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CERTIFICATION

TRENDS

Significant issues remaining in the wake of the U.S. Supreme Court rulings in *Comcast* and *Dukes* include damages and predominance, ascertainability, Article III standing for absent class members, and the role of *Daubert* at the certification stage, attorneys Julian W. Poon, Blaine H. Evanson, and Bradley J. Hamburger say in this BNA Insight.

''Given the sharp divisions in the courts of appeals, and the practical import of class action litigation, it would seem to be only a matter of time before the Supreme Court appropriately addresses and resolves some or all of these pressing issues,'' the authors say.

BNA Insight

Emerging Issues in the Law of Class Certification



By Julian W. Poon, Blaine H. Evanson, and Bradley J. Hamburger

The Supreme Court's decisions in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), and *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), brought much-needed clarity to the law of class certification, and resolved several long-standing conflicts among the courts of appeals.

Yet as courts continue to interpret and apply *Dukes* and *Comcast*, new issues have emerged, and courts are predictably divided on such issues as the proper reading of *Comcast*, the ascertainability of proposed classes, standing, and the proper level of scrutiny of expert testimony at the class certification stage.

Damages and Predominance After *Comcast*

Comcast involved a class of more than two million current and former cable television subscribers who alleged they paid supra-competitive prices as the result of Comcast's alleged violations of the antitrust laws.[1] After concluding that the plaintiffs could not satisfy Rule

[1] *Comcast*, 133 S. Ct. at 1429-30.

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23(b)(3)'s predominance requirement because the damages model their expert had proposed suffered from a fatal flaw, the Supreme Court reversed the Third Circuit's judgment affirming the district court's class certification ruling.[2] The Court's opinion, authored by Justice Scalia, explained that the plaintiffs' damages model was inadequate because it was based on all four theories of liability that the plaintiffs had advanced, whereas the district court had accepted only one of those theories.[3] As the Court summarized, ''a model purporting to serve as evidence of damages in [a] class action must measure only those damages attributable to that theory'' of liability.[4] Thus, the inability of the plaintiffs' model to ''bridge the differences between supra-competitive prices in general and supra-competitive prices attributable'' to the sole remaining theory of liability rendered class certification inappropriate.[5]

Significantly, the Court reasoned that the plaintiffs ''[could not] show Rule 23(b)(3) predominance'' because their damages model ''[fell] far short of establishing that damages are capable of measurement on a classwide basis'' and therefore ''[q]uestions of *individual damage calculations* will inevitably overwhelm questions common to the class.''[6] The Court, in other words, held that individualized issues related to the calculation of damages *could* preclude a finding that common issues predominated, and thus justify the denial of class certification. The Court also made clear that district courts must assess the validity of any proposed damages model at the class certification stage, because accepting ''*any* method of measurement . . . so long as it can be applied classwide, no matter how arbitrary the measurements may be . . . would reduce Rule 23(b)(3)'s predominance requirement to a nullity.''[7]

Dissenting Opinion

Justices Ginsburg and Breyer in a joint dissent sought to limit the impact of the majority's opinion, asserting that it ''should not be read to require, as a prerequisite to certification, that damages attributable to a class-wide injury be measurable 'on a class-wide' basis.''[8] The dissent emphasized that Rule 23(b)(3)'s predominance requirement is meant to '' 'tes[t] whether proposed classes are sufficiently cohesive to warrant adjudication by representation,' '' and it ''scarcely demands commonality as to all questions.''[9] The dissent further claimed that the majority's ruling was ''good for this day and case only,'' and declared that it remains black-letter law that a ''class may obtain certification under Rule 23(b)(3) when liability questions common to the class predominate over damages questions unique to class members.''[10]

The majority and dissenting opinions in *Comcast* are thus sharply split as to whether individualized damages questions preclude a finding of predominance. The majority opinion clearly holds that in the absence of a classwide method of determining damages, individualized damages questions can and will defeat predominance and thus eliminate the possibility of certification under Rule 23(b)(3). Yet the dissent vigorously asserts that the majority opinion does not mean what it appears to say, and did not represent any change in the law. Given this clear divide, it is not surprising that in a short amount of time the courts of appeals have split over the proper interpretation and application of *Comcast* and the impact of individualized damages issues on the predominance calculus.[11]

The D.C. Circuit's decision in *In re Rail Freight Fuel Surcharge Antitrust Litigation*[12] arguably represents the most faithful application of *Comcast* to date. Like the class in *Comcast*, the plaintiffs' argument for certification hinged on the sufficiency of their expert's damages models, which had a ''propensity toward false positives.''[13] The defendants had challenged the methodology of these models, but the district court accepted them as ''plausible'' and ''workable.''[14] The D.C. Circuit reversed, explaining that *Comcast* ''sharpen[ed] the defendants' critique of the damages model as prone to false positives'' because the ''models are essential to the plaintiffs' claim they can offer common evidence of classwide injury.''[15] The court explained that if the

[2] *Id.* at 1430–35.
[3] *Id.* at 1433.
[4] *Id.*
[5] *Id.* at 1435.
[6] *Id.* at 1433 (emphasis added).
[7] *Id.*
[8] *Id.* at 1436 (Ginsburg & Breyer, JJ., dissenting) (citation omitted).

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[9] *Id.* (Ginsburg & Breyer, JJ., dissenting) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997)).
[10] *Id.* at 1437 (Ginsburg & Breyer, JJ., dissenting).
[11] Most Circuits have generally followed *Comcast*'s holding that district courts must assess the sufficiency of a proposed damages model at the class certification stage, and that a damages model must be linked to the plaintiffs' liability case. *See, e.g., Parko v. Shell Oil Co.*, 739 F.3d 1083, 1086-87 (7th Cir. 2014) (''A district judge may not 'refus[e] to entertain arguments against [plaintiffs'] damages model that bore on the propriety of class certification, simply because those arguments would also be pertinent to the merits determination.' The judge should have investigated the realism of the plaintiffs' injury and damage model in light of the defendants' counterarguments, and to that end should have taken evidence.'' (quoting *Comcast*, 133 S. Ct. at 1432–33)); *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 123 n.8 (2d Cir. 2013) (''Plaintiffs' proposed measure for damages is thus directly linked with their underlying theory of classwide liability . . . and is therefore in accord with the Supreme Court's recent decision in *Comcast* . . . . [T]he district court carefully examined plaintiffs' damages model, finding it appropriate and feasible to redress the common harms alleged, and therefore did not abuse its discretion in determining that common issues predominate.'').
[12] *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244 (D.C. Cir. 2013).
[13] *Id.* at 254.
[14] *Id.* at 250.
[15] *Id.* at 253.

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damages model ''detect[ed] injury where none could exist,'' that would ''shred the plaintiffs' case for certification'' because ''questions of fact cannot predominate where there exists no reliable means of proving classwide injury in fact.''[16] As the court succinctly put it, after *Comcast*, ''[n]o damages model, no predominance, no class certification.''[17]

Similarly, the Tenth Circuit in *Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.*[18] has held that, after *Comcast*, ''predominance may be destroyed'' if ''material differences in damages determinations will require individualized inquiries.''[19] District courts therefore must consider whether damages issues ''will overwhelm those questions common to the class.''[20]

By contrast, the Ninth Circuit in *Leyva v. Medline Industries Inc.*[21] reversed a district court's denial of certification that was based on a determination that common questions of liability did not predominate over individualized damages questions.[22] Without specifically addressing *Comcast*'s holding on this issue, the Ninth Circuit stated that ''the presence of individualized damages cannot, by itself, defeat class certification under Rule 23(b)(3).''[23] The Ninth Circuit thus concluded that the ''district court applied the wrong legal standard'' because '' '[i]n this circuit . . . damages calculations alone cannot defeat certification.' ''[24]

The Sixth and Seventh Circuits adopted similarly limited views of *Comcast* in two cases involving allegedly defective washing machines in which the Supreme Court had granted certiorari, vacated the initial decisions, and remanded for reconsideration in light of *Comcast*.[25] In *In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation*, the Sixth Circuit stated that *Comcast*'s rejection ''of a liability and damages class because plaintiffs failed to establish that damages could be measured on a classwide basis'' had only ''limited application'' because ''the district court [had] certified only a liability class and reserved all issues concerning damages for individual determination.''[26] The Sixth Circuit also cited both *Leyva* and the *Comcast* dissent with approval, and suggested it viewed *Comcast* as not having effectuated any change in the law.[27]

The Seventh Circuit in *Butler v. Sears, Roebuck & Co.* similarly emphasized that, unlike in *Comcast*, the district court in that case ''neither was asked to decide nor did decide whether to determine damages on a class-wide basis.''[28] The court also did not view *Comcast* as requiring common proof of damages in order to satisfy the predominance requirement, and asserted that it ''would drive a stake through the heart of the class action device, in cases in which damages were sought rather than an injunction or a declaratory judgment, to require that every member of the class have identical damages.''[29] Rather, according to the Seventh Circuit, even after *Comcast*, ''[i]f the issues of liability are genuinely common issues, and the damages of individual class members can be readily determined in individual hearings, in settlement negotiations, or by creation of subclasses, the fact that damages are not identical across all class members should not preclude class certification.''[30]

As with the majority and dissenting opinions in *Comcast* itself, the post-*Comcast* court of appeals decisions have adopted conflicting views regarding the impact of individualized damages issues on the predominance calculus under Rule 23(b)(3). Given this split in authority, the Supreme Court may eventually need to weigh in to reaffirm and clarify its holding in *Comcast*.

A Renewed Focus on Ascertainability

In a series of recent decisions, most notably *Carrera v. Bayer Corp.*,[31] the Third Circuit has underscored the importance of the fundamental requirement that the membership of any proposed class must be ascertainable. Although ascertainability is not an express requirement of Rule 23, it is nonetheless a generally accepted prerequisite to certification that requires plaintiffs to propose a class definition that is based on objective criteria, and to prove that there is an administratively feasible way to determine who falls within the class definition.[32] What is significant about the recent Third Circuit ascertainability cases is that they hold that defendants have a due process right to challenge whether a person belongs within a class, and they cast significant doubt on the practice of using affidavits from class members attesting to their membership within a class.[33]

As the court explained in *Carrera*, defendants have a ''due process right to challenge the proof used to demonstrate class membership'' and the ''[a]scertainability [requirement] provides due process by requiring that a defendant be able to test the reliability of the evidence submitted to prove class membership.''[34] Thus, a plaintiff ''must demonstrate his purported method for ascertaining class members is reliable and administratively feasible, and permits a defendant to challenge the evidence used to prove class membership.''[35] *Carrera* further made clear that a defendant's right to challenge the

[16] *Id.* at 252–53.

[17] *Id.* at 253; *see also id.* at 255 (noting that prior to *Comcast*, ''the case law was far more accommodating to class certification under Rule 23(b)(3)'').

[18] *Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.*, 725 F. 3d 1213 (10th Cir. 2013).

[19] *Id.* at 1220.

[20] *Id.*

[21] *Leyva v. Medline Indus. Inc.*, 716 F.3d 510 (9th Cir. 2013).

[22] *Id.* at 512–13.

[23] *Id.* at 514.

[24] *Id.* at 513 (quoting *Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1094 (9th Cir. 2010)).

[25] *See Whirlpool Corp. v. Glazer*, 133 S. Ct. 1722 (2013); *Sears, Roebuck & Co. v. Butler*, 133 S. Ct. 2768 (2013); *In re Whirlpool Corp. Front-Loading Washer Products Liab. Litig.*, 722 F.3d 838 (6th Cir. 2013); *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796 (7th Cir. 2013).

[26] 722 F.3d at 860.

[27] *Id.* at 860–61 (''[I]n 'the mine run of cases, it remains the ''black letter rule'' that a class may obtain certification under Rule 23(b)(3) when liability questions common to the class predominate over damages questions unique to class members.' '' (quoting *Comcast*, 133 S. Ct. at 1437 (Ginsburg & Breyer, JJ., dissenting))).

[28] 727 F.3d at 800.

[29] *Id.* at 801.

[30] *Id.*

[31] *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013).

[32] *See, e.g., Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 592–93 (3d Cir. 2012).

[33] *See Carrera*, 727 F.3d at 307–12.

[34] *Id.* at 307.

[35] *Id.* at 308.

evidence supporting class membership extends to ''affidavits attesting to class membership,'' even if the claims at issue ''are of low value'' and thus there is little incentive to ''submit fraudulent affidavits.''[36]

Carrera's interpretation of the ascertainability requirement has been criticized by some as creating a significant barrier to the certification of consumer class actions involving low-dollar-value claims.[37] And four Third Circuit judges dissented from the denial of rehearing en banc in *Carrera*, claiming that the decision ''threatens the viability of the low-value consumer class action.''[38] Despite this criticism, district courts both within[39] and outside[40] the Third Circuit have followed *Carrera*'s guidance on ascertainability, and have thus protected the rights of class action defendants to challenge the evidence used to determine class membership.

Although the Third Circuit's emphasis on ascertainability is somewhat unique among the courts of appeals, even before *Carrera*, several district courts in the Ninth Circuit had recognized the difficulty of ascertaining the membership of proposed classes in cases involving low-value claims. For example, in 2009 a court in the Central District of California denied certification because of ''concerns about how Plaintiffs will identify each class member and prove which brand of [the defendant's] frozen waffles each member purchased, in what quantity, and for what purpose,'' and noted that the ''likelihood that tens of thousands of class members saved their receipts as proof of their purchase of [the defendant's] waffles is very low.''[41] Other district courts in the Ninth Circuit have adopted similar reasoning, both before[42] and after[43] *Carrera*, although this view is not unanimous,[44] and several courts have flatly rejected *Carrera*.[45]

In light of the Third Circuit's decision in *Carrera*, and the conflicting views of district courts that have considered the issue (particularly within the Ninth Circuit), it is likely that other courts of appeals, and perhaps the Supreme Court, will eventually weigh in on the ascertainability requirement and its application to consumer and other class actions involving low-value claims.

Article III Standing for Absent Class Members

There is a square conflict among the courts of appeals over whether a class can be properly certified if it contains persons who lack standing under Article III. This circuit split has existed for several years, and the Supreme Court has not yet addressed the issue, leaving the courts of appeals to continue grappling with the

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[36] *Id.* at 309–10.

[37] *See, e.g.*, Alison Frankel, *3rd Circuit Is Trying to Kill Consumer Class Actions: New En Banc Brief*, *Reuters* (Sept. 30, 2013), http://blogs.reuters.com/alison-frankel/2013/09/30/3rd-circuit-is-trying-to-kill-consumer-class-actions-new-en-banc-brief/.

[38] *Carrera v. Bayer Corp.*, 3d Cir., No. 12-2621, *denial of petition for rehearing en banc*, 5/2/14 (Ambro, J., dissenting from denial of petition for rehearing en banc).

[39] *See, e.g.*, *Byrd v. Aaron's Inc.*, W.D. Pa., No. 11-101 Erie, 1/31/14 (recommending denial of class certification after finding that a proposed class was not ascertainable under *Carrera*); *Haskins v. First Am. Title Ins. Co.*, D.N.J., No. 10-5044 (RMB/JS), 1/27/14 (denying class certification after finding that a proposed class was not ascertainable under *Carrera*).

[40] *See, e.g.*, *Karhu v. Vital Pharms., Inc.*, S.D. Fla., No. 13-60768-CIV-COHN/SELTZER, 3/3/14 (relying on *Carrera* to find that the ascertainability requirement was not satisfied where the plaintiff proposed to use self-identifying affidavits and noting that allowing the defendant ''to contest each affidavit would require a series of mini-trials and defeat the purpose of class-action treatment''); *Donaca v. Disk Network, LLC*, D. Colo., No. 11-cv-02910-RBJ-KLM, 2/18/14 (similar); *In re Skelaxin (Metaxalone) Antitrust Litig.*, E.D. Tenn., No. 1:12-md-2343, 1/30/14 (similar).

[41] *Hodes v. Van's Int'l Foods*, C.D. Cal., No. CV 09-01530 RGK (FFMx), 7/23/09.

[42] *See, e.g.*, *Red v. Kraft Foods, Inc.*, C.D. Cal., No. CV 10-1028-GW (ARGx), 4/12/12 (''[W]here the court would have absolutely no way to verify that self-identified class members in fact suffered the alleged injury (or more to the point, that consumers themselves might not be able to honestly identify themselves even with proper notice), class certification is improper.''); *Xavier v. Philip Morris USA Inc.*, 787 F. Supp. 1075, 1090-91 (N.D. Cal. 2011) (denying class certification on ascertainability grounds, and finding that affidavits from purported class members would be ''unreliable'').

[43] *See, e.g.*, *Algarin v. Maybelline LLC*, S.D. Cal., No. 12-cv-3000 AJB (DHB), 5/12/14 (''Cases where self-identification alone has been deemed sufficient generally involve situations where consumers are likely to retain receipts, where the relevant purchase was a memorable 'big ticket' item; or where defendant would have access to a master list of consumers or retailers. . . . None of these factors exist in the instant case.''); *Jones v. Conagra Foods, Inc.*, N.D. Cal., No. C 12-01633 CRB, 6/13/14 (''Even assuming that all proposed class members would be honest, it is hard to imagine that they would be able to remember which particular Hunt's products they purchased from 2008 to the present, and whether those products bore the challenged label statements. . . . Common sense tells us that while named plaintiffs might make a point of remembering in great detail their history with the products about which they have filed suit, . . . regular class members might not. . . . The class is unascertainable.''); *Sethavanish v. ZonePerfect Nutrition Co.*, N.D. Cal., No. 12-2907-SC, 2/13/14 (finding *Carrera* and similar Ninth Circuit district court cases to be ''persuasive'' and denying class certification on ascertainability grounds).

[44] *See, e.g.*, *Ries v. Ariz. Beverages USA LLC*, 287 F.R.D. 528, 535 (N.D. Cal. 2012) (rejecting argument that ''because most members of the proposed class will not have retained all of their receipts for AriZona Iced Tea over the past few years, the administration of this class will require 'fact-intensive mini trials' to establish whether each purported class member had in fact made a purchase entitling them to class membership'' as ''simply not the case'' and warning that ''[i]f it were, there would be no such thing as a consumer class action''); *Astiana v. Kashi Co.*, 291 F.R.D. 493, 500 (S.D. Cal. 2013) (''If class actions could be defeated because membership was difficult to ascertain at the class certification stage, there would be no such thing as a consumer class action. As long as the class definition is sufficiently definite to identify putative class members, the challenges entailed in the administration of this class are not so burdensome as to defeat certification.'' (quotation marks and citation omitted)).

[45] *See, e.g.*, *McCrary v. Elations Co.*, C.D. Cal., No. EDCV 13-00242 JGB (OPx), 1/13/14 (''[*Carrera*] eviscerates low purchase price consumer class actions in the Third Circuit. It appears that pursuant to [*Carrera*] in any case where the consumer does not have a verifiable record of its purchase, such as a receipt, and the manufacturer or seller does not keep a record of buyers, [*Carrera*] prohibits certification of the class. While this may now be the law in the Third Circuit, it is not currently the law in the Ninth Circuit.''); *see also Brazil v. Dole Packaged Foods, LLC*, N.D. Cal., No. 12-CV-01831-LHK, 5/30/14 (same); *Werdebaugh v. Blue Diamond Growers*, N.D. Cal., No. 12-CV-2724-LHK , 5/23/14 (same).

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proper application of Article III in the class action context.

The clearest example of the divide among the courts of appeals is between the Second Circuit's decision in *Denney v. Deutsche Bank AG*[46] and the Seventh Circuit's decision in *Kohen v. Pacific Investment Management Co.*[47] In *Denney*, the Second Circuit held that ''no class may be certified that contains members lacking Article III standing.''[48] By contrast, the Seventh Circuit in *Kohen* held that ''as long as one member of a certified class has a plausible claim to have suffered damages, the requirement of standing is satisfied.''[49]

The two Circuits to weigh in on this issue most recently have both agreed that the presence of uninjured absent class members can preclude class certification. In *Halvorson v. Auto-Owners Insurance Co.*,[50] the Eighth Circuit held that ''[i]n order for a class to be certified, each member must have standing and show an injury in fact that is traceable to the defendant and likely to be redressed in a favorable decision.''[51] And in *In re Rail Freight*, the D.C. Circuit suggested that, after *Comcast*, decisions such as *Kohen* that previously tolerated the inclusion of uninjured class members within a class are no longer valid, at least to the extent that those cases could be construed as justifying the use of flawed damages models prone to false positives.[52] Rather, according to the D.C. Circuit, ''plaintiffs must also show that they can prove, through common evidence, that all class members were in fact injured.''[53]

Illustrating the continuing confusion on this issue, the Ninth Circuit has in the last few years appeared to endorse both sides of the circuit split. In *Stearns v. Ticketmaster Corp.*,[54] the Ninth Circuit stated that, with respect to standing, ''our law keys on the representative party, not all of the class members, and has done so for many years.''[55] But just a few months later, in *Mazza v. American Honda Motor Co.*,[56] the Ninth Circuit quoted with approval the Second Circuit's holding in *Denney* that '' 'no class may be certified that contains members lacking Article III standing.' ''[57] This apparent conflict within the Ninth Circuit obviously presents significant difficulties for district courts, and demonstrates why Supreme Court review is needed.

Daubert at Class Certification

Although the Supreme Court had the opportunity to address the issue in both *Dukes* and *Comcast*, it has yet to determine whether courts must apply *Daubert* to expert testimony at the class certification stage.[58] In *Dukes*, the Supreme Court suggested in dictum that *Daubert* does apply at the class certification stage, by noting that it ''doubt[ed]'' the correctness of the district court's conclusion ''that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings.''[59] And in *Comcast*, the Supreme Court granted certiorari on the question ''[w]hether a district court may certify a class 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.''[60] But the Court did not decide in either case whether district courts must apply *Daubert* to expert testimony at class certification.

Without clarification from the Supreme Court, the well-recognized and consequential split among the courts of appeals on this issue remains unresolved. Some Circuits, including the Seventh Circuit, have held that when an expert's testimony is critical to class certification, ''the district court must perform a full *Daubert* analysis before certifying the class,'' and ''must conclusively rule on any challenge to the expert's qualifications or submission prior to ruling on a class certification motion,'' as well as on ''the reliability of the information provided by the expert.''[61] By contrast, the Eighth Circuit has held that only a ''limited'' *Daubert* analysis is required at the class certification stage, and thus the district court need only make a preliminary assessment of ''the reliability of the expert opinions in light of the available evidence and for the purpose for which they were offered.''[62] The Eighth Circuit has reasoned that a ''conclusive *Daubert* inquiry . . . cannot be reconciled with the inherently preliminary nature of pretrial evidentiary and class certification rulings.''[63]

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[46] *Denney v. Deutsche Bank AG*, 443 F.3d 253 (2d Cir. 2006).

[47] *Kohen v. Pacific Inv. Mgmt. Co.*, 571 F.3d 672 (7th Cir. 2009).

[48] 443 F.3d at 264.

[49] 571 F.3d at 676. *Kohen* also recognized, however, that ''a class should not be certified if it is apparent that it contains a great many persons who have suffered no injury at the hands of the defendant,'' but it did not frame this as a limitation derived from Article III. *Id.* at 677.

[50] *Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773 (8th Cir. 2013).

[51] *Id.* at 778; *see also Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010) (noting that even if state law ''holds that a single injured plaintiff may bring a class action on behalf of a group of individuals who may not have had a cause of action themselves, it is inconsistent with the doctrine of standing as applied by federal courts'')

[52] 725 F.3d at 255.

[53] *Id.* at 252 (''[W]e do expect the common evidence to show all class members suffered *some* injury.'')

[54] *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013 (9th Cir. 2011).

[55] *Id.* at 1021. At least one district court, however, has concluded that *Stearns* and similar Ninth Circuit decisions had not addressed whether ''a class may be certified where members lack standing.'' *O'Shea v. Epson America, Inc.*, C.D. Cal., No. CV 09-8063 PSG (CWx), 7/29/11.

[56] *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581 (9th Cir. 2012).

[57] *Id.* at 594 (quoting *Denney*, 443 F.3d at 264).

[58] Under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), expert testimony is admissible only if (1) the expert has valid scientific, technical, or other specialized knowledge, and (2) that testimony will assist the fact finder. *See id.* at 589–91; Fed. R. Evid. 702. *Daubert* and Rule 702 require district court judges to serve a gatekeeping function and ensure that expert testimony ''both rests on a reliable foundation and is relevant to the task at hand.'' 509 U.S. at 597.

[59] 131 S. Ct. at 2253–54.

[60] 133 S. Ct. at 1431 n.4.

[61] *Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 815–16 (7th Cir. 2010) (per curiam); *see also Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 812-13 (7th Cir. 2012) (holding that a ''district court's refusal to rule on plaintiffs' *Daubert* motion was an error'' where expert testimony was critical to the class certification decision).

[62] *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 612 (8th Cir. 2011).

[63] *Id.* at 613.

Although the Circuits remain split as to whether district courts must engage in a full *Daubert* analysis of expert testimony before certifying a class, *Dukes* and *Comcast* make clear that courts have an obligation to conduct a ''rigorous analysis'' of the evidence supporting class certification, including expert testimony.[64] As the Ninth Circuit explained in *Ellis v. Costco Wholesale Corp.*,[65] this ''rigorous analysis'' requires courts to go beyond a determination of whether expert testimony is ''admissible,'' and also requires courts to assess the ''persuasiveness'' of such testimony.[66] Thus, even in Circuits that have taken the view that full *Daubert* scrutiny does not apply to expert testimony offered at the class certification stage, ''[i]t is now clear,'' after *Dukes* and *Comcast*, ''that Rule 23 not only authorizes,'' but also ''commands,'' ''a hard look at the soundness'' of expert testimony submitted in support of class certification.[67]

Conclusion

Although the Supreme Court's decisions in *Dukes* and *Comcast* represent a significant and beneficial clarification of the law's requirements for class certification, many important issues remain unresolved and continue to lead to conflicting results and authority.

Given the sharp divisions in the courts of appeals, and the practical import of class action litigation, it would seem to be only a matter of time before the Supreme Court appropriately addresses and resolves some or all of these pressing issues.

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[64] *See Dukes*, 131 S. Ct. at 2551–54; *Comcast*, 133 S. Ct. at 1433.

[65] *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970 (9th Cir. 2011).

[66] *Id.* at 982.

[67] *In re Rail Freight*, 725 F.3d at 255.

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