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LIBOR VII's Implications for Expert Evidence at the Class-Certification Stage

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In the wake of the Supreme Court's rulings in *Wal-Mart Stores, Inc. v. Dukes* and *Comcast Corp. v. Behrend*, district courts were charged with applying enhanced scrutiny to expert evidence presented at the class-certification stage. Prior to these rulings, the Second Circuit had already tasked district courts in its circuit with the burden of applying a heightened level of scrutiny to such evidence. Nevertheless, in practice, this standard was applied unevenly. Whatever the previous standard for expert evidence at the class-certification stage, Judge Buchwald's recent opinion in *In re LIBOR–Based Financial Instruments Antitrust Litigation* (*LIBOR VII*), No. 11 Civ. 5450 (NRB), 2018 WL 1229761 (S.D.N.Y. Feb. 28, 2018), decisively frames the inquiry going forward. Under that ruling, courts in the Southern District of New York must closely analyze expert evidence proffered in support of a motion for class certification. Defendants are advised, where appropriate, to raise *Daubert* challenges in connection with class certification and to seek resolution of "battle of the expert" disputes prior to class certification.

Introduction

Before certifying a class, district courts must ensure that plaintiffs have satisfied the requirements of Rule 23(a). Plaintiffs seeking to certify a damages class under Rule 23(b)(3) must also address predominance and superiority concerns. Courts routinely require plaintiffs to submit detailed expert evidence in support of their motions for class certification to demonstrate their satisfaction of these requirements. *See generally* Daniel J. Barsky & James Langenfeld, "Experts and Expert Depositions in Class Actions," *Class Actions & Derivative Suits*, June 3, 2014.

As the Second Circuit recently stated in affirming certification in *Sykes v. Mel S. Harris & Associates LLC*, "we do expect the

common evidence to show all class members suffered *some* injury." 780 F.3d 70, 82 (2d Cir. 2015) (quoting *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252 (D.C. Cir. 2013)). In many cases, the only potential way to show such commonality is through complicated econometric or other statistical models. *See In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d at 253 ("[The expert's] models are essential to the plaintiffs' claim they can offer common evidence of classwide injury. No damages model, no predominance, no class certification.").

Concurrently with the increasing centrality of expert evidence to the challenge of satisfying Rule 23, recent case law clarifies that district courts must determine the reliability and persuasiveness of expert evidence in making Rule 23 determinations. The Supreme Court has held that trial courts must conduct a "rigorous analysis" of the Rule 23 requirements even when that analysis "overlap[s] with the merits of the plaintiff's underlying claim." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011). In dicta, the Court also indicated that *Daubert* likely applied at the class-certification stage: "[T]he District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that is so. . . ." *Id.* at 354. Two years later, in *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013), the Court reinforced *Wal-Mart*'s indication that district courts must closely scrutinize expert evidence before certifying a class.

Even before *Comcast* and *Wal-Mart*, the Second Circuit had charged its district courts with resolving disputes between expert evidence when necessary to make the requisite Rule 23 determinations. *See In re Initial Pub. Offerings Sec. Litig.* (*In re IPO*), 471 F.3d 24 (2d Cir. 2006) (rejecting earlier Second Circuit precedent that prohibited the weighing of competing expert evidence at the class-certification stage; concluding that district judges (1) must make determinations that each Rule 23 requirement is met and (2) must resolve factual disputes relevant to each Rule 23 requirement and be persuaded that the Rule 23 requirement is met); *Cordes & Co. Fin. Servs. Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 107 (2d Cir. 2007) (noting that, in denying class certification,"[t]he district court did not determine which expert [was] correct" and "leav[ing] this question for it to resolve on remand"); *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.*, 546 F.3d 196, 202 (2d Cir. 2008) (clarifying that Rule 23 determinations described in *In re IPO* must be established by a preponderance of the evidence). Though the Second Circuit has not explicitly ruled on the issue of *Daubert*'s applicability at class certification, it recognized the *Wal-Mart* dicta as "suggesting that a *Daubert* analysis may be required at least in some circumstances." *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 129 (2d Cir. 2013).

Despite the Second Circuit's early leadership on these issues, some courts in the Second Circuit have declined to perform any *Daubert* analysis or otherwise subject expert evidence to any meaningful scrutiny, while others have opted to perform tailored *Daubert* analyses on expert evidence in connection with class certification. *Compare In re Scotts EZ Seed Litig.*, 304 F.R.D. 397, 412 n.8 (S.D.N.Y. 2015) ("The Second Circuit has not yet decided whether *Daubert* motions are appropriate at the class certification stage. . . . [I]nstead, the Court will consider whether each of [the expert's] proposed methodologies satisfy *Comcast*."), *and In re Amaranth Nat. Gas Commodities Litig.*, 269 F.R.D. 366, 385 (S.D.N.Y. 2010) ("Plaintiffs, however, are not required to successfully employ their proposed methods at the class certification stage."), *with Fort Worth Emps. Ret. Fund v. J.P. Morgan Chase & Co.*, 301 F.R.D. 116, 126 (S.D.N.Y. 2014) ("When a motion to exclude expert testimony is made at the class certification stage, the *Daubert* standard applies, but the inquiry is limited to whether or not the expert reports are admissible to establish the requirements of Rule 23.").

Similarly, some cases suggest little distinction between the *Daubert* and Rule 23 predominance analysis, while others have recognized *Daubert* as the beginning, not the end, of the analysis. *Compare Hughes v. Ester C Co.*, 317 F.R.D. 333, 340–43, 350–56 (E.D.N.Y. 2016) (finding it "proper to apply the *Daubert* standard at the class certification stage" but nevertheless declining to analyze the reliability of expert evidence under *Daubert* because the analysis was "so closely intertwined with the Rule 23(b) predominance analysis"; ultimately holding that the expert evidence failed to establish predominance), *with In re Air Cargo Shipping Servs. Antitrust Litig.*, 2014 WL 7882100, at *41–43 (E.D.N.Y. Oct. 15, 2014) ("Under more recent case law, however, it is clear that courts must now hold expert testimony to a higher standard [than *Daubert*] at the class certification stage.").

LIBOR VII wrestled with these sometimes conflicting holdings and admonitions, resolving them as follows: (1) Litigants should be prepared for *Daubert* disputes to arise at class certification; and (2) notwithstanding the admissibility of a plaintiff's model or other expert evidence under *Daubert*, a court must act as fact finder for purposes of determining whether the Rule 23 requirements are met and weigh all evidence before it, rather than defer "battle of the expert" disputes until later proceedings.

***LIBOR VII*'s Application of Heightened Scrutiny to Expert Evidence**

In the exchange-based action—one of the three actions that Judge Buchwald's *LIBOR VII* addressed—the plaintiffs alleged that trader-based manipulation of USD LIBOR affected contract and options prices of Eurodollar futures (EDF, a derivative of USD LIBOR). USD LIBOR is an interest rate benchmark set each business day based on the submissions of 16 different panel banks. LIBOR, in turn, is

referenced by various financial products traded in the global financial market. The plaintiffs alleged, inter alia, that the defendant banks' manipulation of LIBOR caused the plaintiffs harm by affecting EDF contract and options prices, which the plaintiffs traded on the Chicago Mercantile Exchange. The plaintiffs offered expert evidence attempting to show that (1) LIBOR was in fact "artificial" during certain days in the class period, (2) that the defendant banks had manipulated LIBOR and caused this artificiality, and (3) that artificiality in LIBOR caused artificiality in EDF prices. In the exchange-based action, Judge Buchwald excluded substantially all of the plaintiffs' expert evidence and denied the plaintiffs' motion for class certification, holding that the plaintiffs had failed to satisfy the adequacy, typicality, predominance, and superiority requirements of Rule 23.

Reasoning that the Supreme Court's dicta in *Wal-Mart* and Second Circuit precedent "support[ed] a more searching examination of expert testimony offered at the class certification stage," Judge Buchwald held that a tailored *Daubert* inquiry—focusing on the evidence's reliability for purposes of establishing the Rule 23 requirements—applied at class certification. *LIBOR VII*, 2018 WL 1229761, at *12–13. The plaintiffs lead expert, Dr. Nejat Seyhun, proffered econometric models that attempted to show LIBOR artificiality, that the LIBOR artificiality was caused by the defendant banks, and that LIBOR artificiality caused artificiality in EDF prices. Judge Buchwald excluded these opinions in full.

Judge Buchwald rejected, for a variety of reasons affecting their reliability, Dr. Seyhun's models purporting to show LIBOR artificiality. *Id*. at *19–24. With respect to Dr. Seyhun's models purporting to demonstrate that LIBOR artificiality caused artificiality in EDF prices, Judge Buchwald likewise found these analyses unreliable. *Id*. at *26–28.

Judge Buchwald also held that—even if the expert evidence passed muster under *Daubert*—flaws in the expert evidence could nonetheless be considered in the Rule 23 determinations analysis: "[D]isputes between experts must be resolved if necessary to the Rule 23 analysis." *Id.* at *13. Reliability under *Daubert* is thus not the only hurdle plaintiffs' expert evidence must overcome to establish the requirements of Rule 23. Indeed, in her later analysis of the Rule 23 requirements, Judge Buchwald cited her reasons for excluding Dr. Seyhun's models in holding that the plaintiffs failed to meet the predominance requirement. In conducting this analysis, Judge Buchwald rejected case law that suggested a less searching inquiry.

A similar Commodity Exchange Act manipulation case, *In re Amaranth Natural Gas Commodities Litigation*, 269 F.R.D. 366 (S.D.N.Y. 2010), stands in sharp contrast to Judge Buchwald's detailed and deliberate consideration of expert evidence in *LIBOR VII*. In *Amaranth*, the court rejected (1) the defendants' argument

that the artificiality model of the plaintiffs' expert failed to demonstrate that the defendants caused artificial prices, holding that these arguments "impliedly concede[d] that causation can be evaluated on a class-wide basis"; and (2) the defendants' critique that the models were incomplete, holding that the plaintiffs "are not required to successfully employ their proposed methods at the class certification stage." *Id.* at 385. Similar to what courts have done in some other pre-*Wal-Mart* and pre-*Comcast* cases, the court in *Amaranth* engaged in a cursory review of the plaintiffs' expert evidence before certifying a class, holding that the expert models could later stand or fall together for all class members; *LIBOR VII* makes clear that the models must stand or fall at class certification.

LIBOR VII confirms the obsolescence of earlier case law propounding the application of a less stringent burden to plaintiffs' expert evidence at class certification and reinforces the Second Circuit's clear directives on these issues. This decision also better aligns the Southern District of New York and Second Circuit with other circuits that have recognized the sea change heralded by the Supreme Court's decisions in *Wal-Mart Stores, Inc. v. Dukes* and *Comcast Corp. v. Behrend*.

Conclusion

Current case law indicates that plaintiffs' experts are subject to a more stringent inquiry than case law from the pre-*Wal-Mart* and pre-*Comcast* era might suggest, as exemplified in *LIBOR VII*. To preserve the more robust defenses against class certification, however, defendants should consider submitting *Daubert* motions at the class-certification stage. From a practical standpoint, parties may have difficulty fully developing concerns with expert evidence in class-certification briefing alone, and filing *Daubert* motions may allow for a fuller record for the court to consider in weighing disputes between the experts. Further, even in cases in which the court concludes that *Daubert* does not apply—or that the plaintiffs' expert evidence passes *Daubert*—a court may consider arguments made in a *Daubert* motion with respect to the Rule 23 analysis. Indeed, in *LIBOR VII*, Judge Buchwald also relied on her reasons for excluding Dr. Seyhun's opinions when holding that, regardless of the admissibility of the models, they would nevertheless be inadequate to satisfy the plaintiffs' Rule 23 burden. Thus, defendants' best strategy to secure the protections against class certification afforded under recent case law may lie in filing *Daubert* motions. In this way, defendants can provide the court with a clear description of any weaknesses in plaintiffs' expert evidence and a fuller record on which to rule.

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