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# Must Class Certification Evidence Be Admissible?

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IN EARLY 2018, THE SUPREME COURT denied a petition for a writ of certiorari, in which a class action defendant urged the Court to rule that all class certification evidence must be admissible under the Federal Rules of Evidence. The petitioner contended that the Court's decisions in *Wal-Mart Stores, Inc. v. Dukes*[1] and *Comcast Corp. v. Behrend*[2] all but compel such a requirement. Although the Court declined to grant certiorari, litigants (especially litigants in antitrust and other complex class actions) likely have not heard the last of the issue. Were the Court to hold that all class certification evidence, including non-expert evidence, must be admissible, the resulting burdens and delays would benefit defendants significantly. Nothing in Supreme Court precedent, however, requires a rule that both expert and non-expert evidence offered to support class certification be admissible, and no circuit court case has explicitly held as much. Indeed, the only circuit court case expressly addressing the issue held the opposite.

In its petition for certiorari filed on September 14, 2017, Taylor Farms Pacific, Inc. argued:

> To obtain class certification, the moving party "must be prepared to *prove*" the requirements of Federal Rule of Civil Procedure 23. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) []. This includes "satisfy[ing] *through evidentiary proof* at least one of the provisions of [Fed. R. Civ. P.] 23(b)." *Comcast Corp. v. Behrend*, [569 U.S. 27], 133 S. Ct. 1426, 1432 (2013) []. The Court has not yet definitively decided, however, whether class-certification evidence must meet the standards of *admissibility* set forth in the Federal Rules. *Id.* at 1431 n.4; *see also Dukes*, 564 U.S. at 354.[3]

Taylor Farms contended that, while the Supreme Court may not have *expressly* mandated an admissibility requirement for all class certification evidence, it was the "inescapable corollary of *Dukes* and *Comcast*."[4] Taylor Farms also asserted that certiorari was appropriate because there was a clear split among the circuit courts on this question, which the Court should resolve.

At the heart of Taylor Farms' petition was the assertion that "*Dukes* and *Comcast* all but hold that class certification evidence must be admissible."[5] Specifically, the petitioner argued that an "integral part of the 'rigorous analysis' required by Rule 23" is that parties "support their respective positions with *evidence* rather than mere allegations or attorney argument."[6] Thus, "The moving party 'must be prepared *to prove* that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc.'"[7] Further, claimed Taylor Farms, the "Court was even more explicit [in *Comcast*]: 'The party must also satisfy *through evidentiary proof* at least one of the provisions of Rule 23(b).'"[8]

The quoted language, however, does not portend a requirement that *all* evidence offered at the class certification phase of the case—a preliminary stage in the litigation—must meet the requirements for admissibility as if at a trial on the merits. The most relevant Supreme Court cases are narrowly focused on *expert* evidence, and even then do not hold that expert evidence must satisfy the Federal Rules' admissibility standards. Moreover, only one circuit court decision has directly addressed the question whether all class certification evidence must be admissible. Because the circuit court decisions do not reflect a split on the issue that would warrant Supreme Court resolution, the Supreme Court appropriately denied the certiorari petition.

## Expert Testimony

The focus of *Dukes* and *Comcast* was expert testimony. In *Dukes* "the Court expressed 'doubt' that expert evidence could be spared *Daubert* scrutiny at the class certification stage."[9] The central issue in *Dukes*, an employment sex discrimination case, was whether Rule 23(a)(2)'s commonality requirement could be satisfied without a *Daubert*/Federal Rule of Evidence 702 analysis in circumstances where (1) the employer had an express anti-discrimination policy (and, thus, any sex discrimination was the result of unconscious bias by supervisors) and (2) plaintiffs' expert "'could not calculate whether 0.5 percent or 95 percent of the employment decisions . . . might be determined by stereotyped thinking.'"[10]

In *Comcast*, the Court initially granted certiorari on the question of "[w]hether a district court may certify a class

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action without resolving *whether the plaintiff class has introduced admissible evidence*, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis," but ultimately did not decide this issue.[11] Instead, it decertified a class because of flaws in the expert's damages model and stated that "a model purporting to serve as evidence of damages in this class action must measure only those damages attributable to [the liability] theory."[12]

*Dukes* and *Comcast* suggest (without explicitly holding) that expert testimony relied upon by a trial court in certifying a class must satisfy *Daubert*. However, it does not follow that the same should be true for non-expert class certification evidence. Indeed, *Dukes* and *Comcast* are silent as to whether class certification evidence generally must be admissible under the Federal Rules. For one thing, *Daubert* advances a materially different, and stricter, standard for the use of expert evidence at trial than the more accommodating admissibility rules applicable to non-expert evidence, which prevent the jury from hearing evidence that is (for example) irrelevant, privileged, prejudicial, or hearsay not subject to an enumerated exception. Second, class certification analysis differs significantly from the court's merits inquiry, in that the former concerns the ability of the proposed class to meet the particular requirements of Rule 23, rather than the strength of the proposed class's allegations under substantive law.

Relatedly, although the Supreme Court emphasized in *Dukes* and *Comcast* that the trial court's class certification analysis should be rigorous, outside of the class certification context courts traditionally address preliminary (non-merits) questions without deciding issues of admissibility. In the preliminary injunction context, for example, the movant must demonstrate likelihood of success on the merits and irreparable harm, among other things, but need not rely only on admissible evidence in doing so.[13] Finally, experts can themselves rely on inadmissible evidence in formulating their opinions, which indicates that relevant and probative, but inadmissible, evidence can play a legitimate and even informative role in the class certification process.

In any event, not only is there no consensus that expert testimony must satisfy *Daubert* before a trial court may rely upon it in deciding a class certification motion, the lower federal courts differ on this question. One view was summarized recently by a Colorado district court:

> [Rule] 702 and *Daubert* apply when the merits of a case are weighed, and a court does not inquire into the merits at the class certification stage. . . . An exhaustive and conclusive *Daubert* inquiry before the completion of the merits discovery cannot be reconciled with the inherently preliminary nature of pretrial evidentiary and class certification rulings. Moreover, at the class certification stage, there is no independent fact-finder who requires shielding from inadmissible evidence and improper opinions.
>
> Rather than conducting a meticulous *Daubert* inquiry, a court will examine an expert's testimony in light of the criteria for class certification and the current state of the evidence.[14]

In the leading Eighth Circuit case on the issue, *Cox v. Zurn Pex, Inc.* (*In re Zurn Pex Plumbing Products Liability Litigation*), the parties disagreed as to whether a "full and conclusive" *Daubert* analysis of proposed expert testimony was necessary for class certification.[15] The district court declined to conduct a dispositive *Daubert* analysis, particularly since fact discovery was not complete and the expert opinions were therefore subject to change.[16] Instead, the court engaged in a limited *Daubert* inquiry focused only on aspects of the expert opinions that related directly to class certification, while reserving a decision on the admissibility of the evidence at trial until a later time.[17]

The Eighth Circuit affirmed, writing that, in determining whether the requirements of Rule 23(b) had been met, a trial court "should conduct a 'rigorous analysis' including an 'examination of what the parties would be required to prove at trial.'"[18] The court continued:

> Expert disputes "concerning the factual setting of the case" should be resolved at the class certification stage only to the extent "necessary to determine the nature of the evidence that would be sufficient, if the plaintiff's general allegations were true, to make out a prima facie case for the class." . . . We have never required a district court to decide conclusively at the class certification stage what evidence will ultimately be admissible at trial.[19]

Although *Zurn* was decided quite shortly after the Supreme Court's *Dukes* decision, and two years before *Comcast*, there is little reason to think that its central reasoning has not survived. *Comcast* turned on the viability of expert opinions as they related to class certification, *not* with respect to the admissibility of those opinions at trial.

The *Zurn* court expressly declined the defendant's invitation to follow the approach taken by the Seventh Circuit in *American Honda Motor Co. v. Allen*, which had required a conclusive *Daubert* analysis before certifying a class.[20] *American Honda* was distinguishable, the Eighth Circuit said, because the expert opinion in that case was alleged to be so grievously flawed that a Rule 23 analysis was impossible without a full *Daubert* review.[21] In any event, Eighth Circuit precedent did not favor the approach urged by the defendant in *Zurn*: "Class certification is inherently tentative, and may require revisiting upon completion of full discovery. Zurn's desire for an exhaustive and conclusive *Daubert* inquiry before the completion of merits discovery cannot be reconciled with the inherently preliminary nature of pretrial evidentiary and class certification rulings."[22]

In *American Honda*, the Seventh Circuit admonished that "a district court must make whatever factual and legal inquiries are necessary to ensure that requirements for class certification are satisfied before deciding whether a class should be certified."[23] The court concluded that the analysis required under Rule 23 could not be satisfied by anything short of a full *Daubert* inquiry, where the expert's opinion was critical to class certification and was alleged to suffer from several fatal defects.[24] The Seventh Circuit has more recently

clarified that, by "critical," it means "expert testimony important to an issue decisive for the motion for class certification. If a district court has doubts about whether an expert's opinions may be critical for a class certification decision, the court should make an explicit *Daubert* ruling."[25]

Other courts (including the Third Circuit and the D.C. Circuit) agree with *American Honda* that, where an expert's testimony is critical to the issue of class certification, the district court should perform a full *Daubert* analysis in order to carry out the separate "rigorous analysis" required by Rule 23.[26] Meanwhile, the Sixth Circuit has not taken a position as to whether expert testimony must be admissible to support class certification but has upheld a district court's adoption of that rule.[27]

However, even if one reads the Supreme Court's decisions as holding that expert testimony relied upon for class certification purposes must meet *Daubert*'s reliability requirements, it still does not necessarily follow that all evidence offered to support class certification must be admissible at trial. The Federal Rules of Evidence already distinguish expert from non-expert evidence for admissibility purposes, and hold the former to a higher standard. Whereas *Comcast* warns plaintiffs to take care that they base their class certification arguments on sound expert work capable of actually demonstrating plaintiffs' compliance with Rule 23, it is silent as to their use of non-expert evidence to achieve the same end.

## Non-Expert Class Certification Evidence

Neither the Supreme Court nor the most relevant federal court precedent squarely address, much less hold, that all types of class certification evidence must be admissible. It is worth considering the Court's reasoning in *General Telephone Company of the Southwest v. Falcon*, the case in which the Court first articulated the need for a "rigorous analysis" before a class may be certified. The Supreme Court cautioned that while "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question," at other times "the issues are plain enough from the pleadings."[28] This seems to suggest that a district court may decide class certification questions by relying on evidence that is not admissible at trial.

Indeed, class action litigants have presented—and courts have considered—probative and reliable non-expert evidence at class certification that may well have been deemed inadmissible at trial. Individual affidavits are frequently offered in support of class certification motions. For example, in *Serrano v. Cintas Corp.*, an employment discrimination case, the plaintiffs and the defendant submitted employee declarations in support of and in opposition to the plaintiffs' motions to certify the classes.[29] The court denied the parties' motions to strike the declarations as inadmissible, explaining that at the class certification stage "the Court should consider all the evidence presented in support of and in opposition to class certification, and grant to the evidence the weight that the Court finds is most appropriate."[30]

The Ninth Circuit has made a similar point and explained further why courts' class certification determinations should not be limited to consideration of admissible evidence. In *Sali v. Corona Regional Medical Center*, the Ninth Circuit reversed a district court ruling denying class certification.[31] The district court had refused to consider a paralegal declaration purporting to analyze timesheet data to compute the named plaintiffs' injuries on the grounds that the declaration was inadmissible.[32] The Ninth Circuit noted that the same evidence could likely have been presented in an admissible form at trial given that the defendant did not dispute the authenticity of the underlying data or the accuracy of the paralegal's calculations.[33] More fundamentally, "By relying on formalistic evidentiary objections, the district court unnecessarily excluded proof that tended to support class certification."[34]

These considerations are important, explained the Ninth Circuit, because unlike summary judgment, which ends the case without a trial, class certification necessarily anticipates further proceedings, including the possibility of trial.[35] Thus, it is not necessary at class certification to consider what evidence would or would not be admissible at trial because a trial may yet occur, at which point the issue of admissibility would be squarely and properly raised.[36] Class certification is also a preliminary phase of the litigation, often occurring before the conclusion of merits discovery and therefore there is "bound to be some evidentiary uncertainty."[37] While a judge can weigh the reliability of the evidence, the fact that evidence is or is not admissible "tells us nothing about the satisfaction of the typicality requirement" or any other Rule 23 requirement.[38] In contrast, assuming the judge found the evidence reliable, the declaration at issue in *Sali* (and even class counsel's declaration and the attached spreadsheet at issue in Taylor Farms' certiorari petition[39]) *did* inform whether the classes passed muster under Rule 23.

The Ninth Circuit appears to be the first federal appellate court to consider directly whether the "rigorous analysis" required under Rule 23 necessarily obliges the district court to rely solely on admissible evidence. In *Sali* the Ninth Circuit held that "[i]nadmissibility alone is not a proper basis to reject evidence submitted in support of class certification."[40] More specifically, the *Sali* Court ruled that the district court erred in refusing to consider evidence the district court deemed improper lay opinion or expert evidence.[41] In that sense, it is not clear that the Ninth Circuit's decision applies to all class certification evidence, evidence that is presented in an inadmissible form, or evidence the substance of which would be inadmissible under *Daubert*.

Following the Court's ruling, the defendants moved for a rehearing en banc, which the court succinctly denied over a rigorous dissent.[42] The dissent argued that the Ninth Circuit's holding places it on the "wrong side of a lopsided circuit split" (language later used in *Taylor Farms*) as to whether expert testimony must be admissible to be considered at class certification and ignores Supreme Court guidance.[43] But, as

discussed above, the Supreme Court has never ruled that all class certification evidence must be admissible and so the asserted circuit split is illusory.

The *Sali* court did recognize its disagreement with the Fifth Circuit, which had stated in *Unger v. Amedisys Inc.* that a district court's class certification decision must rely on "adequate admissible evidence."[44] Specifically, the *Unger* court wrote: "Like our brethren in the Third, Fourth, Seventh and Ninth Circuits, we hold that a careful certification inquiry is required and findings must be based on adequate admissible evidence to justify class certification."[45] The *Unger* court did not, however, cite the specific decisions of the four circuits upon which it relied for the admissibility point, leaving the reader to guess which ones it had in mind. Moreover, the question of admissibility played no part in the court's disposition of the case, which focused on whether the proffered evidence was adequate, not whether it was admissible, and decertified the class because the district court had failed to consider several factors relevant to whether a proposed investor class satisfied Rule 23(b)(3)'s predominance requirement in a complex fraud-on-the market case.[46] In other words, while there is express language in *Unger*'s introductory paragraph, the extent to which the Fifth Circuit actually requires that a district court rely only on admissible evidence in deciding whether to certify a class remains unclear.

Of course, the possible existence of a circuit split was not the dissent's only concern. The dissent asserted that federal courts, including the Supreme Court, treat class certification as "an oftentimes dispositive step demanding a more stringent evidentiary standard."[47] Yet, while class certification is indeed a significant stage of any class action litigation, it does not follow that a heightened evidentiary standard is required or that "a more stringent evidentiary standard" would allow consideration of only admissible evidence. The dissent does not cite any cases for this proposition, and it is well settled that class certification hearings are not to be mini-trials on the merits.

The dissent also argued that the panel's ruling contradicts the Ninth Circuit's own ruling in *Ellis v. Costco Wholesale Corp.*,[48] which holds that a district court abuses its discretion if the court ends its Rule 23 analysis after evaluating expert evidence under *Daubert*.[49] As the *Costco* court explained, "To the extent the district court limited its analysis . . . to a determination of whether Plaintiffs' evidence [] was admissible, it did so in error."[50] *Costco* did not address whether the district court could consider inadmissible non-expert evidence in its class certification determination.

The Ninth Circuit is not alone in resisting the idea that courts must rely solely on admissible evidence to determine class certification. A district court in New Mexico held that "the Federal Rules of Evidence apply, albeit in a relaxed fashion," at the class certification stage.[51] Without directly deciding the question, the court took exception to the notion that a district court may rely only on admissible evidence:

**Moreover, the implications of a requirement that all class certification evidence be admissible would be colossal. Would district courts be required to decide a plethora of motions *in limine* in all class actions before ruling on Rule 23 motions?**

> [G]iven the importance of the class certification determination and the evidentiary nature of the hearing, the Court concludes that the Federal Rules of Evidence apply. On the other hand, the sole decider in class certification hearings is a judge, and not a jury. Judges may be better equipped to properly weigh the value of hearsay and irrelevant evidence than juries. Moreover, there is no practical way to screen a presiding judge entirely from hearing inadmissible evidence, as it is the judge who must decide the threshold question of admissibility. It is, thus, perhaps more realistic and more honest for the judge to consider all but the most egregiously inadmissible pieces of evidence as they are presented, and factor any evidentiary infirmity into the weight he or she gives to them.[52]

In *In re Rail Freight Fuel Surcharge Antitrust Litigation*, another district court considered, but did not decide, a similar question. On remand from a decision reversing the district court's order certifying the class, the defendants argued that the court could not consider certain documentary evidence of communications between the defendants for purposes of deciding class certification because that evidence would be inadmissible at trial.[53] At the class certification hearing, the court rejected the defendants' argument that the court could not consider the disputed documents for purposes of deciding class certification.[54] Ultimately, the court determined that it could decide class certification without relying on the disputed documents and declined to decide whether the documents were in fact inadmissible at the class certification stage.[55]

*Sali*, *Zuniga*, and *Rail Freight* provide just a few examples of the role inadmissible non-expert evidence may play in class certification proceedings. If, by expressing "doubt" in *Dukes* about whether a full *Daubert* analysis could be avoided at the class certification stage, the Supreme Court intended to imply that *all* evidence presented in support of class certification must be admissible, it would surely have said so.

Moreover, the implications of a requirement that all class certification evidence be admissible would be colossal. Would district courts be required to decide a plethora of motions *in limine* in all class actions before ruling on Rule 23 motions? If so, how would that affect subsequent motions for summary judgment, in which courts are precluded under Federal Rule of Civil Procedure 56 from deciding disputed issues of material fact?[56] Just how much pre-trial practice should be front-loaded in class actions before the "rigorous analysis" require-

ment would be satisfied? Even putting aside these practical considerations, it is not clear whether there is in fact a split among the circuit courts that would compel the Supreme Court to pronounce such a sweeping rule, as most cases touching upon the issue have not squarely addressed it.

## Conclusion

While the prevailing view among the federal circuit courts that have considered the matter is that expert testimony that is critical to an issue relevant to class certification must satisfy the standards for admissibility under *Daubert*, there is no compelling support in the case law for extending that admissibility requirement to *all* evidence considered or relied upon at the class certification stage. Indeed, the single clearest appellate court precedent on the matter—the Ninth Circuit's decision in *Sali*—holds the opposite.

From a policy perspective, and considering the preliminary nature of the class certification inquiry and purpose of the Federal Rules of Evidence, the Ninth Circuit's reasoning in *Sali* appears sound. Class certification is not intended as a mini-trial on the merits and is sometimes decided or litigated before fact discovery is complete. The "rigorous analysis" required under Rule 23 is intended to be directed at the elements of the rule itself, and the nature of the evidence to be proffered at trial, not on the facts that inform a court's grant of summary judgment or a jury verdict. Whatever the admissibility rules applicable to expert testimony under *Daubert* and Rule 702, these cannot be grafted neatly onto non-expert testimony, given that Rule 702 articulates unique prerequisites to admissibility.

But while a general admissibility requirement for class certification evidence would greatly burden both courts and class action plaintiffs, it would correspondingly benefit defendants, especially in complex class actions. Courts may be required to adjudicate numerous evidentiary motions in addition to *Daubert* motions. This process would extend further what is usually already a lengthy hearing. Plaintiffs would be required to both bring and defend against evidentiary motions and might also be required to identify and present authentication witnesses at the class certification hearing. Meanwhile, defendants could easily delay class certification proceedings with motions to exclude. All of this would increase the burden and expense of class action litigation and could even serve as a deterrent to bringing such litigation, particularly in long and costly cases like antitrust class actions. Thus, while the Supreme Court declined to consider the issue last term, with so much at stake on both sides of the "v," it may well surface again before long. ■

[1] 564 U.S. 338 (2011).

[2] 569 U.S. 27 (2013).

[3] Petition for Certiorari at 1–2, Taylor Farms Pac. Inc., v. Pena, No. 17-395 (Sept. 14, 2017).

[4] *Id.* at 16.

[5] *Id.* at 9.

[6] *Id.* at 10.

[7] *Id.* at 10–11 (citing *Dukes*, 564 U.S. at 350) (emphasis modified by petitioner).

[8] *Id.* at 11 (citing *Comcast*, 569 U.S. at 33) (emphasis supplied by petitioner).

[9] *Id.* (citing *Dukes*, 564 U.S. at 354). In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the Supreme Court defined the flexible "reliability" standard by which trial courts must determine whether expert testimony is admissible (or inadmissible) under Federal Rule of Evidence 702.

[10] *Dukes*, 564 U.S. at 354 (citation omitted).

[11] *See Comcast*, 569 U.S. at 39 (Ginsburg, J., dissenting) (citations omitted).

[12] *Id.* at 35.

[13] *See* G.G. v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 725 (4th Cir. 2016) (collecting cases from seven sister circuits), *vacated on other grounds*, 137 S. Ct. 1239 (2017).

[14] Beltran v. InterExchange, Inc., No. 14-cv-03074-CMA-CBS, 2018 U.S. Dist. LEXIS 49925, at *12–13 (D. Colo. Mar. 27, 2018) (internal brackets, citations, and quotation marks omitted).

[15] 644 F.3d 604, 610–11 (8th Cir. 2011).

[16] *Id.* at 611–14.

[17] *See id.* at 610.

[18] *Id.* at 611 (citations omitted).

[19] *Id.* (internal citations omitted).

[20] 600 F.3d 813 (7th Cir. 2010).

[21] *See Zurn*, 644 F.3d at 612.

[22] *Id.* at 613 (internal quotations and citations omitted).

[23] 600 F.3d at 815 (citing Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 676 (7th Cir. 2001)).

[24] *Id.* at 815–16.

[25] Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 812 (7th Cir. 2012).

[26] *See In re* Blood Reagents Antitrust Litig., 783 F.3d 183, 187 (3d Cir. 2015) ("We join certain of our sister courts to hold that a plaintiff cannot rely on challenged expert testimony, when critical to class certification, to demonstrate conformity with Rule 23 unless the plaintiff also demonstrates, and the trial court finds, that the expert testimony satisfies the standard set out in *Daubert*."); Ellis v. Costco Wholesale Corp., 657 F.3d 970, 982 (9th Cir. 2011) (noting that district court was correct to apply *Daubert* in determining admissibility of expert evidence but erred in treating *Daubert* as coextensive with the "rigorous analysis" standard to be applied when analyzing commonality); Campbell v. AMTRAK, 311 F. Supp. 3d 281, 296 (D.D.C. 2018) ("[W]hen a party moves to exclude expert testimony proffered in support of a motion for class certification, the district court must perform a full *Daubert* analysis before certifying a class.").

[27] *See In re* Carpenter Co., No. 14-0302, 2014 U.S. App. LEXIS 24707, at *10–11 (6th Cir. Sept. 29, 2014).

[28] 457 U.S. 147, 160 (1982).

[29] No. 04-40132, 2009 U.S. Dist. LEXIS 26606, at *8 (E.D. Mich. Mar. 31, 2009).

[30] *Id.* at *9–10.

[31] 909 F.3d 996, 1012 (9th Cir. 2018).

[32] *Id.* at 1003.

[33] *Id.* at 1006.

[34] *Id.*

[35] *Id.* (citing *Zurn*, 644 F.3d at 612–13).

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *See* Petition for Certiorari, *Taylor Farms*, *supra* note 3, at 3. The spreadsheet purported to show that the defendant's alleged violations caused injury on a class-wide basis but, the petitioner argued, lacked appropriate explanation of the data or methodology used, and thus "petitioner was precluded from probing the accuracy and reliability of respondents' statistical analysis, which respondents presented to demonstrate that the proposed class members experienced similar treatment susceptible to resolution through a common claim." *Id.* at 4.

[40] 909 F.3d at 1004.

[41] *Id.* at 1003–08.

[42] Sali v. Corona Reg'l Med. Ctr., 907 F.3d 1185, 1185 (9th Cir. 2018) (Bea, J., dissenting).

[43] *Id.* at 1189.

[44] 401 F.3d 316, 319 (5th Cir. 2005).

[45] *Id.*

[46] *See id.* at 320–25.

[47] *Sali*, 907 F.3d at 1188.

[48] *Id.* at 1188 n.7 (citing 657 F.3d 970 (9th Cir. 2011)).

[49] 657 F.3d at 981.

[50] *Id.* at 982.

[51] Zuniga v. Bernalillo Cty., 319 F.R.D. 640, 660 (D.N.M. 2016).

[52] *Id.* at 660 n.5.

[53] The defendants' objection to admissibility was based on a statutory exemption under 49 U.S.C. § 10706. *See* Transcript of Class Cert. Hearing at 24:15-20, *In re* Rail Freight Fuel Surcharge Antitrust Litig., 1:07-mc-00489 (D.D.C. Sept. 27, 2016), ECF No. 823.

[54] *Id.* ("I've never said that the [§ 10706] documents cannot be relied upon pretrial, for any purpose. I think there's a serious question whether or not [§ 10706] applies only to trial, not to summary judgment, not to class certification. I haven't had to rule on that question yet."). *See also* Tr. of Class Cert. Hearing at 4:6-14, *In re*: Rail Freight Fuel Surcharge Antitrust Litig., 1:07-mc-00489 (D.D.C. Sept. 26, 2016), ECF No. 821 (defendants conceding that the court had previously determined that it did not need to rule at the class certification stage on whether certain documents were admissible).

[55] *In re* Rail Freight Fuel Surcharge Antitrust Litig., 292 F. Supp. 3d 14, 50 n.5 (D.D.C. 2017).

[56] *Cf.* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177–79 (1974) (holding that courts may not make determinations as to the merits at the class certification stage).