University of Miami Law Review

Volume 78 | Number 4 Article 5

5-16-2024

Gatekeeping & Class Certification: The Eleventh Circuit's Stringent Approach to Admitting Expert Evidence in Support of Class Certification

Pravin Patel
Weil, Gotshal & Manges LLP

Mark Pinkert
Weil, Gotshal & Manges LLP

Patrick Lyons
Weil, Gotshal & Manges LLP

Gatekeeping & Class Certification: The Eleventh Circuit's Stringent Approach to Admitting Expert Evidence in Support of Class Certification

PRAVIN PATEL,[*] MARK PINKERT[**] & PATRICK LYONS[***]

Federal Rule of Civil Procedure 23 is silent on whether evidence offered in support of a motion for class certification must be admissible under the Federal Rules of Evidence. The Supreme Court has not addressed this issue, and there is currently no authoritative framework for incorporating all or some of the federal evidentiary rules into the class certification process. Resultantly, circuit courts are split on this question and have coalesced among several different approaches. The Eleventh Circuit follows a rigorous evidentiary standard in which evidence offered in support of class certification generally must be admissible under the Federal Rules of Evidence. This Article examines how district courts in the Eleventh Circuit have applied this standard in class action litigation and how those results compare with district courts in other circuits. Based on our review, we conclude that this more rigorous evidentiary standard promotes judicial economy and preserves party resources.

[*] Partner, Complex Commercial Litigation, Weil, Gotshal & Manges LLP.
[**] Associate, Complex Commercial Litigation and Appeals and Strategic Counseling, Weil, Gotshal & Manges LLP.
[***] Associate, Complex Commercial Litigation, Weil, Gotshal & Manges LLP.

INTRODUCTION

Federal Rule 23, which governs class actions, is silent on what quantum of evidence is sufficient to support a motion for class certification and whether that evidence must be admissible under the Federal Rules of Evidence.[1] The Supreme Court has not squarely resolved either of those questions, and there currently is no coherent or authoritative framework for incorporating all or some of the federal evidentiary rules into the class certification process.[2] Circuit courts thus remain split on whether admissible evidence is required to support a class certification motion and have taken various approaches to address these evidentiary questions.[3] This Article will examine the different approaches that the circuits have taken on these issues, discuss the approach followed by most district courts in the Eleventh Circuit, and assess the benefits of this approach.

---

[1] *See* FED. R. CIV. P. 23.

[2] *See, e.g.*, Comcast Corp. v. Behrend, 569 U.S. 27, 29–33 (2013).

[3] This Article elaborates upon a previous examination of the issues underlying the circuit split—particularly Part II. For that discussion, which also summarizes the approaches taken by the various circuits and suggests strategies for litigating within the differing frameworks, see Konrad Cailteux et al., *Strategies to Defending Class Certification Among the Federal Circuits*, BLOOMBERG L. (Sept. 2023), https://www.bloomberglaw.com/external/document/XDCPUAPG000000/litigation-professional-perspective-strategies-to-defending-clas; *see also* discussion *infra* Part II.

Following an unpublished Eleventh Circuit decision from 2011,[4] almost all district courts in the Eleventh Circuit have applied a strict threshold inquiry for admissibility at the class certification stage. Based on our review of class action practice in the Eleventh Circuit since that decision, we conclude that this more rigorous evidentiary approach is efficient and, on balance, preserves judicial and party resources, while also not choking off bona fide class action cases. We also note that district courts in the Eleventh Circuit tend not to consider pre-bench trial motions *in limine* and instead address evidentiary issues at trial.[5] While class certification inquiries in some ways resemble a bench trial, there are sufficient differences between the two types of hearings that counsel strongly in favor of a motion *in limine* process at the threshold of a certification hearing or decision.[6] Scholars and observers have increasingly been paying attention to this circuit split and the lack of an authoritative framework for understanding how evidentiary rules can or should apply at the certification stage.[7] While this Article does not offer a nationwide assessment of the various evidentiary approaches, it creates a template for further empirical and statistical analysis. If and when the rules advisory committee addresses this important missing piece to the class certification puzzle, it should consider the overall efficiency gains of a rigorous evidentiary inquiry at the threshold of the class certification decision.

I. BACKGROUND

The class action has its roots in "group suits" at equity, but the modern practice as we know it is governed by the 1966 amendments

---

[4] Sher v. Raytheon Co., 419 F. App'x 887, 890–91 (11th Cir. 2011) (citing Am. Honda Motor Co. v. Allen, 600 F.3d 813, 817 (7th Cir. 2010)).

[5] *See, e.g.*, Johnson & Johnson Vision Care, Inc. v. CIBA Vision Corp., 616 F. Supp. 2d 1250, 1256 (M.D. Fla. 2009) ("Likewise, that this is a bench trial weighs heavily in favor of denying the motions *in limine* and addressing the issues raised if and when they come up at trial.") (citing Lifetime Homes, Inc. v. Residential Dev. Corp., 510 F. Supp. 2d 794, 811 (M.D. Fla. 2007)).

[6] *See* Cailteux et al., *supra* note 3.

[7] *See, e.g.*, Madeleine M. Xu, *Form, Substance, and Rule 23: The Applicability of the Federal Rules of Evidence to Class Certification*, 95 N.Y.U. L. REV. 1561, 1565–68 (2020).

to Rule 23 of the Federal Rules of Civil Procedure.[8] Today, in order to certify a class and obtain class-wide relief, plaintiffs must satisfy the various requirements of Rule 23.[9] But while Rule 23 addresses various issues regarding the timing of the certication motion, class definition, class requirements, and the appointment of class counsel, it is silent on baseline evidentiary issues.[10] In particular, the Rules do not describe the quantum of proof needed to establish the requirements of Rule 23 (i.e., preponderance of evidence, clear and convincing, etc.).[11] Moreover, Rule 23 does not say whether evidence proffered in support of a motion for class certification must be admissible under the Federal Rules of Evidence.[12]

Accordingly, after the 1966 amendments, courts struggled to articulate the precise boundaries of the Rule 23 certification process and even the fundamental nature of the certification inquiry.[13] In *Eisen v. Carlisle & Jacquelin*, the Supreme Court conceived of the certification process as being somewhat narrow and divorced from any inquiry into the merits of the underlying claims.[14] Later, the Supreme Court changed course to some degree, as it acknowledged that the "[e]valuation of many of the questions entering into determination of class action questions is intimately involved with the merits of the claim."[15] In *General Telephone Co. v. Falcon*, the Court held that a class may only be certified if the district court finds, "after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied."[16]

---

[8] *See* Barak Atrium, *Socially-Driven Class Actions: The Legacy of Briggs*, 23 TEX. J. ON C.L. & C.R. 1, 3–5 (2017).

[9] *Id.* at 7–8.

[10] *See* Cailteux et al., *supra* note 3.

[11] *See* FED R. CIV. P. 23.

[12] *See id.*

[13] *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178 (1974) ("In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.") (internal quotation marks omitted) (quoting Miller v. Mackey Int'l, 452 F.2d 424, 427 (5th Cir. 1971)).

[14] *See id.*

[15] Coopers & Lybrand v. Livesay, 437 U.S. 463, 477 n.12 (1978).

[16] Gen. Tel. Co. v. Falcon, 457 U.S. 147, 161 (1982).

The Court's class-action precedent after the 1966 amendments was thus inconsistent and offered imprecise guidelines for lower courts. Indeed, the phrase "rigorous analysis" provided more confusion than clarity: How does a court conduct a rigorous analysis without wandering into the merits inquiry and conducting a mini-trial? When is a certification inquiry not sufficiently rigorous?

More specifically, the Court never got around to elucidating the two critical evidentiary questions that Rule 23 leaves open. First, what quantum of evidence is required for the movant to satisfy the requirements of Rule 23? In *Falcon*, the Court briefly suggested that "significant proof" is required,[17] a standard more rigorous than the typical civil preponderance standard. But it said little else in its contemporaneous precedent. Second, the Court never explained whether courts can even consider the movant's evidence (and/or the opponent's counter-evidence), unless it determines at the threshold whether the evidence is *admissible*. This open question applied to fact evidence and opinion evidence, which in theory could incorporate different certification-stage rules of admissibility.

In more recent cases, the Court has been poised to answer these critical questions but ultimately was unable to do so squarely.[18] It did, however, lean toward a more formal, rigorous evidentiary approach. In *Wal-Mart Stores, Inc. v. Dukes*, the Supreme Court, in dicta, expressed "doubt" at the proposition that "*Daubert* did not apply to expert testimony at the certification stage of class-action proceedings."[19] Then, in *Comcast Corp. v. Behrend*, the Court explained that Rule 23 "does not set forth a mere pleading standard."[20] Rather, "a party must . . . 'be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact,' typicality of claims or defenses, and adequacy of representation, as required by Rule 23(a)."[21] And, a "party

---

[17] *Id.* at 163 n.15.

[18] *See, e.g.*, Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 348–52 (2011).

[19] *Id.* at 354. "*Daubert*" refers to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the benchmark Supreme Court decision articulating the standard for admissibility of expert testimony under the Federal Rules of Evidence. *See* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 589–98 (1993).

[20] Comcast Corp. v. Behrend, 569 U.S. 27, 33 (2013).

[21] *Id.* (quoting *Dukes*, 564 U.S. at 350).

must . . . satisfy through *evidentiary proof* at least one of the provisions of Rule 23(b)."[22] The original question presented to the Court, however, had been "[w]hether a district court may certify a class action without resolving whether the plaintiff class had introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis."[23] The respondents argued that because petitioners had failed to object to the admission of expert testimony in the proceedings below, they "forfeited their ability to answer this question" and were limited to "argu[ing] that the evidence failed to show . . . the case is susceptible to awarding damages on a class-wide basis."[24] However, the Court rephrased the question presented as whether "certification was improper because respondents had failed to establish that damages could be measured on a class wide basis."[25] Therefore, the Court never decided whether "evidentiary proof" must be admissible under the Federal Rules of Evidence and, if so, whether there are different admissibility rules for fact evidence or expert opinion.

II. APPROACHES AMONG THE CIRCUITS

Ever since the 1966 Rule 23 amendments—and particularly in the last decade—federal district and appellate courts have needed to address the extent to which evidentiary standards are applicable to class certification evidence.[26] Perhaps because each class action certification presents unique evidentiary issues, no court, to date, has held the Federal Rules of Evidence applicable *in toto* at the class certification stage. Instead, courts around the country have generally settled on three different approaches to addressing evidence at class certification.

---

[22] *Id.* (emphasis added).

[23] *Id.* at 32 n.4 (quoting Comcast Corp. v. Behrend, 567 U.S. 933, 933 (2012)).

[24] *Id.*

[25] *Id.*

[26] *See* Linda S. Mullenix, *Putting Proponents to Their Proof: Evidentiary Rules at Class Certification*, 82 GEO. WASH. L. REV. 606, 608 (2014).

A. *The Standard for Admissibility*

In the Third, Fifth, Seventh, and Eleventh Circuits, evidence in support of class certification generally must be admissible, though these circuits have only applied this rule in the context of expert testimony.[27] In *American Honda Motor Co. v. Allen*, the seminal decision for this approach, the Seventh Circuit held that a complete *Daubert* analysis must be performed prior to class certification "if the situation warrants" and when the expert opinion "is critical to class certification."[28] In *In re Blood Reagents Antitrust Litigation*, the Third Circuit reversed a certification decision because the district court did not fully resolve the defendants' *Daubert* motion, and it rejected the lower court's reasoning that the expert testimony "could evolve to become admissible evidence at trial."[29] Relying on *American Honda*, the *Blood Reagents* court added that requiring a *Daubert* analysis of expert testimony was a logical extension of the Supreme Court's recent decisions in *Dukes* and *Comcast*.[30] Similarly, the Fifth Circuit in *Prantil v. Arkema Inc.* decertified a class because the lower court failed to perform a *Daubert* analysis of expert reports provided in support of certification.[31] Finally, the Eleventh Circuit has favorably cited and applied the *American Honda* rule as well, albeit in an unpublished, non-precedential decision.[32]

The First Circuit took up a different issue in *In re Asacol Antitrust Litigation*—whether *fact* evidence, instead of expert testimony, in support of certification must be admissible evidence.[33] The *Asacol* court decertified a class because the plaintiffs had relied on inadmissible hearsay contained within affidavits.[34] The Court

---

[27] *See* Am. Honda Motor Co. v. Allen, 600 F.3d 813, 815–17 (7th Cir. 2010).

[28] *Id.* at 816; *see also* Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 812–13 (7th Cir. 2012) (holding that regardless of how a court rules on a certification motion, it must first "conclusively" decide any *Daubert* issues on expert testimony that are "critical" to the certification decision).

[29] *In re* Blood Reagents Antitrust Litig., 783 F.3d 183, 188 (3d Cir. 2015).

[30] *Id.* at 187–88.

[31] *See* Prantil v. Arkema Inc., 986 F.3d 570, 575 (5th Cir. 2021).

[32] *See* Sher v. Raytheon Co., 419 F. App'x 887, 890–91 (11th Cir. 2011) (citing *Am. Honda*, 600 F.3d at 817).

[33] *See In re* Asacol Antitrust Litig., 907 F.3d 42, 53 (1st Cir. 2018).

[34] *See id.*

took a particularly strident stance to evidentiary submissions, explaining that "[t]he fact that plaintiffs seek class certification provides no occasion for jettisoning the rules of evidence" because "evidence may not be used in a class action to give 'plaintiffs and defendants different rights . . . [from what] they could . . . assert[] in an individual action.'"[35]

The Second Circuit has not answered whether a district court should solely consider admissible evidence as part of the Rule 23 certification analysis. Although the court seemed to have implicitly rejected an admissibility standard in *In re U.S. Foodservice Inc. Pricing Litigation*, noting that the *Daubert* inquiry is "flexible,"[36] some Second Circuit decisions, like *In re Salomon Analyst Metromedia Litigation*, seem to favor an admissibility standard.[37] For example, in *Lujan v. Cabana Management, Inc.*, the district court interpreted *Salomon* to endorse admissibility—*sub silentio*—because the court "rejected the 'prima facie' standard."[38] The *Lujan* court proceeded to consider whether the declarations at issue—declarations from the defendant company's employees regarding company policies on payment, timekeeping, breaks, and related matters—were inadmissible as hearsay or for lack of personal knowledge.[39] Other unpublished Second Circuit decisions also seem to follow this standard.[40]

---

[35] *Id.* (quoting Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 458 (2016)).

[36] *In re* U.S. Foodservice Inc. Pricing Litig., 729 F.3d 108, 129–30 (2d Cir. 2013); *see also In re* LIBOR-Based Fin. Instruments Antitrust Litig., 299 F. Supp. 3d 430, 470 (S.D.N.Y. 2018) ("Neither the Supreme Court nor the Second Circuit has definitely decided whether the *Daubert* standard governs the admissibility of expert evidence submitted at the class certification stage.").

[37] *See In re* Salmon Analyst Metromedia Litig., 544 F.3d 474, 486 (2d Cir. 2008).

[38] Lujan v. Cabana Mgmt., 284 F.R.D. 50, 64 (E.D.N.Y. 2012).

[39] *Id.* at 64–65.

[40] *See In re* Initial Pub. Offerings Secs. Litig., 471 F.3d 24, 42 (2d Cir. 2006) (observing that "an expert's testimony may [not] establish a component of a Rule 23 requirement simply by being not fatally flawed" because a judge must first assess admitted evidence); *cf.* Cuevas v. Citizens Fin. Grp., 526 F. App'x 19, 21–22 (2d Cir. 2013) (explaining that a district court must "assess[] all of the relevant evidence admitted at the class certification stage" and "resolve" all material disputed facts as part of its "rigorous analysis" under Rule 23) (internal quotation

Altogether, the approach among these circuits makes sure that evidence in support of class certification will generally be admissible, particularly expert evidence. Nonetheless, because admissibility issues arise more often with expert evidence at class certification, several circuits have simply "never addressed whether fact evidence, rather than expert opinion, must likewise be admissible."[41] The question that these decisions open the door to, though do not directly answer, is whether the application of *Daubert* (and Federal Rule of Evidence 702) means that all evidence rules are likewise applicable at the class certification phase.[42]

B. *Relaxed Standards*

While not requiring admissible evidence at the certification stage, the Sixth, Eighth, and Ninth Circuits[43] instead afford district courts the discretion to adjust their analyses based on the underlying purposes of class certification decisions.[44] For example, in *In re Zurn Pex Plumbing Products Liability Litigation*, the Eighth Circuit reasoned that the district court could perform what it dubbed a "focused *Daubert* analysis."[45] This inquiry assesses the reliability of expert evidence in view of the current state of discovery and underlying purposes of class certification.[46] The *Zurn* court explained that because the certification analysis is limited by the Rule 23 requirements, expert evidence findings should be confined to "whether, if [plaintiff's] basic allegations [are] true, common evidence could suffice, given the factual setting of the case, to show classwide injury."[47] Thus, a "full and conclusive *Daubert* inquiry" at this phase

---

marks omitted) (first quoting *In re Initial Pub. Offerings*, 471 F.3d at 29, 42; then quoting Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 351 (2011)).

41 Allen v. Ollie's Bargain Outlet, Inc., 37 F.4th 890, 905 (3d Cir. 2022) (Porter, J., concurring).

42 *In re* Asacol Antitrust Litig., 907 F.3d 42, 53 (1st Cir. 2018).

43 *See, e.g.*, *In re* Zurn Pex Plumbing Prods. Liab. Litig., 644 F.3d 604, 612–14 (8th Cir. 2011); Lyngaas v. Curaden AG, 992 F.3d 412, 428–29 (6th Cir. 2021).

44 *See In re Zurn*, 644 F.3d at 612–14; *Lyngaas*, 992 F.3d at 428–29.

45 *In re Zurn*, 644 F.3d at 612–14.

46 *See id.*

47 *Id.* at 612 (citing Blades v. Monsanto Co., 400 F.3d 562, 575 (8th Cir. 2005)).

was premature.[48] Instead, district courts should "examine[] the reliability of the expert opinions in light of the available evidence and the purpose for which they [are] offered . . . with Rule 23's requirements in mind."[49] One particular Rule 23 purpose involves the timing considerations regarding dual-track merits and class-specific discovery. Thus, according to *Zurn*, a defendant'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."[50]

The Ninth Circuit applies the most relaxed approach to evidence at the certification stage, notwithstanding a degree of intra-circuit disagreement about the precise contours of the admissibility standards. For example, in *Sali v. Corona Regional Medical Center*, the Ninth Circuit held that the district court erred in sustaining "formalistic evidentiary objections" because doing so "unnecessarily exclud[ed] proof that tended to support class certification" that could "have been presented in admissible form at trial."[51] In a subsequent decision just a year later, the Ninth Circuit added that "strictly admissible evidence is not required" for class certification, and "plaintiffs can meet their evidentiary burden in part through allegations [that] are detailed and supported by additional materials."[52] Another year later, in *Grodzitsky v. American Honda Motor Co.*, the Ninth Circuit found that a district court was within its discretion to exclude an expert opinion at the class certification stage.[53] Unlike *Grodzitsky*, the *Sali* defendants had not attacked the overall reliability of the plaintiffs' report, instead focusing on the plaintiffs' failure to authenticate underlying data.[54] This, the Ninth Circuit explained, was erroneous because it excluded proof that could likely have been

---

[48] *Id.*

[49] *Id.*

[50] *Id.* at 613.

[51] Sali v. Corona Reg'l Med. Ctr., 909 F.3d 996, 1006 (9th Cir. 2018).

[52] B.K. *ex rel.* Tinsley v. Snyder, 922 F.3d 957, 973–74 (9th Cir. 2019) (finding "confidential medical and placement evidence in the record," though it was "thin," was "sufficient to corroborate [the plaintiff's] allegations at [the class certification] stage").

[53] Grodzitsky v. Am. Honda Motor Co., 957 F.3d 979, 984–85 (9th Cir. 2020).

[54] *Sali*, 909 F.3d at 1006.

presented in admissible form at trial.[55] Both *Grodzitsky* and *Sali* show that an expert report should be "reliable" by *Daubert*'s standards to support certification. But *Sali* cautions that there are some "formalistic" evidentiary objections that are inappropriate for class certification. Such "formalistic" evidentiary objections include objections to presumably any material that could conceivably be presented in admissible form at trial. Thus, the range of admissible evidence within the Ninth Circuit remains unclear.

The Sixth Circuit has yet to consider this issue of expert testimony. In *Lyngaas v. Curaden AG*, the court held that evidentiary proof at the class certification phase "need not amount to admissible evidence, *at least with respect to nonexpert evidence*."[56] *Lyngaas* concluded that the district court had discretion to certify a class in part based on inadmissible summary-report logs because "[a]ll that was left was authentication," which could be done at trial.[57]

C. *Other Circuits*

The Fourth Circuit has not addressed the issue, but its district courts have, and they diverge among their approaches.[58] The Tenth Circuit has also not considered the issue. Additionally, the D.C. Circuit has not taken up the issue, unlike its district courts which lean towards the admissibility standard with respect to expert evidence.[59]

---

[55] *Id.*

[56] Lyngaas v. Curaden AG, 992 F.3d 412, 428–30 (6th Cir. 2021) (citations omitted).

[57] *Id.*

[58] *Compare In re* Marriott Int'l, Inc. Customer Data Sec. Breach Litig., 602 F. Supp. 3d 767, 772–73 (D. Md. 2022) (rejecting the admissibility standard and joining other Fourth Circuit district courts that adopted "the 'necessary to decide class certification' test discussed by Newberg"), *with* Soutter v. Equifax Info. Servs., 299 F.R.D. 126, 131–32 (E.D. Va. 2014) (holding that "only reliable evidence must be considered in deciding class certification because reliability of evidence is a fundamental dictate of *Daubert*" and rejecting argument that affiant was not required to have direct personal knowledge of matters contained in his declaration).

[59] *See* Campbell v. Nat'l R.R. Passenger Corp., 311 F. Supp. 3d 281, 295–96 (D.D.C. 2018) (concurring "with the heavy weight of authority that, when a party

III. ELEVENTH CIRCUIT APPROACH

As discussed above, the Eleventh Circuit first adopted its approach to this issue in its unpublished decision *Sher v. Raytheon Co*.[60] Citing with approval the Seventh Circuit's decision in *American Honda*,[61] the court held that "a district court must make the necessary factual and legal inquiries and decide all relevant contested issues prior to certification, [including conflicting expert testimony]."[62] The court found that the district court had erred "by not sufficiently evaluating and weighing conflicting expert testimony on class certification" because plaintiffs must "prove, at the class certification stage, more than just a *prima facie* case."[63] Notably, while the court followed *American Honda*, prior Eleventh Circuit precedent suggested a more relaxed approach.[64]

Several years later, in *Local 703, I.B. of T. Grocery & Food Employees Welfare Fund v. Regions Financial Corp.*, the Eleventh Circuit briefly addressed arguments that the district court had improperly decided a class certification motion without resolving pending challenges to expert testimony.[65] The court, however, dismissed those arguments in a footnote because the district court had not relied on the challenged expert evidence in deciding the relevant class certification issues.[66]

---

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").

[60] Sher v. Raytheon Co., 419 F. App'x 887, 890 (11th Cir. 2011).

[61] Am. Honda Motor Co. v. Allen, 600 F.3d 813, 817 (7th Cir. 2010).

[62] *Sher*, 419 F. App'x at 891.

[63] *Id.* at 890.

[64] *See* Drayton v. W. Auto Supply Co., No. 01-10415, 2002 WL 32508918, at *6 n.13 (11th Cir. Mar. 11, 2002) (declining to hold that court "must perform a *Daubert* inquiry of scientific evidence at this early stage of a class action proceeding," and deeming it sufficient for court to "address this issue as [the] case progresses").

[65] Loc. 703, I.B. of T. Grocery & Food Emps. Welfare Fund v. Regions Fin. Corp, 762 F.3d 1248, 1258 n.7 (11th Cir. 2014).

[66] *Id.*

IV. DISTRICT COURT APPLICATION IN THE ELEVENTH CIRCUIT

A. *(Minor) Confusion in the District Courts*

Because there is no published decision directly on point, the vast majority of district courts have followed *Sher*.[67] That said, some courts have pushed back against *Sher* by emphasizing that the *Daubert* standards are relaxed in the bench trial context, which is analogous to the class certification context, because there is no need for a judge to act as a gatekeeper when the judge is the finder of fact.[68]

B. *Continued Vitality of Class Action Litigation*

One of the criticisms of the more rigorous evidentiary approach is that discovery at the class certification stage is more limited, and thus, stingy evidentiary gatekeeping will ultimately filter out otherwise bona fide class action claims and prevent plaintiffs from accessing justice.[69] But district courts in the Eleventh Circuit continue to grant motions for class certification at rates comparable to other jurisdictions, notwithstanding the Eleventh Circuit's purportedly "stringent" approach.[70] Analyzing the average percentage of class certification motions granted among a nationwide sample of twenty district courts outside the Eleventh Circuit, the average grant rate was approximately 52.8%.[71] By comparison, the average grant rate

---

[67] *See, e.g.*, Simmons v. Ford Motor Co., 576 F. Supp. 3d 1136, 1143 (S.D. Fla. 2021); *In re* Disposable Contact Lens Antitrust, 329 F.R.D. 336, 359 (M.D. Fla. 2018); Navelski v. Int'l Paper Co., 244 F. Supp. 3d 1275, 1285, 1303 (N.D. Fla. 2017); Lee-Bolton v. Koppers Inc., 319 F.R.D. 346, 370 (N.D. Fla. 2017).

[68] *See, e.g.*, Braggs v. Dunn, 317 F.R.D. 634, 643 (M.D. Ala. 2016).

[69] A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441, 448 (2013).

[70] *Id.* at 448 n.38.

[71] Utilizing Westlaw Litigation Analytics, we determined the following grant rates for class certification motions among twenty of the busiest district courts in the country, utilizing all available data. To determine the following numbers, we combined the number of class certification motions granted and granted in part, and divided that amount by the total number of class certification motions considered, excluding those denied as moot, stricken from the record, or withdrawn:

1. S.D.N.Y. | 713 / 1149 | 62.1%
2. E.D.N.Y. | 313 / 482 | 64.9%
3. N.D. Cal. | 632 / 1022 | 61.8%
4. C.D. Cal. | 607 / 1244 | 48.8%

among all Eleventh Circuit district courts was approximately 41%.[72] While there is a gap of approximately 11.8%, this number is not materially significant when compared to differences between certain district courts in the sample. For instance, there is an approximate 13% spread between the Northern and Central Districts of California in class certification grant rates.[73] There is a 14% spread between the Northern and Southern Districts of Ohio.[74] There is at least a 12% spread between the Southern District of New York and the District of New Jersey.[75] And there is a 13% spread between the Northern and Southern Districts of Texas.[76]

---

5. E.D. Cal. | 123 / 241 | 51%
6. S.D. Cal. | 156 / 281 | 55.5%
7. D.N.J. | 300 / 604 | 49.7%
8. E.D. Pa. | 143 / 337 | 42.4%
9. D. Md. | 145 / 252 | 57.5%
10. D.S.C. | 111 / 318 | 34.9%
11. E.D. Va. | 93 / 156 | 59.6%
12. N.D. Tex. | 129 / 269 | 48%
13. S.D. Tex. | 328 / 537 | 61%
14. W.D. Tex. | 202 / 407 | 49.6%
15. E.D. Mich. | 182 / 407 | 44.7%
16. N.D. Ohio | 106 / 207 | 51.2%
17. S.D. Ohio | 258 / 395 | 65.3%
18. N.D. Ill. | 632 / 1460 | 43.3%
19. S.D. Ind. | 121 / 233 | 51.9%
20. D. Ariz. | 152 / 288 | 52.8%

[72] We applied the same methodology utilized *supra* note 71 with regards to the Eleventh Circuit district courts:

1. S.D. Fla. | 313 / 782 | 40%
2. M.D. Fla. | 223 / 581 | 38.4%
3. N.D. Fla. | 41 / 99 | 41.4%
4. N.D. Ga. | 143 / 305 | 46.9%
5. M.D. Ga. | 38 / 76 | 50%
6. S.D. Ga. | 26 / 66 | 39.4%
7. N.D. Ala. | 64 / 161 | 39.8%
8. M.D. Ala. | 37 / 124 | 29.8%
9. S.D. Ala. | 18 / 42 | 42.9%

[73] *Supra* note 71.

[74] *Id.*

[75] *Id.*

[76] *Id.*

As a caveat, this statistical analysis does not consider several variables that could affect grant rates in the various circuits, particularly in terms of other procedural or substantive rules that might make class actions easier or harder to bring. Further empirical investigation is needed to determine whether strict evidentiary rules at class certification create too many "false negatives"—i.e., weed out cases that have merit—or whether looser rules create "false positives"—i.e., grant class certification to meritless cases. Still, if the strict evidentiary standards had become a major impediment to bringing bona fide class actions, one would expect a greater drop in grant rates, particularly after a decade of defense lawyers learning to use *Sher* as an effective shield against certification.

C. *Benefits of Judicial Efficiency*

In addition to the preliminary statistical analysis, the district court decisions themselves exemplify how the "stringent" standard is not actually inhibiting class actions, but instead promoting judicial efficiency by giving district courts greater clarity in deciding class certification and helping narrow the issues before trial. In other words, the efficiency is gained not just in weeding out invalid cases or certifying valid ones as an either-or proposition; there is also efficiency gained within the cases themselves, insofar as it may lead to a more nuanced analysis of class definition and may help weed out individual *claims* that may lack merit.

For example, in *Coffey v. WCW & Air, Inc.*, plaintiffs filed a putative class action against defendants based on in-home water tests, asserting claims for unjust enrichment, civil conspiracy, and violation of the Florida Deceptive and Unfair Trade Practices Act.[77] In support of their class certification motion, the plaintiffs submitted the deposition testimony of their water-quality expert and damages expert, which the defendant moved to exclude.[78]

First, the court rejected the defendant's motion to exclude the water-quality expert, finding that the expert's "decision to consider

---

[77] Coffey v. WCW & Air, Inc., No. 17cv90, 2020 WL 4519023, at *1 (N.D. Fla. Mar. 25, 2020).

[78] *Id.*

some technical features while ignoring other technical features" affected "the weight that the factfinder may give to his testimony, not its admissibility."[79] Further, the expert considered technical features that water quality professionals, including defendants, regularly use to compare different water systems.[80] Second, the court rejected in part the defendant's motion to exclude the damages expert. The court observed that, while the expert's opinions on the full refund theory were inadmissible because the theory was "procedurally and substantively unavailable," the expert's price premium damages theory was admissible because it "presented a reasonable methodology using hedonic regression analysis to calculate class-wide damages."[81] Thus, the court allowed expert testimony from the plaintiffs' water quality expert in full while allowing expert testimony from the plaintiffs' damages expert in part. This afforded the court greater clarity in its subsequent class certification analysis while simultaneously narrowing the issues for trial.

In re Disposable Contact Lens Antitrust involved a multidistrict antitrust action brought against contact lens manufacturers and distributors based on pricing policies adopted by manufacturers as to the distribution and sale of certain contact lens products.[82] The plaintiffs moved for class certification, and the defendants filed *Daubert* motions seeking to exclude several of the plaintiffs' experts.[83] Resolving the motions to exclude expert testimony before reaching the motion for class certification, the court held that the plaintiffs' class certification expert was admissible and denied the defendants' motions because, among other reasons, the defendants' arguments went to the weight of the evidence and not its admissibility.[84] As in *Coffey*, the court ruling on the defendants' motions *in limine* before considering class certification ultimately clarified the class certification issues for the court, with the added benefit of narrowing the legal issues for trial.

---

[79] *Id.* at *4.

[80] *Id.* at *3–4.

[81] *Id.* at *6–7.

[82] *In re* Disposable Contact Lens Antitrust, 329 F.R.D. 336, 336 (M.D. Fla. 2018).

[83] *Id.* at 349.

[84] *Id.* at 396–97.

In *Navelski v. International Paper Co.*, the plaintiffs were landowners whose property was flooded by storm water runoff from a collapsed dam.[85] The plaintiffs filed a putative class action against the defendant paper mill, as owner of the dam, asserting claims for negligence, trespass, nuisance, and strict liability based on the failure to properly maintain or remove the dam.[86] After plaintiffs moved for class certification, the parties filed dueling motions to strike each other's respective experts. The *Navelski* court observed that "[b]ecause [certain] expert testimony [on the flooding of plaintiffs' neighborhood subdivisions] is challenged as unreliable and is also critical to class certification, the [c]ourt must perform a full *Daubert* analysis before resolving the class certification motion."[87] Resolving the dueling motions to strike prior to reaching class certification, the *Navelski* court found the plaintiffs' causation expert opinion to be admissible, the plaintiffs' damages expert opinion to be inadmissible, and the defendant's damages expert opinion to be admissible.[88] The court subsequently granted in part the plaintiffs' class certification motion, certifying a class on the issue of liability, and granted in part the defendant's motion for summary judgment as to class-wide damages.[89]

In all three of these cases, by resolving the *Daubert* challenges before reaching class certification, the courts gained additional clarity on the issues relevant to class certification and likewise narrowed the number of issues for trial, promoting judicial efficiency. Additionally, by resolving important expert admissibility issues early on in the litigation, courts enhance the likelihood of pre-trial settlement by giving the parties a better and more accurate understanding of the strength of their positions and chances of success.

---

[85] Navelski v. Int'l Paper Co., 244 F. Supp. 3d 1275, 1284, (N.D. Fla. 2017).

[86] *Id.* at 1308–09.

[87] *Id.* at 1285 (citing Sher v. Raytheon Co., 419 F. App'x 887, 890 (11th Cir. 2011)).

[88] *Id.* at 1311.

[89] *Id.*

V. TENSION WITH TREATMENT OF MOTIONS *IN LIMINE* IN BENCH TRIAL CONTEXT

Because class certification resembles a bench trial insofar as it is a fact-laden inquiry determined by a judge and not a jury, one might think that district courts would be more reluctant to hear motions *in limine* before a certification decision or hearing as they are with bench trials.

In the context of a bench trial, "[t]he rationale underlying pretrial motions *in limine* does not apply" because "it is presumed the judge will disregard inadmissible evidence and rely only on competent evidence."[90] "The purpose of a motion *in limine* is to permit the pre-trial resolution of evidentiary disputes without having to present potentially prejudicial evidence in front of a jury."[91] Thus, "[i]n the event of a bench trial, the weight of authority suggests that all evidence should first be received, and questions of admissibility determined when and if necessary."[92] In fact, "courts are advised to deny motions *in limine* in non-jury cases."[93]

Nonetheless, courts in the Eleventh Circuit have followed *Sher*. For example, in *Ray v. Judicial Correction Services, Inc.*, the plaintiffs filed a putative class action alleging Section 1983 claims for constitutional violations committed by the defendants against persons placed on probation by Alabama's municipal courts.[94] The plaintiffs sought to certify a statewide class of (i) persons who were

---

[90] Singh v. Caribbean Airlines Ltd., No. 13-20639-CIV, 2014 WL 4101544, at *1 (S.D. Fla. Jan. 28, 2014) (citations omitted); *see also* United States v. Brown, 415 F.3d 1257, 1269 (11th Cir. 2005) ("There is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself.").

[91] Alan L. Frank L. Assocs. v. OOO RM Inv, No. 16-22484-CIV, 2016 WL 9348064, at *1 (S.D. Fla. Nov. 30, 2016) (citations omitted).

[92] Kremer v. Lysich, No. 19-cv-887, 2022 WL 18358955, at *3 (M.D. Fla. Mar. 25, 2022) (citing Johnson & Johnson Vision Care, Inc. v. CIBA Vision Corp., 616 F. Supp. 2d 1250, 1256 (M.D. Fla. 2009) (noting that "a bench trial weighs heavily in favor of denying the motions *in limine* and addressing the issues raised if and when they come up at trial")).

[93] *OOO RM Inv*, 2016 WL 9348064, at *1 (citing 9 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2411 (3d ed. 2008)).

[94] Ray v. Jud. Corr. Servs., No. 12-cv-02819, 2017 WL 4180910, at *1–2 (N.D. Ala. Sept. 21, 2017).

assigned by municipal courts in Alabama to probation with the defendants for the collection of fines, fees, and costs, and (ii) persons assigned to the defendants that were incarcerated for failure to pay fines, fees, and costs without consideration of their indigent status.[95] The parties filed dueling motions *in limine* to exclude each other's experts.[96] The court explained that under *Local 703* and *Sher*, the court was required to examine a class certification expert's testimony under *Daubert* if the expert's testimony is critical to resolving class certification.[97] The court also observed that none of the parties had disputed "that *Daubert* gatekeeping is appropriate at the class certification stage."[98] Then, citing the Eleventh Circuit's *Brown* opinion, the court recognized "that the *Daubert* barriers are more relaxed when a judge, rather than a jury, serves as the fact finder."[99] The court proceeded to analyze each party's respective motion *in limine* seeking to exclude the other's class certification expert, and ultimately found the plaintiffs' expert testimony to be fully admissible and defendants' expert testimony to be partially admissible.[100]

There is no indication that *Ray* was a bench trial case, as the plaintiffs had demanded a jury trial in their operative complaint.[101] Thus, the *Ray* court's observation that *Daubert* barriers are more relaxed when a judge serves as the factfinder indicated the court's view that *Daubert*'s gatekeeping role is lessened in the class certification context because the judge, not a jury, is making findings of fact on class certification issues. By comparing class certification to a bench trial, the *Ray* court brought into tension two separate bodies of Eleventh Circuit law. On one end, *Sher* and *Local 703* instruct district courts to resolve material issues of expert evidence admissibility prior to deciding class certification. But, on the other end, *Brown* and countless other decisions suggest it is improper to consider motions *in limine* before a bench trial, as there is no need for

---

95 *Id.*

96 *Id.*

97 *Id.* at *4.

98 *Id.*

99 *Id.* (citing United States v. Brown, 415 F.3d 1257, 1268 (11th Cir. 2005)).

100 *Ray*, 2017 WL 4180910, at *7–8.

101 *See* Fifth Amended Class Action Complaint, Ray v. Jud. Corr. Servs., No. 12-cv-02819, 2017 WL 4180910, at *39 (N.D. Ala. July 6, 2018).

the role of a gatekeeper when the judge is the factfinder. Undoubtedly, class certification involves a district court making findings of fact.[102] This raises the question as to why judges should act as gatekeepers in deciding expert evidence admissibility issues before deciding class certification.

The answer is straightforward. Although outwardly similar in posture, the ultimate purposes of the gatekeeping role in the class certification context and in the trial context are distinct. In the trial context, the gatekeeping role serves to "permit the pre-trial resolution of evidentiary disputes without having to present potentially prejudicial evidence in front of a jury."[103] This purpose is absent when a judge, not a jury, serves as the factfinder. By contrast, in the class certification context, the gatekeeping role serves to clarify the class certification issues and narrow the issues remaining for trial. District courts across the country acknowledge that narrowing the issues remaining for trial is a key function of motions *in limine*.[104]

However, there is yet a more fundamental purpose for resolving motions *in limine* prior to class certification. An order certifying a class "usually is the district judge's last word on the subject; there is no later test of the decision's factual premises."[105] Thus, "[b]efore deciding whether to allow a case to proceed as a class action . . . a judge should make whatever factual and legal inquiries are necessary under Rule 23."[106] The Seventh Circuit explained in *Szabo* that when motions under Rule 12(b)(1) or 12(b)(2) depend on contested

---

[102] *See, e.g.*, Tershakovec v. Ford Motor Co., 79 F.4th 1299, 1306 (11th Cir. 2023) (observing that a district court can abuse its discretion in granting or denying class certification if it "bases its decision on clearly erroneous findings of fact"); Santos v. Healthcare Revenue Recovery Grp., 85 F.4th 1351, 1357 (11th Cir. 2023) (same).

[103] Alan L. Frank L. Assocs. v. OOO RM Inv, No. 16-22484-CIV, 2016 WL 9348064, at *1 (S.D. Fla. Nov. 30, 2016).

[104] *See, e.g.*, Stehn v. Cody, 74 F. Supp. 3d 140, 144 (D.D.C. 2014) (observing that the purpose of motions *in limine* includes "narrow[ing] the evidentiary issues at trial"); United States v. Jacobs, No. 21-CR-053, 2023 WL 3579043, at *2 (S.D. Ohio May 22, 2023) ("The purpose of a motion *in limine* is to "narrow the issues remaining for trial and to minimize disruptions at trial."); Buddy's Plant Plus Corp. v. CentiMark Corp., 978 F. Supp. 2d 523, 528 (W.D. Pa. 2013) (same); United States v. Anderson, 563 F. Supp. 691, 694 (E.D. Mich. 2021) (same).

[105] Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 676 (7th Cir. 2001).

[106] *Id.*

facts, district courts have the discretion to hear these disputes and make findings of fact before deciding the relevant motion.[107] This, the court explained, is in contrast to Rule 12(b)(6) motions, where the district court is required to accept the plaintiff's factual allegations as true.[108] Thus, the court explained, there is "no reason to extend [the Rule 12(b)(6)] approach to Rule 23, when it does not govern even the other motions authorized by Rule 12(b)."[109]

Szabo emphasized that a Rule 23 class certification decision involves making affirmative findings of fact and conclusions of law.[110] It is nothing like a Rule 12(b)(6) motion, where contested facts are presumed true in the plaintiff's favor.[111] Accordingly, affirmatively deciding contested evidentiary issues raised in motions *in limine* prior to deciding class certification is required in the Rule 23 context because of the finality of the Rule 23 class certification decision. Indeed, practically speaking, the class certification decision *is* the ultimate decision of the case, as it typically forces the defendants into a settlement or the plaintiff into voluntary dismissal.[112] Once a class action is certified, the risk to the defendant company is often too large to proceed, and thus, the defendant is eager to settle for substantial sums.[113] A class certification decision might mean thousands of plaintiffs (and thus exponential payouts), versus a handful.[114] By contrast, because the purpose behind a class action is to aggregate claims that individuals would not otherwise bring

---

[107] *Id.* at 676–77.

[108] *Id.* at 677.

[109] *Id.*

[110] *Id.* at 676.

[111] *Szabo*, 249 F.3d at 677.

[112] Mullenix, *supra* note 26, at 631 (describing the class certification decision as "the main event" in class action cases).

[113] *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1298 (7th Cir. 1995) (explaining that class action defendants "might, therefore, easily be facing $25 billion in potential liability (conceivably more), and with-it bankruptcy. They may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle.").

[114] Parker v. Time Warner Ent. Co., 239 F.R.D. 318, 341 (E.D.N.Y. 2007) (observing that in large class action cases, defendants face "devastating judgments" and "catastrophic damages awards").

because they are too small, plaintiffs (and plaintiffs' lawyers) often do not proceed to trial stages after losing a certification decision.[115]

Thus, before findings of fact can be made in a class certification decision, relevant evidentiary issues should be resolved. The gatekeeper role in the Rule 23 context acts as a procedural due process safeguard that ensures a non-movant is entitled to raise contested evidentiary issues before a court decides class certification (and makes findings of fact) because "an order certifying a class usually is the district judge's last word on the subject; there is no later test of the decision's factual premises,"[116] and that decision will essentially resolve the case one way or another.[117]

CONCLUSION

Despite the purportedly "stringent" standard adopted by the Eleventh Circuit, class action litigation remains alive and well. Eleventh Circuit district courts continue to grant motions for class certification at rates comparable to their sister district courts nationwide.[118] However, Eleventh Circuit district courts now benefit from a substantially more efficient class certification procedure. That procedure, which in a nutshell allows defendants to raise contested evidentiary issues and have them heard and decided prior to class certification, better helps district courts decide class certification by clarifying the issues. This approach also has the added benefit of narrowing the issues set for trial. Furthermore, by having district courts decide critical evidentiary disputes early on, attorneys are better equipped to develop their litigation strategies and explore settlement options with clients. But most critically, this approach protects the procedural rights of non-movants to raise evidentiary issues and be fully heard on them before findings of fact are set in stone by a class certification order.

---

115 *Id.* at 337–38.

116 *See Szabo*, 249 F.3d at 676.

117 Mullenix, *supra* note 26, at 632 ("Once the serious consequences of class certification are embraced, it follows that all actors involved should be required to produce and secure as reliable a record as necessary to ensure that a court has appropriate information upon which to make a serious class certification decision.").

118 *See supra* notes 71–72.