB exposure and lung cancer. A third study involved workers exposed to mineral oil, and made no mention of PCBs. The fourth study involved workers who had been exposed to numerous potential carcinogens in addition to PCBs.

The Supreme Court found that the trial court properly excluded the experts’ testimony. The fact that animal and human studies often form the basis of scientific opinion regarding the cause of disease was not a sufficient basis for admitting the expert’s opinion. The question, the Supreme Court explained, “was whether these experts’ opinions were sufficiently supported by the animal studies on which they purported to rely.” These particular studies, the Court agreed, were too far removed from the actual facts of the plaintiff’s claims. The plaintiff argued that the Daubert inquiry should focus on experts’ methodologies rather than their conclusions, but the Court cautioned that “conclusions and methodology are not entirely distinct from one another.” Neither Daubert nor the Federal Rules of Evidence would permit an expert to proffer opinions based solely on his own assurances that his opinions are well founded. Excluding the expert’s testimony is appropriate where “there is simply too great an analytical gap between the data and the opinion proffered.”

In Kumho Tire Co. v. Carmichael, the Court held that the district court’s duty to assess the reliability and relevancy of expert testimony applied to proffers of scientific and non-scientific testimony alike. The district court’s “basic gatekeeping obligation” is necessary because Rule 702 allows expert witnesses to offer ultimate opinions that are not based upon first-hand knowledge or observation. Experts have “testimonial

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91 Id. at 139-40.
92 Id. at 140.
93 Id. at 143-44.
94 Id. at 145.
95 Id. at 146.
96 Id.
97 Id. at 145-46.
98 Id. at 146.
99 Id. at 146-47.
100 Id. at 144.
101 Id. at 144-45.
102 Id. at 146.
103 Id.
104 Id.
106 Id. at 147.
latitude unavailable to other witnesses on the ‘assumption that the expert’s opinion will have a reliable basis in the knowledge and experience of his discipline.’

III. The Circuit Split Regarding Class Certification Standards

*Daubert* and its progeny have interpreted Rule 702 to impose three requirements on any party who seeks to proffer expert opinion testimony: the expert (1) must base his opinions upon an appropriate methodology, (2) must apply that methodology reliably to the particular facts of the case, and (3) must offer opinions that will help to resolve some question in dispute. But the Supreme Court has never addressed whether *Daubert*’s requirements apply when expert testimony is presented at the class certification hearing. Nor has the Court addressed the interplay between the bare admissibility of expert testimony under *Daubert*, on one hand, and the level of scrutiny necessary for class certification under Rule 23, on the other. In the absence of clear guidance from the Supreme Court, the lower federal courts have adopted three different approaches to class certification. Those approaches are detailed below.

A. The First Approach — No Merits Inquiries Permitted

A few courts refuse to apply *Daubert*’s strictures to expert testimony proffered by the plaintiff in support of class certification. These courts reason that such an analysis would delve into the merits of the case in violation of *Eisen*. Courts utilizing this “No Merits” approach to class certification will certify the class so long as the expert’s opinion is not so “fatally flawed” that it would be “inadmissible as a matter of law.” One district court certified a class after finding only that the expert’s methodology was “not so insubstantial as to amount to no method at all.” Another court found that the expert’s proposed methodologies were not “worthless” or “inherently faulty” and certified a class on that basis.

This highly deferential approach to the plaintiff’s evidence at class certification has largely fallen out of favor. The Second Circuit was originally the leading proponent of the No Merits approach, but it recently overruled two landmark cases, *Caridad v. Metro-North Commuter R.R.* and *In re Visa*, and expressly disavowed the No Merits

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107 Id. at 148.
110 *Daubert*, 509 U.S. at 591-93.
113 *In re Potash Antitrust Litig.*, 159 F.R.D. at 687. See also *In re Monosodium Glutamate Antitrust Litig.*, No. Civ. 00-MDL-1328 (PAM), 2003 WL 244729, at *1 (D. Minn. Jan. 29, 2003)(“On a motion for class certification, the Court cannot, and indeed should not, engage in the [*Daubert*] analysis.”).
116 *In re Visa Check / MasterMoney Antitrust Litig.*, 280 F.3d 124 (2d Cir. 2001).
rule. *Caridad* had held that “statistical dueling” between expert witnesses is “not relevant to the certification determination.” And *In re Visa* had refused to permit a full *Daubert* inquiry at class certification stage, stating that “a motion for class certification is not an occasion for examination of the merits of the case” and thus the court may only determine whether the expert opinion is “so flawed that it would be inadmissible as a matter of law.”

The Second Circuit expressly renounced these standards in its 2006 case *In re IPO Securities Litigation*, and yet the standards articulated in *Caridad* and *Visa* continue to influence the development of the law in this area. An important example is *Dukes v. Wal-Mart, Inc.*, where the district court certified the largest employment discrimination class in history. The *Dukes* plaintiffs proposed to certify a class of roughly 1.5 million women employed over a five year period at 3,400 Wal-Mart stores. The plaintiffs alleged that Wal-Mart’s policy of delegating broad discretion to its managers in making salary and promotion decisions resulted in company-wide discrimination against women. The plaintiff’s expert conducted a statistical analysis of Wal-Mart’s operations on a region-by-region basis, and found statistically significant distinctions in salary and promotions based upon sex. Wal-Mart presented its own expert in statistics, who conducted approximately 7,500 separate regression analyses of various departments within individual Wal-Mart stores. While the defendant’s expert did find limited instances of gender disparities in compensation, they were sufficiently isolated that they did not support an inference that Wal-Mart put into effect a company-wide policy of discrimination against female employees.

The district court cited to *Eisen* and *Caridad* in explaining the scope of its inquiry at class certification stage:

> [A]rguments on the merits are improper at this stage of the proceedings. *See Eisen*. . . . Accordingly, courts should avoid resolving “the battle of the experts.” *See Caridad* (district court may not weigh conflicting expert evidence or engage in “statistical dueling” of experts). Indeed, courts should not even apply the full *Daubert* “gatekeeper standard at this stage. Rather, it is clear that a lower standard should be employed at this class certification stage. . . . [The] court should only determine whether expert testimony is so fatally flawed as to be inadmissible as a matter of law[.]”

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117 *Caridad*, 191 F.3d at 292-93.
118 *In re IPO Sec. Litig.*, 471 F.3d 24, 40 (2nd Cir. 2006) (“Obviously, we can no longer continue to advise district courts that “some showing,” *Caridad*, of meeting Rule 23 requirements will suffice. . . . or that an expert’s report will sustain a plaintiff’s burden so long as it is not “fatally flawed,” see *Visa*. . . .”).
119 See *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1190 (9th Cir. 2007).
121 *Id.* at 141.
122 *Id.* at 155-57.
123 *Id.* at 156.
124 *Id.* at 156.
The district court found that the plaintiff’s evidence passed these standards, and granted the plaintiff’s motion for class certification. The Ninth Circuit affirmed, and its original opinion relied heavily on Caridad. It held that the district court need not apply “the full Daubert ‘gate-keeper’ standard at the class certification stage. Rather ‘a lower Daubert standard should be employed at this stage of the proceedings.’” The Ninth Circuit later issued a revised opinion reaching the same result, but carefully avoiding citations to Caridad’s overruled language.

The Tenth Circuit also continues to follow the No Merits approach, citing Eisen for the proposition that “the court must accept the substantive allegations of the complaint as true, although it need not blindly rely on conclusory allegations that parrot Rule 23 and may consider the legal and factual issues presented by plaintiff’s complaints.”

One district court articulated the Tenth Circuit’s class certification standard as follows:

[In adjudicating a motion for class certification, the court accepts the allegations in the complaint as true so long as those allegations are sufficiently specific to permit an informed assessment as to whether the requirements of Rule 23 have been satisfied. The merits of the class members’ substantive claims are generally irrelevant to this inquiry. Eisen v. Carlisle & Jacquelin.]

Specifically regarding expert evidence, the court again cited Eisen for the proposition that it was not permitted “to inquire into the merits of the suit during the certification process” and “should not weigh conflicting expert evidence. At this stage, robust gatekeeping of expert evidence is not required; rather, the court must query only whether expert evidence is useful in evaluating whether class certification requirements have been met.” Daubert’s requirements, the court opined, served merely as “useful guideposts” at class certification stage, and the court would reject the opinion only if it was “so flawed that it would be inadmissible as a matter of law.”

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126 Id.
127 Dukes v. Wal-Mart, Inc., 474 F.3d 1214, 1227 (9th Cir. 2007).
128 Dukes v. Wal-Mart, Inc., 509 F.3d 1168 (9th Cir. 2007). According to the Ninth Circuit’s revised opinion, Wal-Mart’s objections to the plaintiff’s expert were not focused on Rule 23’s requirements but instead related “to the ultimate merits of the case and thus should properly be addressed by a jury considering the merits rather than a judge considering class certification.” 509 F.3d at 1177. The Ninth Circuit opined that Wal-Mart had not actually challenged the plaintiff’s expert’s methodologies, but had instead challenged his conclusions, and the Ninth Circuit cited Daubert for the proposition that “the focus . . . must be on the principles and methodology, not on the conclusions they generate.” Thus, the Ninth Circuit reasoned, the trial court would have excluded the challenged expert opinion even if it had conducted a full Daubert analysis. Id. at 1179 (“Daubert does not require a court to admit or exclude evidence based on its persuasiveness, but rather, requires a court to admit or exclude evidence based upon its scientific reliability and relevance.”).
129 Shook v. El Paso County, 386 F.3d 963, 968 (Colo. 2004) (internal citations omitted).
131 Id.
132 Id. at *5 (citing In re Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 135 (2d Cir. 2001).
The “inadmissible as a matter of law” standard is puzzling. It cannot be reconciled with the abuse-of-discretion standard that governs the admissibility of expert testimony. The question is not whether the district court committed legal error (i.e., an error “as a matter of law”) by considering unsupported or immaterial expert testimony. The question is instead whether the district court abused its discretion. And a district court abuses its discretion when it refuses to determine whether expert testimony is relevant and reliable; as Justice Scalia has explained, the trial court’s discretion under Daubert “is not discretion to abandon the gatekeeping function.”133

B. The Second Approach — Daubert Only

A second approach rejects the notion that the Eisen decision disallows a full Daubert analysis at class certification stage. Instead, as its name implies, the “Daubert Only” approach permits the district court to ensure that the plaintiff’s expert opinion passes Daubert’s relatively lenient standards for admissibility. It does not, however, permit the district court to assess whether the plaintiff’s proffered evidence is persuasive, nor does it allow the court to consider the defendant’s opposing expert evidence in order to determine the likely course of trial.134 For Daubert Only courts, the “rigorous analysis” required under Rule 23 begins and ends with subjecting the plaintiff’s expert evidence to the Daubert analysis. These courts opine that Rule 23 “does not require — or authorize — the Court to credit Plaintiffs’ evidence over Defendants’ or vice versa.”135 If class certification “involves a battle of the experts, it [is] not appropriate for the Court to determine which expert is more credible at this time.”136 In point of fact, these courts resolve the battle in the plaintiffs’ favor as a matter of course, because they refuse to consider the defendant’s contrary expert evidence. The Daubert Only approach leaves certification automatic so long as the plaintiff hires a reasonably competent expert.

In re Pressure Sensitive Labelstock Antitrust Litigation is a paradigm example of the Daubert Only approach to class certification.137 The plaintiffs there alleged that the defendants had conspired to fix prices and allocate the market for self-adhesive labels.138 At class certification stage, both plaintiffs and defendants offered expert testimony from economists, and neither opinion was excluded under Daubert. The defendants challenged the factual basis for the plaintiffs’ expert’s analysis, and argued that, in order for the district court to make a meaningful decision regarding whether Rule 23’s requirements were met, the court would have to resolve those preliminary questions of fact.139 The district court refused to do so, finding class certification appropriate where the court “assured itself that Plaintiffs’ attempt to prove their allegations will predominantly involve common issues of fact and law.”140

134 See, e.g., In re Polymedica Corp. Sec. Litig., 432 F.3d 1 (1st Cir. 2005); In re IPO; Blades v. Monsanto Co., 400 F.3d 562, 575 (8th Cir. 2005).
135 In re Pressure Sensitive Labelstock Antitrust Litigation, 2007 WL 4150666, 6 (M.D. Pa. 2007).
137 In re Pressure Sensitive Labelstock, 2007 WL 4150666.
138 Id. at *1.
139 Id. at *3.
140 Id. (citing In re Linerboard Antitrust Litig., 203 F.R.D. 197, 217 n.13 (E.D. Pa. 2001)).
Not all cases so neatly fit the Daubert Only prototype, and it is sometimes difficult to determine whether a particular Circuit follows the Daubert Only rule, or also permits the district court to weigh conflicting evidence presented by the defendant and make preliminary factual findings in cases where certification is appropriate under one set of facts but not another.\(^{141}\) An important example is the Second Circuit’s recent decision in *In re IPO Securities Litigation*, which expressly recanted the standards set in *Caridad* and *In re Visa*.\(^{142}\)

*In re IPO* detailed a new standard for class certification: The district court must determine whether the plaintiffs have satisfied each threshold Rule 23 requirement.\(^{143}\) In order to do so, the district court will often have to “resolve[] underlying factual disputes, and, as to these disputes, the judge must be persuaded that the fact at issue has been established.”\(^{144}\) And yet the Second Circuit was reluctant to authorize factual “findings” by the judge at certification stage.\(^{145}\) The Second Circuit found it “troublesome” that a district court would resolve fact disputes relevant to Rule 23’s strictures but also related to the lawsuit’s substantive claims.\(^{146}\) *In re IPO* grudgingly confirmed that “there is no reason to lessen a district court’s obligation to make a determination that every Rule 23 requirement is met before certifying a class just because of some or even full overlap of that requirement with a merits issue.”\(^{147}\) But the Second Circuit feared that “a Rule 23 hearing will extend into a protracted mini-trial of substantial portions of the underlying litigation,” and so it emphasized that the district court could limit both pre-certification discovery and the class certification hearing.\(^{148}\)

\(^{141}\) It appears that the First, Second, Sixth, and Eighth Circuits usually follow the Daubert Only approach. *In re Polymedica Corp. Sec. Litig.*, 432 F.3d 1 (1st Cir. 2005); *In re IPO Securities Litig.*, 471 F.3d 24, 40 (2nd Cir. 2006); Beattie v. CenturyTel, Inc., 511 F.3d 554, 560 (6th Cir. 2007) (citing *Eisen* for proposition that “Rule 23 does not require a district court, in deciding whether to certify a class, to inquire into the merits of the plaintiff’s suit.”). Blades v. Monsanto Co., 400 F.3d 562, 566 (8th Cir. 2005) (“[I]f, to make a prima facie showing on a given question, the members of a proposed class will need to present evidence that varies from member to member, then it is an individual question. If the same evidence will suffice for each member to make prima facie showing, then it becomes a common question.”). The Eleventh Circuit has not yet addressed the issue.

\(^{142}\) *In re IPO Sec. Litig.*, 471 F.3d 24, 40 (2nd Cir. 2006) (“Obviously, we can no longer continue to advise district courts that “some showing,” *Caridad*, of meeting Rule 23 requirements will suffice. . ., or that an expert’s report will sustain a plaintiff’s burden so long as it is not “fatally flawed,” see *Visa* . . .”).

\(^{143}\) *Id.*

\(^{144}\) *Id.* The court used the numerosity requirement as an example: “a judge might need to resolve a factual dispute as to how many members are in a proposed class. Any dispute about the size of the class must be resolved, and a finding of the size of the class, e.g., 50, 100, or more than 200, must be made.” *Id.* at 41. The court also confirmed that these preliminary factual findings would be reviewed on appeal, as would any factual finding by the court, under the clearly erroneous standard. *Id.*

\(^{145}\) The Court “resist[ed] saying that what are required are “findings” because that word usually implies that a district judge is resolving a disputed issue of fact. Although there are often factual disputes in connection with Rule 23 requirements, and such disputes must be resolved with findings, the ultimate issue as to each [Rule 23] requirement is really a mixed question of fact and law. A legal standard, e.g., numerosity, commonality, or predominance, is being applied to a set of facts, some of which might be in dispute.” *Id.*

\(^{146}\) *Id.*

\(^{147}\) *Id.*

\(^{148}\) *Id.*
By overruling Caridad and In re Visa, the In re IPO decision undoubtedly granted defendants and absent class members greater procedural protections than they were previously afforded. In re IPO straightforwardly rejected the No Merits position that at class certification stage the district court should determine only whether the plaintiff’s expert opinion is “fatally flawed.” But In re IPO shied away from permitting the district court to make preliminary factual findings relevant to the propriety of class certification, perhaps still operating under a misunderstanding of Eisen. The Second Circuit vacillated on whether the district court should resolve factual disputes where class certification was appropriate under one set of facts but not another, and this apprehension about the district court’s role as fact-finder for Rule 23’s requirements has led lower courts to construe In re IPO narrowly. Consider for example Hnot v. Willis Group Holdings. The district court there had already granted class certification, and the defendants moved for reconsideration in light of In re IPO. The Hnot district court stated that, “In re IPO does not stand for the proposition that the Court should, or is even authorized to, determine which of the parties’ expert reports is more persuasive. Defendants ignore that In re IPO specifically rejected this interpretation of Rule 23. Instead, In re IPO reiterated that experts’ disagreement on the merits — whether a discriminatory impact [can] be shown — is not a valid basis for denying class certification.”

The district court believed In re IPO disallowed any assessment of the credibility of the expert’s proposed method of proof: “For the Court to decide which expert report was more persuasive would be to decide whether the class was actually discriminated against by the defendants. This the Court was not required to do, either before or after, In re IPO.”

District courts outside the Second Circuit have taken an even narrower view of In re IPO. The Eastern District of Louisiana recently took the position that In re IPO does not even require a Daubert hearing at class certification stage: “[I]n reality, In re IPO . . . underscores that a court should not make a final determination of the merits at certification stage. Instead, a court should exercise its discretion to insure that class certification does not become a pretext for a partial trial on the merits. . . . [N]othing in [In re IPO] stands squarely for the proposition that a full Daubert review is mandated.”

The Daubert Only approach views the plaintiff’s half of the case in isolation. Daubert Only courts disregard the defendant’s evidence relevant to manageability and predominance. As shown below, however, Rule 23 does not permit certification based solely on what evidence plaintiff intends to present at trial. It permits certification only where the trial as a whole will be manageable. Common issues must predominate over individual inquiries for “the action,” and not just plaintiff’s part of it.

C. The Third Approach — Daubert Plus a Rigorous Analysis

149 Id.
151 Id. at 210 (citing In re IPO, 471 F.3d at 35).
152 Id.
A third approach treats the Daubert inquiry as separate from, and preliminary to, the Rule 23 inquiry of whether class treatment is warranted. In fulfilling Daubert’s “gatekeeper” role, the district court determines whether expert evidence is relevant to Rule 23’s requirements and is based on a reliable methodology. Daubert determines whether the expert evidence is admissible. If so, then the district court considers the plaintiff’s expert testimony along with all other admissible evidence presented at the class certification hearing. Where class certification would be appropriate under one set of facts but not another, the district court makes “whatever factual and legal inquiries are necessary” to determine whether Rule 23’s requirements are met. This Daubert-Plus-a-Rigorous-Analysis approach (hereinafter called “Daubert Plus” for ease of reference) authorizes the district court to make preliminary factual findings necessary to determine whether issues common to all class members predominate over individual issues, so that a mass trial would be manageable. The Seventh Circuit was the first to embrace this approach in an influential 2001 opinion, Szabo v. Bridgeport Machines, Inc. There the Seventh Circuit recognized and articulated the distinction between the types of “merits” inquiries that Eisen warns against at class certification stage and the merits inquiries that the district court must undertake before it can meaningfully exercise its discretion under Rule 23. The dispute in Szabo focused on

154 A few No Merits courts have argued that the Federal Rules of Evidence do not apply at class certification hearings, and thus Daubert’s requirements, which arise from the Supreme Court’s interpretation of Federal Rule of Evidence 702, must also be inapplicable. See, e.g., Bacon v. Honda of America Mfg. Inc., 205 F.R.D. 466, 470 (S.D. Ohio 2001)(“Although at least one court has found that the Federal Rules of Evidence apply to proceedings under Rule 23, other courts have concluded that on a motion for class certification, the evidentiary rules should not be strictly applied.”); In re Hartford Sales Practices Litig., 192 F.R.D. 592, 597 (D. Minn. 1999). Discrediting this argument requires a close look at the Federal Rules of Evidence. Rule 104(a) provides that the district court is not bound by the rules of evidence, except rules regarding privilege, when determining whether a person is qualified to be a witness. Fed. R. Evid. 104(a). Taken at face value, then, Rule 104(a) would seem to permit the district court to ignore Federal Rule of Evidence 402, which permits only “relevant evidence” to be considered. In other words, Rule 104(a) seems to allow the court to determine whether a person is qualified to testify as a witness based upon irrelevant material. This was not the intent of Rule 104(a)’s drafters. The Advisory Committee Notes to Rule 104 contemplate that a judge deciding a witness’s qualifications will hold a hearing at which it will “of necessity receive evidence pro and con on the issue.” See Fed.R. Evid. 104(a) advisory committee’s note, reprinted in 28 U.S.C. app. at 681 (1982). The drafters intended that the judge should not be bound by the strict exclusionary rules of evidence, but instead “should be empowered to hear any relevant evidence, such as affidavits and other reliable hearsay.” See id. (citing McCormick on Evidence § 53, at 136 n.8 (E. Cleary 3d ed. 1984). See also Norman M. Garland and Jay A. Schmitz, Of Judges and Juries: A Proposed Revision of Federal Rule of Evidence 104, 23 U.C. Davis L. Rev. 77, 80 (1989)(“Rule 104 does not exemplify a drafting masterpiece… The drafters [ ] complicated subdivision (a) by including the final sentence which states that evidentiary rules do not bind the judge in determining preliminary questions of fact under Rule 104(a)… Any dispute based on evidentiary rules, including the rule of relevancy, is one of admissibility. As the Committee noted, rules of exclusion of evidence on grounds other than relevancy are the child of the jury system.”)(emphasis supplied)(internal citations omitted).

155 See, e.g., Johnson v. HBO Mgmt., Inc., 265 F.3d 178, 188 (3d Cir. 2001); Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 676 (7th Cir. 2001).

156 The Third, Fifth, and Seventh Circuits consistently follow the Daubert Plus approach. Johnson, 265 F.3d 178; Szabo, 249 F.3d 672; Regents of the University of California v. Credit Suisse First Boston (USA), 482 F.3d 372 (5th Cir. 2007).
a computer system for operating machine tools. The plaintiff filed suit against the manufacturer, Bridgeport Machines, alleging that the computer was defective and that Bridgeport had committed fraud in describing its capabilities. The plaintiff sought to represent a nationwide class of Bridgeport computer purchasers. The proper definition of a class turned upon whether Bridgeport itself made the alleged misrepresentations, or whether various distributors made the representations without Bridgeport’s knowledge. If Bridgeport made the representations, then a single state’s law of fraudulent misrepresentation would apply, and so the commonality, typicality, and numerosity prongs would likely be met. On the other hand, if various distributors made representations without Bridgeport’s knowledge, then individual fact-finding would be required to resolve each plaintiff’s claims and different states’ laws would apply, likely defeating commonality, typicality, and numerosity.

The trial court certified a nationwide class, citing Eisen for the proposition that the court was not permitted to “conduct a preliminary inquiry into the merits” in order to determine whether to certify the class. The Seventh Circuit rejected this argument: “Certifying classes on the basis of incontestable allegations in the complaint moves the court’s discretion to the plaintiff’s attorneys — who may use it in ways injurious to other class members, as well as ways injurious to defendants.”

Szabo explained that, where necessary to evaluate Rule 23’s requirements, the district court is both authorized and required to inquire into the underlying facts. “[N]othing in . . . Rule 23, or the opinion in Eisen, prevents the district court from looking beneath the surface of a complaint to conduct the inquiries identified in the rule and exercise the discretion it confers. Plaintiffs cannot tie the judge’s hands by making allegations relevant to both the merits and class certification[.]”

In West v. Prudential Securities, Inc., the Seventh Circuit affirmed that Szabo’s requirements apply where the class certification motion is supported by expert testimony. West instructs the district court to resolve conflicts between competing expert testimony where those fact determinations are necessary to the class certification decision. The district court certified the class because each side’s position was supported by a reputable expert, but the Seventh Circuit held that that was not enough:

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157 Szabo, 249 F.3d 24.
158 Id. at 673-674.
159 Id.
160 Id. at 674-675.
161 Id.
162 Id.
163 Id. at 677.
164 Id.
165 Id. (“The proposition that a district judge must accept all of the complaint’s allegations when deciding whether to certify a class cannot be found in Rule 23 and has nothing to recommend it[.]”).
166 Id. at 675-76.
167 W. v. Prudential Sec., Inc., 282 F.3d 935, 938 (7th Cir. 2002).
168 Id.
That amounts to a delegation of judicial power to the plaintiffs, who can obtain class certification just by hiring a competent expert. A district judge may not duck hard questions by observing that each side has some support, or that considerations relevant to class certification also may affect the decision on the merits. Tough questions must be faced and squarely decided, if necessary by holding evidentiary hearings and choosing between competing perspectives.”

The Fifth Circuit, too, has recently adopted the *Daubert* Plus approach. If each side’s expert passes muster under *Daubert*, then the district court is obligated to resolve any disputes necessary to determine whether Rule 23’s prerequisites are met. The *Unger* plaintiffs alleged securities fraud claims and sought to certify a class of purchasers of the defendant’s common stock. One of the essential elements in the underlying substantive claim was reliance, which normally would require individual inquiries from each class member. The plaintiffs alleged, however, that the defendants’ stocks traded in an efficient market, and thus they were entitled to a rebuttable presumption of reliance under the “fraud-on-the-market” theory. The Fifth Circuit held that the plaintiffs were not entitled to a presumption on the reliance element unless expert evidence showed that the stock did *in fact* trade in an open and developed securities market.

The Fifth Circuit noted that “[t]he plain text of Rule 23 requires the court to ‘find,’ not merely assume, the facts favoring class certification.” Thus “Rule 23 requires a complete analysis of fraud-on-the-market indicators,” which, in turn, requires the district court to “address and weigh factors both for and against market efficiency.” This preliminary fact finding required at the certification stage “may be revised (or wholly rejected) by the ultimate factfinder, [but] the court may not simply presume facts in favor of an efficient market.” *Unger* analogized the district court’s role at class certification stage to its fact-finding role where the defendant challenges subject matter or personal jurisdiction. There the district court must decide any facts necessary to

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169 Id.
170 See, e.g., Regents of the University of California v. Credit Suisse First Boston (USA), 482 F.3d 372, 381 n.8 (5th Cir. 2007)(instructing the district court to “make whatever factual and legal inquiries are necessary under Rule 23. . . and if some of the considerations under Rule 23(b)(3) . . . overlap the merits. . . then the judge must make a preliminary inquiry into the merits.”).
171 Unger v. Amedisys Inc., 401 F.3d 316 (5th Cir. 2005).
172 Id. at 325.
173 Id. at 319-20.
174 Id.
175 Id.
176 Id. at 321.
177 Id. at 325 (emphasis supplied).
178 Id. at 322-23.
179 Id. at 323 (“Because this inquiry can prove decisive for class certification, and because, given the realities of litigation costs, certification can compel settlements without trial, courts have frequently applied rigorous, though preliminary, standards of proof to the market efficiency determination. Courts have likened the degree of proof required to the standards used in preliminary injunction hearings, or in [subject-matter and personal] jurisdiction contexts.”).
determine its jurisdiction. If those facts happen to overlap the plaintiff’s underlying substantive claims, then the trial jury would not be bound by the district court’s preliminary factual findings and indeed would never become aware of those findings.

IV. Courts Must Conduct a *Daubert* Hearing Before Certifying a Class Based Upon Expert Testimony.

The first premise of this Article is that the No Merits approach to class certification should be laid to rest. The Supreme Court has instructed the district courts to conduct a “rigorous analysis” of class claims to ensure that each of Rule 23’s prerequisites is actually met before certifying a class. And the Court has explained that this will typically require the court to “probe beyond the pleadings[.]” In other words, the plaintiff may not rely on its mere allegations, but must instead come forward with evidence at class certification stage. At the very least, that evidence should be sufficiently relevant and reliable to warrant its admission into evidence. The *Daubert* analysis is the Court-approved process for determining whether expert evidence is admissible, and *Daubert* is thus a necessary prerequisite where the trial court bases the class certification decision on expert evidence.

The few courts that continue to adhere to the No Merits approach to class certification lean heavily on *Eisen*’s objection to a “preliminary inquiry into the merits” to justify relying upon potentially worthless expert evidence. As previously shown, the *Eisen* decision does not support the No Merits certification approach. To the contrary, *Eisen* held that Rule 23’s requirements must be strictly observed; the district court was not permitted to lighten the procedural burdens that Rule 23 places on the named plaintiff. The *Eisen* Court intended its words to protect defendants from abuse, but the No Merits approach turned *Eisen* on its head, using its language out of context to justify lax standards for class certification. For the sake of argument, however, let us give *Eisen* its broadest possible reading. Even assuming that *Eisen* instructs that district courts should avoid making factual findings on “merits” issues that will eventually be determined by a jury, *Daubert* still does not determine the “merits” of the underlying substantive claims.

The *Daubert* standard is a relatively low one. *Daubert* determines only whether an expert’s opinion meets a threshold level of reliability and relevance. Where an opinion

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180 See id.
181 See id.
183 *Id.* at 160.
184 *Id.* at 160-61.
185 See *supra* Part II.
186 See *supra* Part III.A.
187 See *supra* Part I.B.
189 See infra Part IV(a). See also *In re IPO Sec. Litig.*, 471 F.3d 24, 36 n.9 (2nd Cir. 2006).
190 See *supra* Part II.
191 *Id.*
is not based in a reliable methodology, or is irrelevant to the issues before the court, it is not helpful to the district judge who must determine whether Rule 23’s requirements are met. The *Daubert* inquiry does not require the court to decide the facts underlying the plaintiff’s claims. *Daubert* instead directs the district court to ask two questions: First, is the expert testimony reliable (i.e., is it properly grounded in an appropriate methodology)? Second, is the expert testimony relevant (i.e., does it help resolve some disputed fact in the case)? As shown below, these are not “merits” determinations.

### a. Determining reliability does not determine “merits.”

*Daubert*’s reliability prong does not permit the district court to exclude one expert’s testimony because if finds another’s more persuasive. *Daubert* instead requires the court to determine whether a challenged expert’s testimony meets a minimum acceptable level of reliability. The court determines whether the expert’s opinions are based upon “good grounds,” that is, something “more than subjective belief or unsupported speculation.” The parties are not required to demonstrate that their experts’ opinions are correct, only that those opinions are reliable, and the “evidentiary requirement of reliability is lower than the merits standard of correctness.” Rule 702 contemplates that conflicting testimony from opposing experts will be admitted into evidence, so long as each expert’s opinion is derived from reliable methods appropriately applied to the facts of the case. Rule 702’s Advisory Committee Notes explain the matter this way:

> When a trial court, applying [Rule 702], rules that an expert’s testimony is reliable, this does not necessary mean that contradictory expert testimony is unreliable. [Rule 702] is broad enough to permit testimony that is the product of competing principles or methods in the same field of expertise.

The district court does not impermissibly delve into the merits of an expert’s opinions if it uses the opposing expert’s opinion to educate itself on the subject matter that is subject to expert testimony. *Daubert* recognizes that federal judges are experts in the law, but in the law only. Judges are not, and are not expected to be, experts in the innumerable scientific or technical fields of study that may become the subject of expert testimony in litigation. Because judges cannot be experts in all fields, they may be misled by

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192 Id.
193 See supra Part II(a).
195 Id.
196 Id. at 589.
197 Id. at 589. See also 29 Charles Allen Wright et al., Federal Practice and Procedure Evidence, § 6266 nn. 18-25, 31.
198 Daubert, 509 U.S. at 590.
199 In re Paoli R. R. Yard PCB Litigation, 35 F.3d 717, 744 (2d Cir. 1994). See also Ruiz-Trouche v. Pepsi Cola, 161 F.3d 77, 85 (1st Cir. 1998)(“*Daubert* neither requires nor empower trial courts to determine which of several competing scientific theories has the best provenance.”).
200 Fed. R. Evid. 702 (advisory committee notes).
201 Id.
unreliable yet seemingly reasonable expert testimony, and the district court does nothing improper by considering the points raised by the opposing expert. 203

b. Determining relevancy does not determine “merits.”

Determining whether an expert’s testimony is relevant to Rule 23’s requirements likewise does not determine the “merits” of the case. Anderson v. Boeing Co., 204 a 2004 case from the Northern District of Oklahoma, is a prime example of the misstep No Merits courts take when they refuse to determine whether an expert’s opinion satisfies Daubert’s relevance prong. The Anderson plaintiffs were female employees alleging that Boeing had discriminated against them on the basis of their gender, paying them lower wages and assigning them less overtime work than male employees. 205 The plaintiffs sought to represent both salaried and hourly wage employees at Boeing’s Oklahoma facilities. 206

In support of the motion for class certification, the plaintiffs’ expert conducted a statistical analysis of pay and overtime at Boeing’s Oklahoma locations. 207 At plaintiff’s counsel’s direction, the expert assumed that any discrepancies in compensation between males and females were the result of a common discriminatory practice by Boeing. 208 Thus, the expert’s analysis did not, and did not even purport to, show that similar facts gave rise to both the named plaintiffs’ and the unnamed class members’ claims. 209 Because he assumed that Boeing’s Oklahoma facilities discriminated against women, the plaintiff’s expert did not attempt to account for legitimate factors, such as length of service, prior experience, education, or varying promotion policies at different Boeing divisions, that might account for the discrepancies in pay between genders. 210

Boeing argued that the expert’s opinions did not relate to any issue in dispute at class certification stage. 211 The crucial issue before the court on the plaintiffs’ motion for class certification was whether Boeing had engaged in a common course of conduct vis-à-vis its female employees, but the plaintiff’s expert had assumed, rather than shown, this common course of conduct. 212 Because his analysis showed only that there were in fact discrepancies in pay, without attempting to show that Boeing employed a common discriminatory policy or practice that caused the discrepancies, his opinions were irrelevant to every issue before the court on a motion for class certification. 213

The expert’s analysis could not, for example, show that each member of the class had

203 At the same time, the district court need not depend upon the opinions proffered by the parties’ experts in making its preliminary evaluation of reliability and relevancy. Rule 706 permits the court to seek advice from an expert of its own choosing in determining whether the proffered expert testimony is reliable and whether it fits the facts of the case at bar.
205 Id. at 528.
206 Id. at 530.
207 Id. at 526.
208 Id. at 528.
209 Id.
210 Id. at 528-29.
211 Id. at 526, 528.
212 Id. at 528.
213 Id.
factual issues in common; nor could his analysis show that the factual issues that gave rise to the named plaintiff’s discrimination claim were typical of the putative class members’ claims; nor could it show that there were other victims of Boeing’s discriminatory treatment too numerous to practically join in the lawsuit. But the district court refused to consider whether the expert’s opinions were relevant to the class certification issues. The court stated that it “is not applying the Daubert standard and thus, [the court] looks less at the relevance of the analyses and more at whether they are so fatally flawed as to be inadmissible as a matter of law.”

The trial court’s reasoning missed the mark. Rule 702 permitted consideration of expert testimony only if it would “assist the trier of fact to understand the evidence or to determine a fact in issue.” The only issues before the Anderson court on the plaintiff’s motion for class certification were Rule 23’s requirements. The propriety of treating Boeing’s female employees as a class depended upon whether the named plaintiff and a large group of female employees had claims against Boeing arising from similar facts. If Boeing was correct, and the expert’s testimony merely demonstrated that there were in fact discrepancies in pay, without demonstrating that similar facts gave rise to those discrepancies, then the expert’s opinions were wholly immaterial to Rule 23’s requirements. Expert testimony that does not relate to the issues before the court does not meet Rule 702’s requirement that expert testimony “assist the trier of fact.” By definition, irrelevant evidence can never help resolve the issues, and refusal to determine whether evidence is relevant is an abuse of trial court discretion.

c. Class certification is an advanced stage in the litigation.

Courts that follow the No Merits approach often claim that the Daubert inquiry would be premature at class certification. They argue that certification is a preliminary step in the litigation, and thus the plaintiff’s expert should not be expected to fully evaluate the relevant evidence or reach a final conclusion until discovery is complete. The judge often promises to decertify the class if, during discovery, more facts come to light to show that class certification was improvidently granted. Even the Falcon decision supported this view, stating that “the judge remains free to modify [the class certification

214 See Fed. R. Civ. P. 23(a)(2)(permitting class certification only if “there are questions of law or fact common to the class”).
215 See Fed. R. Civ. P. 23(a)(3)(permitting class certification only if the named plaintiff’s claims “are typical of the claims . . . of the class”).
216 See Fed. R. Civ. P. 23(a)(1)(permitting class certification only if “the class is so numerous that joinder of all members is impracticable”).
217 Anderson, 222 F.R.D. at 528.
218 Id.
219 Fed. R. Evid. 702.
221 Fed. R. Evid. 702.
222 Daubert v. Merrell Dow Pharm., 509 U.S. at 591.
223 Midwestern Mach. v. Nw. Airlines, Inc., 211 F.R.D. 562, 566 (D. Minn. 2001) (“[The expert] should not be expected to have fully evaluated all data at the preliminary stage of class certification.”); see also In re Visa Check/Mastermoney Antitrust Litig., 192 F.R.D. 68, 76 (E.D.N.Y. 2000)(referring to class certification as a “preliminary stage”).
order] in the light of subsequent developments in the litigation. For such an order, particularly during the period before any notice is sent to members of the class, ‘is inherently tentative.’”

These arguments are no longer persuasive, if they ever were. Congress recently enacted the Class Action Fairness Act of 2005 (“CAFA”), which changed the timing and tenor of the class certification decision. Before CAFA, Rule 23(c)(1) required the court to determine whether to certify class action “as soon as practicable” after the putative class action was filed, and provided that class certification “may be conditional, and may be altered or amended before the decision on the merits.” CAFA significantly altered this Rule, thereby legislatively overruling those cases permitting a “tentative” class certification decision. Today, Rule 23(c)(1) specifies the class certification decision should be made “at an early practicable time”, and the language permitting “conditional” certification has been stricken from the Rule.

CAFA’s amendments to Rule 23 comport with what was already the common practice of the federal courts. The class certification decision does not take place soon after the case is filed. To the contrary, it has long been customary to permit significant pre-certification discovery on class issues. Courts normally enter an order limiting discovery to facts relevant to Rule 23’s requirements; in practice this leaves few facts on the table for post-certification discovery, because the Rule 23 facts are so intertwined with facts relevant to the substantive claims. Class certification experts thus have access to whatever facts they need to proffer an opinion relevant to Rule 23’s requirements.

V. Rule 23 requires that Courts weigh all relevant and reliable evidence in making the class certification decision.

This Article’s first premise was that the Daubert analysis is a necessary prerequisite where the trial judge bases the class certification decision on expert evidence. The Article’s second premise builds on the first: The Daubert analysis is necessary, but not sufficient, for class certification. In addition to subjecting expert testimony to Daubert’s standards for admissibility, the federal courts must also conduct the full “rigorous analysis” that Rule 23 demands. The Daubert Only approach conflates these two separate inquiries, while the No Merits approach abandons them both. The Daubert Plus approach, in stark constrast, recognizes that Daubert and Rule 23 serve two very different purposes and requires the district court to perform two very different analyses where expert testimony is proffered at certification stage. The first task is the preliminary assessment of whether expert testimony is admissible. Expert testimony that fails to meet Daubert’s basic standards of reliability and relevance cannot be admitted into evidence.

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226 Rule 23(c)(1)(C) states, “An order under Rule 23(c)(1) may be altered or amended before final judgment.”
227 See Falcon, 457 U.S. at 161.
The second task is a rigorous analysis of the full range of admissible evidence offered in support of and in opposition to class certification.

A. Rule 23 Requires that the Court “Find” that the “Class Action” Meets All Certification Requirements.

Under the express language of Rule 23, a class may be certified only where the district court “finds” that the Rule’s requirements are met. To make the required “findings,” the district court must necessarily assess all relevant evidence and act as a trier of fact as to Rule 23’s requirements. But the No Merits and Daubert Only approaches do not permit the district court to act in a fact-finding role. These courts refuse to evaluate all evidence relevant to Rule 23’s strictures, even where resolving the underlying fact disputes would determine whether common issues predominate or whether a mass trial could be adjudicated manageably. Instead, they base the certification decision on the plaintiffs’ evidence alone.

This is well illustrated in Chase v. Northwest Airlines, a Sixth Circuit decision. The allegations in Chase centered on “hidden-city ticketing,” a practice by which a passenger seeks a lower airline fare by using only part of a ticket. For example, a passenger who wished to travel from Atlanta to Nashville may discover a lower fare on a flight from Atlanta to New York, with a layover in Nashville. The passenger might purchase the Atlanta-to-New York ticket, disembark in Nashville, and forego the New York leg of the journey. By a variety of mechanisms, large commercial airlines prevented hidden-city ticketing. Plaintiffs alleged that, by preventing hidden city ticketing, the airlines had monopolized air transportation markets in violation of the Sherman Act.

In support of class certification, the plaintiffs’ expert opined that individualized proof regarding each of the allegedly monopolized markets would not be necessary; instead, the expert proposed to demonstrate “hub-based” proof of monopolization, which cut down his proof to only seven different airline hubs. The defendants’ expert, on the other hand, opined that proof relevant to monopolization would require proof regarding each of the 234 routes. The district court acknowledged that the plaintiff’s expert opinion raised a number of “difficult questions,” including the expert’s admission that passengers would not save money on all hidden-city route tickets. The court stated, however, that it “already ha[d] concluded in a prior Opinion that Defendants’ challenges go only to the evidentiary weight of Plaintiffs’ expert opinions and the correctness of the

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228 Fed. R. Civ. P. 23(b)(3).
229 Id.
231 Id.
232 See id at 177-78. (explaining practice of hidden-city ticketing generally)
233 Id. at 178.
234 Id. at 179.
235 Id.
236 Id. at 220.
237 Id. at 222.
conclusions drawn by those experts, but do not provide a basis for altogether excluding these opinions.”

The district court opined that, because Plaintiff’s experts passed Daubert, the airlines’ counterproof was irrelevant to the certification decision. The court rested class certification solely on the plaintiffs’ evidence: “[I]t is enough that plaintiffs and their experts have put forward a ‘colorable method’ of establishing their antitrust claims through generalized, class-wide proof.” The court held that, at certification stage, it should “not delve into the merits of an expert’s opinion or indulge ‘dueling’ between opposing experts.” Thus, the defendants’ only option was to argue their counterproof at trial.

The district court’s opinion suffered from at least two conceptual problems. First, the district court’s approach collapsed Rule 23’s requirements of predominance and manageability into Daubert’s standard for admissibility. The court determined that plaintiff’s expert testimony passed muster under Daubert, then certified the class on that basis alone. The court failed to discern the distinction between Daubert’s lenient standard for admissibility and Rule 23’s strict requirements for class certification. The court was probably correct in concluding that the plaintiffs’ expert’s opinions passed Daubert’s standard for admissibility, which requires only that the opinion be based on reliable methods and be relevant to some issue in the case. But Rule 23 asks a wholly different set of questions, including, but not limited to, whether a large group of people have claims arising out of similar facts, whether the trial will be manageable, and whether common issues will predominate. The district court could only make meaningful decisions about these issues by first engaging in preliminary fact finding. The plaintiff’s expert opined that it was possible to prove monopolization by proof related only to the seven “hub” airports; the defendant’s expert testified, on the contrary, that it was not possible to prove monopolization by reference only to the seven hubs, and proof regarding 234 separate routes would be required. In order to determine whether trial would be manageable and whether common issues would predominate, the trial court should have resolved this dispute between the experts.

The second conceptual problem was a related one: The district court based the certification decision solely on the plaintiffs’ proof, and failed to account for the defendant’s contrary evidence. The Chase plaintiffs would present econometric evidence related only to seven hubs, and the court presumably found that the plaintiff’s presentation would be manageable. But Rule 23 requires rigorous analysis of the likely course that the “class action” will take, and not just plaintiff’s portion of it. The district court should have determined the manageability of the trial in its entirety, which the

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238 Id. at 220.
239 Id. at 220 (“Defendants accuse Plaintiffs’ experts of making an unwarranted leap from hub-based to market-wide findings of monopoly power, and they argue that it is necessary to separately examine each of Plaintiffs’ 234 city-pair routes for the presence of such power. Again, however, the Court has already held that Plaintiffs will be allowed to present their somewhat “hub-skewed” market analysis to the trier of fact.”).
240 Id.
241 Id. at 218.
242 See id.
district court could only do by accounting for the defendant’s expert testimony. The court stated that “Defendants, of course, are free to offer evidence that tends to undermine Plaintiffs’ attempt to establish unlawful overcharges through generalized proofs.” But the court did not determine whether the defendants’ counterproof could be manageably presented in a jury trial, or whether it would predominate over the plaintiffs’ evidence.

The Chase defendants sought interlocutory review of the class certification, but the Sixth Circuit declined, stating, “We believe these issues to be so enmeshed with the merits of the case as to disfavor immediate review. A Rule 23(f) appeal should avoid mixing the merits of the case with the class certification issues.” In so holding, the Sixth Circuit endorsed the view, based upon a misreading of Eisen, that merits inquiries are inappropriate at class certification stage. The Chase decision places the Sixth Circuit squarely in the Daubert Only camp. It permits the district court to determine whether expert testimony is admissible under Daubert, but prohibits any more searching review. It allows the district court to rest class certification solely on plaintiffs’ expert’s proposed methodology, an approach at odds with the language of Rule 23, which requires that a class be certified only where the court can manageably adjudicate “the controversy[,]” not just plaintiffs’ case-in-chief.

The Daubert Plus approach, in contrast, takes the defendant’s evidence into consideration. A straightforward example is Arch v. American Tobacco Co., where the district court refused to certify a class of Pennsylvania smokers. The plaintiffs proposed to establish that individual class members were nicotine dependent through simple questionnaires. The district court refused to certify the class, finding that even though the questionnaire could establish a class member’s nicotine dependence as a prima facie matter, the defendant would be entitled to cross-examine each class

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243 Id. at 222.
244 In re Delta Air Lines, 310 F.3d 953, 961 (6th Cir. 2002).
245 See, e.g., Daffin v. Ford Motor Co., 458 F.3d 549, 553 (6th Cir. 2006); Beattie v. CenturyTel, Inc., 511 F.3d 554, 560 (6th Cir. 2007)(citing Eisen for proposition that “Rule 23 does not require a district court, in deciding whether to certify a class, to inquire into the merits of the plaintiff’s suit.”).
246 Waste Mgmt. Holdings v. Mowbray, 208 F.3d 288, 295 (1st Cir. 2000)(“[W]e regard the law as settled that affirmative defenses should be considered in making class certification decisions.”); Barnes v. Am. Tobacco Co., 161 F.3d 127, 145-49 (3d Cir. 1998)(holding that defendant’s affirmative defenses and responses to plaintiff’s generalized proof made class certification inappropriate); Castano v. Am. Tobacco Co., 84 F.3d 734, 744 (5th Cir. 1996)(“Going beyond the pleadings is necessary, as a court must understand the claims, defenses, [and] relevant facts . . . in order to make a meaningful determination of the certification issues.”); Sandwich Chef of Texas, Inc. v. Reliance Nat’l Indem. Ins. Co., 319 F.3d 205 (5th Cir. 2003)(decertifying class where district court “did not adequately account for individual issues of reliance that will be components of defendants’ defenses”); In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1303 (7th Cir. 1995)(ordering decertification because defendant’s affirmative defenses raised individual issues that would predominate over common issues).
248 Id. at 488. The defendants responded by citing the Diagnostic and Statistical manual of Mental Disorders (4th ed.) (“DSM-IV”), which provided that the determination of substance dependence required clinical assessment of the individual. Id.
member. The case as a whole, including defendant’s evidence, could not be manageably presented in a classwide trial, so class certification was inappropriate. Similarly, in Newton v. Merrill Lynch, an antitrust case, the Third Circuit recognized that it was not enough that plaintiffs’ case-in-chief would be presented through common evidence. The defendant’s right to present its defense could not be compromised or ignored: “[E]ven if plaintiffs could present a viable formula for calculating damages, . . . defendants could still require individual proof of economic loss.” Unless the lawsuit can be manageably tried on a class basis, Rule 23 does not permit certification.

The No Merits and Daubert Only courts interpret Rule 23 to permit class certification where the defendant could not manageably present at trial its evidence rebutting the plaintiffs’ evidence or supporting its own affirmative defenses. This interpretation not only violates the language of Rule 23 itself, but arguably violates the Rules Enabling Act as well. The Rules Enabling Act delegated to the Supreme Court the power to promulgate procedural rules for the operation of the federal courts, and Rule 23, like all the Federal Rules of Civil Procedure, “must be interpreted in keeping with . . . the Rules Enabling Act, which instructs that rules of procedure ‘shall not abridge, enlarge or modify any substantive right[].’” Although the Supreme Court has never invalidated a Federal Rule of Civil Procedure as violating the Rules Enabling Act, the Court has demanded that the Rules be strictly interpreted to avoid damaging the parties’ substantive rights. Specifically regarding Rule 23, the Court has said that it is “of overriding importance” that its requirements are faithfully observed.

The line between procedural and substantive rights is a notoriously murky one, and the Court’s attempts to define the terms have invariably devolved into circularities. But the Rules Enabling Act clearly delegates power to the Supreme Court to promulgate only procedural rules, and reserves to itself all control over substantive rights. Thus, one strong indicator that a right is “substantive” within the meaning of the Rules Enabling Act is that Congress has directly regulated the area through general legislation. Congress’ recent enactment of CAFA strongly indicates that Congress views class actions as affecting substantive rights. Congress enacted CAFA to end abuse of the

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249 Id. (finding that trial would last approximately 250 years if defendants were limited to one hour of cross-examination per class member).
250 Id.
253 Id. at 593 (“[C]ourts must be mindful that the rules as now composed set the requirements they are bound to enforce. Federal Rules take effect after an extensive deliberative process involving many reviewers: a Rules Advisory Committee, public commenters, the Judicial Conference, this Court, the Congress. . . . The text of a rule thus proposed and reviewed limits judicial inventiveness. Courts are not free to amend a rule outside the process Congress ordered[].”)
254 The Supreme Court has held that a rule is “procedural” within the meaning of the REA if the “rule really regulates procedure[].” Sibbach v. Wilson, 312 U.S. 1, 14 (1981).
class action device.\textsuperscript{256} CAFA’s legislative history specifically denounced the early view that Rule 23 authorized a named plaintiff to serve as a private attorney general, finding it “too anarchical to authorize private attorneys to self-appoint themselves as enforcers of law without adequate accountability to the lawmakers or the public.”\textsuperscript{257} In the view of the CAFA drafters, such an interpretation of Rule 23 would run afoul to the Rules Enabling Act, “bestow[ing] substantive rights not otherwise available under common or statutory law.”\textsuperscript{258}

The No Merits and \textit{Daubert} Only approaches permit class certification based solely on the evidence that the plaintiff plans to present at trial, and fail to determine whether the defendant can manageably present its defenses at a mass trial. Where those defenses would require individual inquiries from each class member, class certification denies the defendant’s right to present those defenses for all practical purposes. Consider \textit{In re Polymedica Corp. Securities Litigation}, a securities class action lawsuit.\textsuperscript{259} Like many securities class actions, the dispute focused upon whether the defendant’s securities traded in an efficient market. If the market was efficient, then the fraud-on-the-market theory would apply, and the plaintiff would be entitled to a rebuttable presumption of the issue of reliance. If, on the other hand, the market was inefficient, then individual reliance would have to be shown. The district court followed the \textit{Daubert} Only approach, subjecting the plaintiff’s expert to \textit{Daubert}’s standards, but ignoring the defendant’s evidence that the market was not efficient. The plaintiff’s expert passed muster under \textit{Daubert}, and so the district court certified the class.\textsuperscript{260}

On appeal, the First Circuit recognized that “the application of the fraud-on-the-market presumption only establishes just that — a presumption of reliance. That reliance can be rebutted at trial.” But immediately after acknowledging the defendant’s right to present evidence in its defense, the First Circuit noted that the defendant’s evidence of market inefficiency was “unwieldy” and “highly technical.”\textsuperscript{261} The First Circuit encouraged

\begin{footnotesize}
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\item\textsuperscript{257} S. Rep. No. 109-014, at n.160 (2005).
\item\textsuperscript{258} S. Rep. No. 109-014, at n.161 (2005).
\item\textsuperscript{259} \textit{In re Polymedica Corp. Sec. Litig.}, 432 F.3d 1, 17 (1st Cir. 2005).
\item\textsuperscript{260} \textit{Id.; See} Crammer v. Bloom, 711 F. Supp. 1264, 1290 (D.N.J. 1989) (stating that “if it were concluded after a hearing [that] the market appeared efficient, and [that] plaintiffs could proceed under the rebuttable presumption, [the defendant] would be entitled to prove to a jury that the market was inefficient, thereby rebutting the presumption.”); Lehocky v. Tidel Techs., Inc., 220 F.R.D. 491, 505 n.16 (S.D. Tex. 2004) (stating that, at class certification stage, “the Court need only inquire whether the stock traded in an efficient market and not examine the merits of the case. . . . Thus, the Court will not address whether Defendants can rebut the presumption of reliance.”).
\item\textsuperscript{261} \textit{In re Polymedica}, 432 F.3d at 17. The First Circuit opined that “the question of how much evidence is necessary for a court to accept the fraud-on-the-market presumption of reliance at the class-certification stage is therefore one of degree. District courts must draw these lines sensibly, mindful that evidence of fundamental value may be relevant to the determination of informational efficiency, but other more accessible and manageable evidence may be sufficient at the certification stage to establish the basic facts that permit a court to apply the fraud-on-the-market presumption. Knowing the high stakes in the class-certification decision, the parties will try to move the court in different directions, with plaintiffs arguing for less evidence of efficiency and defendants for more, some of it highly technical. . . .
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district courts to use “accessible and manageable evidence” to establish the rebuttable presumption of reliance, so that the class could be certified, and discouraged consideration of the defendant’s “highly technical” evidence at class certification stage. In a telling footnote, the First Circuit pointed out that 90% of certified cases settle. The unstated but obvious implication was class certification would force a settlement, and thus the jury would never see the defendant’s “highly technical” and “unwieldy” evidence. The First Circuit interpreted Rule 23 to permit class certification even though the defendant could not practicably present its defenses at trial. This interpretation of Rule 23 abridged the defendant’s substantive rights no less than if the court had eliminated the affirmative defenses themselves.

B. The Daubert Plus Approach Enforces Substantive Law Appropriately

Rule 23, like any other procedural rule, is an implement used to enforce substantive law. Any procedural system should aim to enforce the substantive law appropriately. It should protect the substantive rights of individuals by compensating those who suffer from another’s unlawful act; it should protect society as a whole by deterring unlawful conduct; and it should function efficiently, so that it neither overdeters corporate actors from engaging in socially advantageous activities nor underdeters them from wrongful acts. The three different approaches to class certification seem to turn on disagreements about the best way to achieve these goals. To illustrate, let us consider two different paradigmatic uses of class litigation: small claims and mass torts.

1. The Small Claims Class Action

In small claims litigation, the amount at stake for each claimant is low enough that individual litigation is not viable. Litigation costs would far exceed any expected recovery. The plaintiffs must bring their grievances through the class device or not at all, and so consolidation of small claims is the “policy at the very core of the class action mechanism.” The small claim class action serves the socially desirable goals of compensating victims and deterring defendants from future wrongdoing. A class suit may also conserve the resources of the judicial system and the parties by permitting a singular trial of a common issue, rather than presenting the same facts repetitively in multiple individual lawsuits.

Courts that follow the No Merits and Daubert Only approaches believe that these efficiency, compensation, and deterrence goals will be better served by lenient certification standards. These courts advocate erring on the side of certifying the class, and the district courts are given less discretion to deny class certification than to grant it. The No Merits approach is more extreme, disallowing any factual inquiries other

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262 Id.
264 Heerwagen v. Clear Channel Communications, 435 F.3d 219, 225 (2d Cir. 2006)( “When reviewing a denial of class certification, we accord the district court noticeably less deference that when we review a grant of certification.”)(citing Parker v. Time Warner Entm’t Co., 331 F.3d 13, 18 (2d Cir. 2003)).
than determining whether the plaintiffs’ expert’s opinion is “inadmissible as a matter of law.” At first blush, the Daubert Only rule seems to permit a more extensive analysis of the law and facts, but the Daubert inquiry is a relatively limited one. Both the No Merits and Daubert Only courts seem to view intensive judicial scrutiny of the underlying facts as too costly or prone to error, and so they permit class certification wherever the plaintiffs’ expert, as a prima facie matter, devises a common methodology for proving injury and damages.

Even in small claims class litigation, these lenient certification standards are inappropriate. The No Merits and Daubert Only approaches are overly focused on the policy objective of compensating the class members in small claims litigation. Compensation should not be the main object of the lawsuit, because each class member’s recovery is too insignificant to justify the enormous costs that class litigation generates. The only persons who meaningfully profit from small claims litigation are the lawyers, and compensating lawyers is certainly not an appropriate policy goal in and of itself. Thus, No Merits and Daubert Only courts must articulate some other policy rationale to justify the class device. The only viable option is a belief that the threat of a small claims class action deters corporate actors from wrongful conduct.

Lenient certification standards do not, however, achieve an appropriate level of deterrence. To the contrary, they both over- and under-deter corporate wrongdoing. A now infamous case that illustrates this problem is Avery v. State Farm Mutual Automobile Insurance Company. The plaintiff’s allegations in Avery v. State Farm focused on State Farm’s practice of writing collision repair estimates based upon the cost of generic automobile parts (“non-OEM” parts), rather than paying for substantially more expensive parts manufactured by the original equipment manufacturer (“OEM” parts). Plaintiffs’ theory of the case was a novel one. The language of State Farm’s insurance policy required State Farm to pay to “repair” the damaged automobile. Plaintiffs alleged that all non-OEM parts were inferior to the comparable OEM parts, and thus were incapable of returning an automobile to its pre-accident condition. Thus, they theorized, State Farm had breached its contractual duty to “repair” the automobile by failing to pay for more-expensive but allegedly better-quality OEM parts.

Plaintiffs attempted to demonstrate that the class members’ claims were susceptible to common proof, which should have been an impossible task. More than 33,000 different automobile replacement parts were at issue in the lawsuit, and proving that any particular non-OEM part was inferior to the OEM version should have required empirical testing. Even if the plaintiffs’ expert conducted a test that demonstrated, for example, that a non-OEM rear side panel for a 1995 Ford Taurus made by a particular non-OEM manufacturer was in fact inferior to the OEM version, this test would not show that a

266 Avery, 746 N.E.2d at 1247.
267 Id. at 1256.
268 Id. at 1247.
269 Id.
non-OEM front bumper for a 2001 Chevy Tahoe made by another manufacturer was inferior to the OEM version.\textsuperscript{271} But the plaintiffs conducted no testing whatsoever in support of class certification.\textsuperscript{272} Instead, the plaintiffs proffered an expert on repair parts who testified that every non-OEM part, for every make, model and year of car, was inferior in crashworthiness, appearance, and durability to every comparable OEM part.\textsuperscript{273} On the basis of this testimony, a nationwide class was certified, and a verdict of $1.2 billion was eventually awarded the plaintiffs.\textsuperscript{274}

State Farm had no advance warning that a court might find that it had breached its policy by paying for OEM parts. Quite the opposite, insurance regulations in many states encouraged, and some mandated, the use of non-OEM parts. The risk of class certification could not deter State Farm from using non-OEM parts, because State Farm had no notice that using non-OEM parts might be considered a breach of the duty to “repair” a policyholder’s automobile. At the same time, lax certification standards would likely over-deter other insurance companies from engaging in socially desirable conduct in the future. Many insurance companies used non-OEM parts because they were less expensive, and this cost savings presumably resulted in lower insurance premiums for their customers. By increasing the demand for non-OEM parts, insurance companies also created greater competition in the market for automobile replacement parts, which put pressure on the OEM manufacturers to keep prices down. But the \textit{Avery} decision ensured that insurance companies would never again risk a ruinous judgment by using non-OEM parts to repair automobiles, even in those states which encouraged their use.

Low levels of scrutiny for the class certification decision also have the undesirable effect of encouraging frivolous class action litigation. This problem has been a matter of serious academic discussion for decades, and scholarly and congressional focus on abuse of the class device intensified in the 1990s when the number of class action filings increased exponentially. \textit{Daubert} Only courts began to require a somewhat more extensive showing that Rule 23’s requirements were met, and refused to certify a class based upon inadmissible expert evidence. This procedure was more efficient than the No Merits approach, which treated class certification as a mere matter of pleading. Putting the plaintiff’s expert to \textit{Daubert}’s test prevented wholly unsupported cases from proceeding, thus increasing litigation efficiency by discouraging plaintiffs from filing bogus claims. As shown above, however, \textit{Daubert}’s requirements are actually rather lenient, and the \textit{Daubert} Only rule fails to account for the full range of evidence offered in support of and in opposition to class certification. Because they ignore defendants’ counterproof, class certification is virtually automatic under the \textit{Daubert} Only approach so long as the plaintiffs hire a well credentialed expert.

The \textit{Daubert} Plus approach, on the other hand, enables the defendant to resist illegitimate pressure to settle frivolous class claims. Class certification is not a preliminary stage in the litigation, but is instead the key decision that will determine the case’s outcome. The

\begin{itemize}
  \item \textsuperscript{271} \textit{Brief of Petitioner-Appellant Avery}, 746 N.E. 1242, 2003 WL 249298241, *16.
  \item \textsuperscript{272} \textit{Id.} at *14.
  \item \textsuperscript{273} \textit{Id}.
  \item \textsuperscript{274} \textit{Avery}, 746 N.E.2d at 1247.
\end{itemize}
vast majority of certified cases settle, and so there is no opportunity to correct an erroneously granted motion to certify a class. Many influential class action critics have argued that certification places such intense settlement pressure on the class defendant that it amounts to no less than “legalized blackmail.” The “blackmail” rhetoric has critics of its own, and some of those criticisms are well founded. Small claims class litigation, for instance, undoubtedly intensifies pressure upon the defendant to settle with claimants. No rational claimant would litigate if individual actions were required, because the expected litigation costs far exceed the expected recovery. But aggregating small claims cannot be considered illegitimate “blackmail.” It is, to the contrary, the precise intent of Rule 23’s drafters and remains the “core” purpose of class litigation.

There are instances, however, where class certification in small claims litigation intensifies settlement pressure to such a degree that it does become a normative concern. The core policy rationale supporting small claims litigation is to enable private enforcement of substantive rights. Rule 23 provided a procedural device for appropriate enforcement of the substantive law. It permitted a private individual with a real but insignificant loss to represent a large group of similarly situated persons with similar losses. Their combined recovery was sufficiently weighty to deter the corporate actor from future wrongdoing. Many statutory schemes, however, have provided alternative mechanisms for financing private litigation, where the substantive rights are of great consequence but the monetary damages are low. Examples include fee shifting provisions in civil rights statutes; treble damages in antitrust actions; and federal and state statutes providing for minimum statutory damages above the plaintiff’s actual damages. In these and similar cases, class treatment is unnecessary. The main purpose

275 “Any device which is workable only because it utilizes the threat of unmanageable and expensive litigation to compel settlement is not a rule of procedure — it is a form of legalized blackmail. If defendants who maintain their innocence have no practical alternative but to settle, they have been de facto deprived of their constitutional right to a trial on the merits.” Milton Handler, The Shift from Substantive to Procedural Innovations in Antitrust Suits – The Twenty-Third Annual Antitrust Review, 71 Colum. L. Rev. 1, 9 (1971). Many federal court decisions are wary of blackmail settlements. See, e.g., In re Bridgestone/Firestone, Inc., 288 F.3d 1012 (7th Cir. 2002); Newton, 259 F.3d 154, 164 (N.J. 2001); Castano v. Am. Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996); Marascalco. V. Int’l Computerized Orthokaratology Soc., Inc., 181 F.R.D. 331, 339 n.19 (N.D. Miss. 1998). The view does have its critics. See generally Charles Silver, “We’re Scared to Death”: Class Certification and Blackmail, 78 N.Y.U. L. Rev. 1357 (2003).

276 Compare Richard A. Nagareda, Aggregation and its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA, 106 Colum. L. Rev. 1872 (2006)(arguing that settlement pressure can be a matter of normative concern because it can distort the remedial scheme of underlying substantive law) with Charles Silver, “We’re Scared to Death”: Class Certification and Blackmail, 78 N.Y.U. L. Rev. 1357 (2003)(opining that pressure to settle is only a normative problem when class certification has denied the defendant’s right to due process). Judge Posner disagrees with the term “blackmail” in this context. See Richard A. Posner, Blackmail, Privacy, and Freedom of Contract, 141 U. Pa. L. Rev. 1817, 1820-22, 1827-28 (1993) (“Confidentiality clauses . . . are not classified as blackmail” and tort victims cannot commit blackmail by threatening to sue).


279 See 15 U.S.C. § 15(a); see also Epstein, supra note 27, at 502-06 (arguing that class certification where damages are automatically trebled distorts the substantively law).

of small-claims litigation is deterrence, not compensation, and the statutory mechanisms fully protect that interest. Moreover, certifying such a class distorts the remedial scheme laid out in the statute. Antitrust classes, where the damages are automatically trebled, are the most obvious and egregious example. The treble damage provision was presumably designed to ensure private enforcement by individual plaintiffs of the antitrust laws. Trebling not only that individual plaintiff’s damages but also the entire class’ damages may well bankrupt an antitrust defendant.\footnote{This settlement pressure is present, and may even be heightened, where the named plaintiff’s class claims lack merit. It is important to define what it means to “lack merit” here, because class action claims can lack merit in many different ways. Class allegations lack merit, even if the law and facts supporting the named plaintiff’s substantive claims are well-founded, where the Rule 23 elements are not satisfied. Under those circumstances, the claims could not be manageably tried together, and the litigation would devolve into mini-trials of individualized issues. And a class action also lacks merit where the substantive claims are weak, either from a legal or factual standpoint. The facts of \textit{Avery v. State Farm} once again illustrate these distinctions. The plaintiffs’ class claims lacked merit in the first sense because the claims could not be proved on a classwide basis. Proving that a particular OEM part was inferior to its corresponding non-OEM part would not bear on whether any of the other 33,000 OEM parts at issue were inferior to their non-OEM counterparts. The \textit{Avery} claims may have also lacked merit because the substantive claims were weak from a legal standpoint. The plaintiffs’ theory of the case had never been tested before. No precedent existed by which State Farm could judge its potential liability, and the trial court did not decide whether the plaintiffs’ legal theories were viable before certifying the class. The plaintiffs’ allegation that every OEM part was inferior to every non-OEM part may or may not have been meritless as a factual matter; determining the truth of the allegation would require empirical testing of the relevant parts. State Farm did not settle before trial, but State Farm was an exception to the general rule. Rather than face the expense of litigation, most class action defendants will settle, even where the plaintiffs’ claims are weak or meritless.}

\footnote{\textit{See} Northwest Airlines Corp. v. Chase, Petition for Certioari, n.7

Apparently failing to take account of the continuing damages claimed by plaintiffs, the automatic trebling of those damages in antitrust cases and the exposure of each defendant to joint and several liability, the court discounted the potential “death knell” impact of certification in this case: “the class damages sought by the plaintiffs are nearly $1 billion. . . .Although the instant lawsuit is probably more than a mere unpleasantry, the impact of class certification alone does not support an appeal. Nor are we entirely convinced that, in the absence of an immediate appeal, these defendants will have no recourse but to settle.”}\footnote{Coopers & Lybrand v. Livesay, 437 U.S. 463, 476 (1978)(“Certification of a large class may so increase the defendant’s potential damages liability and litigation costs that he may feel it economically prudent to settle and to abandon a meritorious defense.”); Castano v. Am. Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996)(“[C]lass certification creates insurmountable pressures on defendants to settle. . . . The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low”).}
their own defenses are strong.\textsuperscript{283} Permissive certification standards thus do not appropriately and effectively enforce the substantive law in the small claims context.

2. The Mass Tort Class Action

A second, more controversial paradigm for class litigation is in the mass tort context. These lawsuits aggregate personal injury claims where each class member’s damages are sufficiently substantial to justify individual litigation. Thus, the foremost goal in mass tort class litigation is not to ensure compensation or to deter future wrongdoing, because individual litigation can achieve those goals. Rather, class treatment of mass torts is intended to conserve the resources of the parties and the judicial system. The drafters of the 1966 amendments to Rule 23 expressed doubt that class litigation would achieve efficiencies in mass tort cases.\textsuperscript{284} But many courts ignore this advice and claim that efficiencies will result from class treatment, because the common issues may be extremely complex and require expert testimony. Even though the stakes are sufficiently high to make individual litigation feasible, lawyer and expert fees would quickly consume a good deal of the victim’s recovery. It is therefore more efficient, they claim, to decide liability issues in a mass trial and leave individuated damage issues for later judicial or administrative proceedings.\textsuperscript{285}

\textit{Daubert} Plus courts, on the other hand, believe that class treatment in mass tort cases leads to inefficiencies. The most influential opinion to express this view was authored by Judge Richard Posner in \textit{In re Rhone-Poulenc Rorer, Inc.}\textsuperscript{286} The named plaintiffs were hemophiliacs who became infected with the HIV virus as a result of using blood products manufactured by the defendants.\textsuperscript{287} They claimed that the defendants had failed to exercise reasonable care in screening blood donors, and they sought to represent a nationwide class of HIV-positive hemophiliacs against the blood products industry.\textsuperscript{288} The district court certified a class to determine certain liability issues, which mainly centered on when and how the defendants should have undertaken steps to eliminate the HIV-virus from the blood supply.\textsuperscript{289}

\textsuperscript{284} The Advisory Committee Note to the 1966 revision of Rule 23 states that “[a] ‘mass accident’ resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.”
\textsuperscript{285} This argument raises Seventh Amendment issues that are outside the scope of this work, but have been discussed at length elsewhere. \textit{See, e.g.}, Wright and Miller, Fed. Prac. and Proc. § 1801 regarding the right to a jury trial in a class action.
\textsuperscript{286} \textit{In re Rhone-Poulenc Rorer, Inc.}, 51 F.3d 1293 (Ill. 1995).
\textsuperscript{287} \textit{Id.}
\textsuperscript{288} \textit{Id.}
\textsuperscript{289} \textit{Id.} at 1294.
The Seventh Circuit found that the trial court had abused its discretion by certifying the class. Rule 23(b)(3) permits certification only where class treatment is “superior” to other methods for adjudicating the dispute, and class certification was not superior to the obvious alternative: “a decentralized process of multiple trials” that “will reflect a consensus, or at least a pooling of judgment, of many different tribunals.”

Judge Posner rejected the argument that a central trial on liability would be more efficient. In his view, multiple lawsuits would reduce the margin for jury error. The defendants had prevailed in 12 of the 13 previous cases alleging similar theories of liability. Whether that pattern continued in future trials or not, the additional information would help defendants and plaintiffs alike to assess their risk of liability and reach reasonable settlements in future cases. Judge Posner rightly observed that “it is not a waste of judicial resources to conduct more than one trial, before more than six jurors, to determine whether a major segment of the international pharmaceutical industry is to follow the asbestos manufacturers into Chapter 11.”

VI. Conclusion

In Eisen v. Carlisle & Jacquelin, the trial court made a preliminary determination that the plaintiffs would probably win their case, and so the court ordered the defendant to pay for notice to the class members. The Supreme Court reversed on the grounds that Rule 23 assigns certain procedural burdens to the plaintiff in order to protect defendants from class action abuse. The Court held that a district court may not lighten the plaintiff’s procedural burdens in order to obtain the perceived benefits that class certification would afford. The Eisen Court had no way to predict that a few words of dicta criticizing the trial court for shifting notice costs to the defendants after conducting a “preliminary inquiry into the merits” would spawn decades of confusion in class action practice.

Rule 23 permits a district court to certify a class where the trial of the action would be manageable, where common issues will predominate over individual factual inquiries, and where an aggregated adjudication is superior to other methods for resolving the dispute. But many courts refuse to undertake the depth of factual and legal inquiry required to determine these issues. Some courts refuse to take any look at the facts and law underlying the plaintiffs’ claims. Others determine only whether the plaintiffs have presented admissible evidence on Rule 23’s requirements. These approaches, which this Article calls the No Merits and Daubert Only approaches, are not faithful to Rule 23.

The Supreme Court has charged the district court with conducting a “rigorous analysis” of the facts and law that influence the propriety of class certification. This rigorous

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290 Interlocutory appeals of class certification orders were not routinely available at the time Rhone-Poulenc was decided. The Seventh Circuit instead granted a writ of mandamus. Rule 23 was later amended to include Subsection (f), which permits interlocutory appeals from orders denying or granting class certification.

291 Rhone-Poulenc, 51 F.3d at 1299-1300.

292 Id. at 1300.
analysis should include an assessment the relative weight and credibility of all expert testimony, as well as the full range of evidence presented to the court in support of or in opposition to class certification. The district court will often be unable to determine whether certification is appropriate until it resolves fact disputes relevant to Rule 23’s elements. Unless the district court follows this Daubert Plus approach, the court cannot make a meaningful determination that the case is actually one in which common issues predominate and which can be handled manageably on a class-wide basis. Rule 23 not only permits this depth of inquiry, but indeed requires it.