Critical Junctures: Depositions of Class Representatives and Challenging Expert Testimony at the Class Certification Stage

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DEPOSING CLASS REPRESENTATIVES

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I. INTRODUCTION

Deposing class representatives in a putative class action is a critical step in class certification discovery. Many times class counsel develop their theory of the case before they identify plaintiffs. As a result, named plaintiff's deposition testimony may not align with the claims and class definition in the complaint, providing valuable evidence to defeat class certification. The proposed class representatives may even provide significant admissions undermining class counsel's theory of the case. For example, a plaintiff's individual belief as to the nature of his injury or what caused it may differ from what is alleged in the complaint.

Because Rule 23 is not "a mere pleading standard," the party seeking certification "must affirmatively demonstrate compliance with the Rule." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350-51 (2011). But given the Supreme Court's instruction that courts should conduct a "rigorous analysis" of whether "the prerequisites of Rule 23(a) have been satisfied," defense counsel should be prepared to offer evidence showing why named plaintiff has not and cannot meet the requirements of Rule 23. *Id.* at 351.

Rule 23(a) requires numerosity, commonality, typicality, and adequacy. *Id.* at 349. While commonality and typicality "tend to merge with the adequacy-of-representation requirement," the adequacy inquiry required by Rule 23(a)(4) remains significant in its own right. *Id.* at 349 n.5.

> In essence, commonality and typicality require a convergence of interest between the class and its representative, while [adequacy] requires this and more, asking also whether conflicts might undermine the convergence of interest, and whether the representative parties are competent to promote the interests of the class even assuming their interests align with those of the class.

1 Newberg on Class Actions § 3:57 (5th ed.).

Because the typicality and adequacy requirements focus on the attributes of the proposed class representatives, they are particularly relevant topics for named plaintiff's deposition. *See id.* § 3:50. We will therefore focus on these requirements and how defense counsel can use named plaintiff's deposition to gather evidence that they cannot be met. We will touch briefly on how deposition testimony can be used in connection with arguments against certification under Rule 23(b)(3) as well.

As always, be sure to carefully study the law in your jurisdiction as the case law on these topics can vary.

II. TYPICALITY

A class action may be maintained only if "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). The typicality requirement protects the putative class by ensuring that their claims will rise or fall with the named plaintiff's claims. *See CE Design Ltd. v. King Architectural Metals, Inc.*, 637 F.3d 721, 724 (7th Cir. 2011). Otherwise, the class could be left "in the lurch" if named plaintiff's claims fail or succeed for reasons unique to him. *See id.* at 724.

To obtain certification, plaintiff must show that "each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability." *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29, 35 (2d Cir. 2009). While the factual background of named plaintiff's claim need not be identical to that of

the class members, "the disputed issue of law or fact [should] occupy essentially the same degree of centrality to the named plaintiff's claim as to that of other members of the proposed class." *In re Fosamax Prod. Liab. Litig.*, 248 F.R.D. 389, 398 (S.D.N.Y. 2008).

Defense counsel should question plaintiff closely on her claims with an eye toward identifying differences between the factual and legal bases for those claims and the claims alleged in the complaint. *See, e.g., Levias v. Pac. Mar. Ass'n*, No. 08-CV-1610-JPD, 2010 WL 358499, at *5 (W.D. Wash. Jan. 25, 2010) (declining to find typicality "in view of [p]laintiff's seniority and rather limited work experiences vis-à-vis the class"); *Benner v. Becton Dickinson & Co.*, 214 F.R.D. 157, 167 (S.D.N.Y. 2003) (in products liability action, named plaintiffs' claims were not typical because they arose "from a substantially different course of events" and they would have "dissimilar" legal arguments "to those members of the class that were stuck by different needle device products"). It can be helpful "to compare what is needed to prove the plaintiff's claim with proofs needed for those of the proposed class." *In re Fosamax*, 248 F.R.D. at 398 (citing Newburg on Class Actions § 17:11).

The existence of "an arguable defense peculiar to the named plaintiff or a small subset of the plaintiff class may destroy the required typicality of the class." *CE Design*, 637 F.3d at 726; 7A Fed. Prac. & Proc. Civ. § 1764 (3d ed.) (recognizing that repeat securities class action plaintiffs (*i.e.*, "professional" plaintiffs who have filed numerous suits) may not be typical because they may be subject to unique reliance defenses). Defense counsel should therefore question named plaintiffs about facts relevant to potential defenses as well. *See Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 60 (2d Cir. 2000) (finding that named plaintiff's claim in securities fraud suit was atypical because she was a professional broker and subject to unique defenses). If named plaintiff signed a release and other class members did not,

"she may be subject to unique defenses that could become a focus of the litigation, rendering her atypical and making class certification inappropriate." *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 599-601 (3d Cir. 2009) (noting that a class representative could also be atypical if she did not sign a release but other class members did).

III. ADEQUACY

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). While the named plaintiff has the burden of establishing adequacy, some courts presume the truth of plaintiff's assertion of adequacy unless defendant offers evidence to the contrary. *See* 1 Newberg on Class Actions § 3:55 (5th ed.); *but see London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246, 1253 (11th Cir. 2003) ("[A]dequacy is for the plaintiffs to demonstrate; the plaintiffs are not entitled to any presumption of adequacy."); *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 481 (5th Cir. 2001) (same). So it is important for defense counsel to affirmatively seek evidence of named plaintiff's inadequacy.

Counsel should investigate potential conflicts between named plaintiff's interests and the interests of absent class members. *See In re Flag Telecom*, 574 F.3d at 35. They should also try to develop evidence showing named plaintiff's lack of qualifications, *e.g.*, his "lack of ability or willingness to take an active role in and control of the litigation to protect the interests of the absentee class members." *Nat'l Air Traffic Controllers Ass'n. v. Dental Plans, Inc.*, No. CIV.A. 1:05-CV-882TW, 2006 WL 584760, at *3 (N.D. Ga. Mar. 10, 2006).

Note that the typicality inquiry often "merges" with the adequacy inquiry." *CE Design*, 637 F.3d at 724. A plaintiff with an atypical claim may be inadequate because she lacks "the motivation or incentives to adequately pursue the claims of other class members." 1 Newberg on Class Actions § 3:57 (5th ed.). Where the facts support it, defendants should argue that

plaintiff's atypicality means she fails both Rule 23(a)(3) and Rule 23(a)(4). *See In re Schering Plough,* 589 F.3d at 602 ("Because of the similarity of the typicality and adequacy inquiries, certain questions—like whether a unique defense should defeat class certification—are relevant under both.") For example, a named plaintiff subject to a release "may lack the same financial stake as other members of the class." *Id.* In other words, she may be an inadequate representative because she has "different incentives in terms of how much time, energy, and money she is willing to spend pursuing the claim." *Id.*

A. Conflicts of Interest

The adequacy inquiry looks for "conflicts of interest between named parties and the class they seek to represent." *Amchem Prods. v. Windsor,* 521 U.S. 591, 625 (1997); *see also Burton v. Chrysler Grp. LLC,* No. CIV.A. 8:10-00209, 2012 WL 7153877, at *7 (D.S.C. Dec. 21, 2012) ("Basic due process requires that named plaintiffs possess undivided loyalties to absent class members."). The court need not find an actual conflict. *Aliano v. CVS Pharmacy, Inc.*, No. 16CV2624FBSMG, 2018 WL 3625336, at *6 (E.D.N.Y. May 21, 2018). A "potential conflict of interest" will suffice "to render a named plaintiff an inadequate class representative." *Aliano,* 2018 WL 3625336, at *6 (internal quotation and citation omitted).

Thus, defense counsel should ask named plaintiffs about potential conflicts of interest between named plaintiffs and the putative class, such as prior claims against and releases of defendant. *See, e.g.*, *Levias,* 2010 WL 358499, at *6 (finding that the possibility of a "favorable settlement" in named plaintiff's individual action "might undermine [his] loyalty . . . to the putative class"); *Danielson v. DBM, Inc.*, No. 1:05-CV-2091-WSD, 2007 WL 9701055, at *6 (N.D. Ga. Mar. 15, 2007) (finding potential conflicts of interest where "[s]everal named

Plaintiffs resolved their warranty claims before joining this action, and at least one of the named Plaintiffs signed a release of liability").

Other specific types of conflicts are differences in type of relief sought (*e.g.*, prospective v. retrospective) and differences in type of injury (*e.g.*, current v. future). See 1 Newberg on Class Actions § 3:50 (5th ed.); *Amchem*, 521 U.S. at 625-27 (recognizing conflict between currently injured class members and exposure-only class members who may suffer injury in the future); *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 827 F.3d 223, 234 (2d Cir. 2016) (recognizing conflicting interests of Rule 23(b)(2) class seeking injunctive relief and Rule 23(b)(3) class seeking monetary relief)

Another important source of conflicts is named plaintiff's relationship with class counsel. Close relationships between class counsel and named plaintiffs "create[ ] a present conflict of interest—an incentive for [named plaintiff] to place the interests of [class counsel] above those of the class." *London*, 340 F.3d at 1255 ("The long-standing personal friendship of [plaintiff] and [counsel] casts doubt on [plaintiff]'s ability to place the interests of the class above that of class counsel."); *see also Ctr. City Periodontists, P.C. v. Dentsply Int'l, Inc.*, 321 F.R.D. 193, 208 (E.D. Pa. 2017) (finding no adequacy, in part, because plaintiff and class counsel had been close friends for twenty-five years); *O'Shaughnessy v. Cypress Media, L.L.C.*, No. 4:13-CV-0947-DGK, 2015 WL 4197789, at *5 (W.D. Mo. July 13, 2015) (finding brother of class counsel inadequate class representative because "he [was] more likely to refrain from criticizing a fee request submitted by him, or to give too much deference to his recommendation regarding a settlement").

For example, there may be a conflict where:

- class counsel has represented named plaintiff in numerous class actions over nearly a decade (*Aliano*, 2018 WL 3625336, at *6);

- class counsel has represented named plaintiff as a defendant for no charge (*id.*);
- named plaintiff is the brother of class counsel (*Susman v. Lincoln Am. Corp.*, 561 F.2d 86, 95 (7th Cir. 1977));
- named plaintiff and class counsel were "business partners in a series of real estate deals" (*Sipper v. Capital One Bank*, No. CV 01-9547 LGB (MCX), 2002 WL 398769, at *3-5 (C.D. Cal. Feb. 28, 2002));
- named plaintiff and class counsel were joint defendants in a lawsuit (*id.*); and
- named plaintiff was the long-term friend and former stockbroker of class counsel (*London*, 340 F.3d at 1255).

However, a close relationship in and of itself is not always a disqualifying conflict. *In re Currency Conversion Fee Antitrust Litig.*, 230 F.R.D. 303, 309 (S.D.N.Y. 2004) (declining to find named plaintiff could not "fairly and adequately protect the interests of the class" due to his close personal relationship with class counsel). But when combined with other indicia of inadequacy, a close relationship can be significant. *See Bohn v. Pharmavite, LLC*, No. CV 11-10430-GHK AGRX, 2013 WL 4517895, at *3 (C.D. Cal. Aug. 7, 2013) (acknowledging that plaintiff's inconsistent testimony and failure to conduct due diligence was "even more troubling when viewed in light of Plaintiff's close personal relationship with" class counsel).

An examination of named plaintiff's financial incentives may also show that a close relationship with class counsel constitutes a disqualifying conflict of interest. *See London*, 340 F.3d at 1254-55. For example, when class counsel's fee will "far exceed the class representative's recovery," a close relationship may provide evidence that the class representative may "allow settlement on terms less favorable to the interests of absent class members." *Id.* Similarly, "a Court will consider whether the value a class member may recover [in the class action] is eclipsed by the benefit that plaintiff expects from an ongoing relationship with class counsel." *Aliano*, 2018 WL 3625336, at *5-6 ("The sheer number of lawsuits brought

with [class counsel] as counsel and [plaintiff] as lead plaintiff creates the appearance that [plaintiff] is likely interested in bringing additional actions with [class counsel] as his counsel in the future.").

On the other hand, if plaintiff doesn't know class counsel at all, that suggests they have not been overseeing or actively participating in the litigation, which raises concerns discussed further below.

B. Qualified to Serve as Class Representative

1. Understanding of Case

To be an adequate class representative, named plaintiff must be able to manage the litigation and provide a check on class counsel. *In re Monster Worldwide, Inc. Sec. Litig.*, 251 F.R.D. 132, 135 (S.D.N.Y. 2008). This requires at least "a minimal degree of knowledge regarding the action" and "a general understanding of the nature of class-action litigation." *Scott v. New York City Dist. Council of Carpenters Pension Plan*, 224 F.R.D. 353, 355 (S.D.N.Y. 2004) (citations omitted); *see Unger v. Amedisys Inc.*, 401 F.3d 316, 321 (5th Cir. 2005); *Baffa*, 222 F.3d at 61. An adequate class representative must also actively participate in the litigation.

The knowledge requirement is not necessarily a high bar for plaintiffs. *In re Flag Telecom*, 574 F.3d at 42 (noting that the Second Circuit "disfavor[s] [ ] attacks on the adequacy of a class representative based on the representative's ignorance"); *but see Berger*, 257 F.3d at 483 n.18 ("Plaintiffs should understand the actions in which they are involved, and that understanding should not be limited to derivative knowledge acquired solely from counsel."). "But the standard is not so low as to be meaningless." *In re Monster Worldwide*, 251 F.R.D. at 135.

A proposed class representative must "be aware of the basic facts underlying the lawsuit." *Id.* (internal quotation omitted) (recognizing that in complex cases named plaintiffs

need not be experts on all aspects of the case). Therefore, named plaintiffs may be denied class representative status "where [they] have so little knowledge of and involvement in the class action that they would be unable or unwilling to protect the interests of the class against the possibly competing interests of the attorneys.'" *Id.* (quoting *Baffa*, 222 F.3d at 61).

For example, in *In re Monster Worldwide*, the district court found it "appalling" that the witness testifying for named corporate plaintiff in a Rule 30(b)(6) deposition did not know:

- the name of the stock at issue in the case;
- the name of defendants;
- whether the corporate plaintiff he represented ever owned the stock at issue;
- whether an amended complaint had been filed;
- whether he had ever seen any complaint;
- whether a motion to dismiss had been filed; or
- whether the corporate plaintiff had moved for summary judgment.

Id.; *but see In re Intuitive Surgical Sec. Litig.*, No. 5:13-CV-01920-EJD, 2016 WL 7425926, at *8 (N.D. Cal. Dec. 22, 2016) (distinguishing *In re Monster Worldwide* because it involved a corporate plaintiff being deposed under Rule 30(b)(6), which requires the corporate entity "to educate its designees about matters beyond his or her personal knowledge").

Likewise, an individual named plaintiff was recently found in adequate based on deposition testimony revealing that he did not know why he filed the lawsuit, what relief he was seeking on behalf of the class, the legal basis for his claim, and what was improper about the letter upon which he based his Fair Debt Collection Practices Act claim. *Ocampo v. GC Servs. Ltd. Partnership*, No. 1:16-cv-09388, Mem. Op. (ECF No. 72) at 19-22 (N.D. Ill. Nov. 28, 2018).

Therefore, defense counsel should question named plaintiffs to see if they understand "the nature of th[e] action, the facts alleged, and the theories of relief against defendant." *Bodner v. Oreck Direct, LLC*, No. C 06-4756 MHP, 2007 WL 1223777, at *2 (N.D. Cal. Apr. 25, 2007) (concluding from "the record that plaintiff's counsel, and not plaintiff, is the driving force behind this action"); *see Danielson*, 2007 WL 9701055, at *6; *Jones v. CBE Grp., Inc.*, 215 F.R.D. 558, 568-69 (D. Minn. 2003).

If opposing counsel argues that this information is privileged, that too can support an argument that named plaintiff is inadequate. *See, e.g.*, *Karnes v. Fleming*, No. CIV.A. H-07-0620, 2008 WL 4528223, at *3 (S.D. Tex. July 31, 2008) ("That the proposed class representative gained knowledge of the facts and issues from counsel is insufficient."); *Bodner*, 2007 WL 1223777, at *1-2 (inadequate plaintiff obtained "virtually all of [his] knowledge regarding this matter . . . from his attorneys"); *Kelley v. Mid-Am. Racing Stables, Inc.*, 139 F.R.D. 405, 409 (W.D. Okla. 1990) ("Based on plaintiffs' testimony in this case, the Court finds that these plaintiffs are inadequate representatives because of their almost total lack of familiarity with the facts of their case. Indeed, what the plaintiffs know appears to come entirely from their counsel.").

2. Understanding of & Willingness to Fulfill Duties:

Adequacy requires that "parties are not simply lending their names to a suit controlled entirely by the class attorney." *Alberghetti v. Corbis Corp.*, 263 F.R.D. 571, 580 (C.D. Cal. 2010), *aff'd*, 476 F. App'x 154 (9th Cir. 2012); *see Unger*, 401 F.3d at 321("Class representatives must satisfy the court that they, and not counsel, are directing the litigation."). Thus, class representatives must understand the nature of a class action. *See Burton*, No. 2012 WL 7153877, at *7 ("Plaintiff [ ] testified that no one has ever explained to him the cost and

benefits of a class action versus an individual action" and "he did not understand that this case is a class action . . . .").

Further, a class representative should understand his duties and obligations to the class and confirm his willingness to represent the class. *See, e.g.*, *Price v. United Servs. Auto. Ass'n*, No. 10-2152, 2012 WL 2847821, at *8 (W.D. Ark. Mar. 16, 2012), *report and recommendation adopted sub nom. Price v. USAA Cas. Ins. Co.*, No. 2:10-CV-02152, 2012 WL 2847916 (W.D. Ark. July 11, 2012) ("Plaintiff's own testimony demonstrates that he does not understand or appear to care about his duty as a class representative to vigorously pursue the interests of potential class members."); *Alberghetti*, 263 F.R.D. at 579-80 (finding inadequacy where plaintiff testified that she did not agree to represent all members of the proposed class, only a small subset of the proposed class); *In re FEMA Trailer Formaldehyde Prod. Liab. Litig.*, No. MDL 071873, 2008 WL 5423488, at *10 (E.D. La. Dec. 29, 2008) (finding it concerning that some "proposed class representatives believe that they have no responsibility to other class members" and one "stated that he does not want to be a representative").

For example, a plaintiff may not be adequate where he does not know or understand:

- that the case is a class action (*Scott*, 224 F.R.D. at 356);
- what a class action is (*id.*; *Ocampo*, 11/28/18 Mem. Op. at 20);
- what a class representative is or what duties a class representative owes to class members (*Scott*, 224 F.R.D. at 356; *Price*, 2012 WL 2847821, at *8; *Ocampo*, 11/28/18 Mem. Op. at 20);
- the class definition or who is in the class (*Price*, 2012 WL 2847821, at *8; *Scott*, 224 F.R.D. at 356);
- what effect winning the case will have on his claims or class members' claims (*Scott*, 224 F.R.D. at 356);
- "what would happen if class certification was denied" (*Price*, 2012 WL 2847821, at *8); and

- "how his attorneys would be compensated if [plaintiff] lost the lawsuit." (*id.*).

3. Active Participation

An adequate class representative must actively participate in and devote time to the case. The failure to do so weighs against a finding of adequacy. *In re Monster Worldwide*, 251 F.R.D. at 135-36 (recognizing as problematic named plaintiff's failure to learn about the substance of the case until shortly before the deposition and failure to devote any time to the case prior to preparing for the deposition). For example, plaintiff's failure to conduct basic due diligence on her claims can demonstrate inadequacy:

> [Plaintiff] testified at her deposition based on unverified memories that turned out to be mostly incorrect. These issues could have been easily avoided had Plaintiff made the effort to conduct simple due diligence on her claims. That she failed to do so—and provided deposition testimony without having done so—raises serious questions about her interest and commitment to protecting the interest of the classes.

Bohn, 2013 WL 4517895, at *3.

Other evidence of failure to participate that constitutes potential inadequate representation is:

- failure to read the complaint before filing or before sitting for deposition (*Bodner*, 2007 WL 1223777, at *1-2; *Danielson*, 2007 WL 9701055, at *6; *Scott*, 224 F.R.D. 356);

- failure to comply with discovery obligations, such as refusing to answer relevant questions at deposition (*Darvin v. Int'l Harvester Co.*, 610 F. Supp. 255, 257 (S.D.N.Y. 1985)); and

- over deference to class counsel (*Scott*, 224 F.R.D. at 356 (noting that plaintiff testified "he would leave every decision up to his attorney and never question his advice")).

If during her deposition named plaintiff purports to actively participate in the litigation, test that contention by inquiring about her communications with class counsel. *See, e.g., Griffin v. GK Intelligent Sys.*, 196 F.R.D. 298, 302 (S.D. Tex. 2000) (finding class representatives

inadequate when "[t]hey do not participate in litigation decisions, do not receive regular cost/expense information, and they learn of activity in the case when they are copied on matters already completed"). This line of inquiry need not stray into privileged communications if defense counsel focuses on how often they confer, by what method they confer, and for how long they confer. The fact of communication, as opposed to the substance of communications, is not privileged.

4. Credibility

While many courts have rejected arguments that "prior unrelated unsavory, unethical, or even illegal conduct" renders a named plaintiff inadequate, 1 Newberg on Class Actions § 3:68 (5th ed.), "[a] named plaintiff who has serious credibility problems . . . may not be an adequate class representative," *CE Design*, 637 F.3d at 726. "[C]redibility or integrity" is relevant to named plaintiff's "adequacy to the extent they concern issues directly relevant to the litigation or involve confirmed examples of dishonesty, such as a conviction for fraud." *Bohn*, 2013 WL 4517895, at *1 (internal quotations and citations omitted); *see also Jamison v. First Credit Servs., Inc.*, 290 F.R.D. 92, 105 (N.D. Ill. 2013) (acknowledging courts deny class certification where "the class representative generally lacked credibility or the class representative's credibility was severely strained with respect to the claims in the lawsuit").

Therefore, credibility remains a topic to be explored during a named plaintiff's deposition. But for "an assault on the class representative's credibility to succeed, the party mounting the assault must demonstrate that there exists admissible evidence so severely undermining plaintiff's credibility that a fact finder might reasonably focus on plaintiff's credibility, to the detriment of the absent class members' claims." *CE Design*, 637 F.3d at 728.

For example, inconsistent or untruthful testimony may render plaintiff inadequate. *See, e.g.*, *id.* at 726-27 (finding named plaintiff's testimony raised doubts about his truthfulness);

Savino v. Computer Credit, Inc., 164 F.3d 81, 87 (2d Cir. 1998) (affirming district court denying class certification on adequacy grounds where plaintiff "repeatedly changed his position as to whether he received" the letter his statutory claim was based upon, "creat[ing] serious concerns as to his credibility at trial"); *Gbarabe v. Chevron Corp.*, No. 14-CV-00173-SI, 2017 WL 956628, at *34 (N.D. Cal. Mar. 13, 2017) (finding named plaintiff inadequate due to inconsistencies in his testimony and discovery responses that "raised significant, unanswered questions about [his] credibility"); *Jovel v. Boiron, Inc.*, No. 11-CV-10803-SVW-SHX, 2014 WL 1027874, at *5 (C.D. Cal. Feb. 27, 2014) ("Because [named plaintiff]'s inconsistent statements were both significant and related to a material issue, if he serves as a representative plaintiff he will reduce the likelihood of prevailing on the class claims.").

Also, criminal convictions, particularly if they entail fraud, may render plaintiff inadequate. *See Jamison*, 290 F.R.D. at 105 (recognizing that felony conviction for fraud was "sufficient by itself to render [named plaintiff] an inadequate representative under the case law"); *but see Benedict v. Altria Grp., Inc.*, 241 F.R.D. 668, 674 (D. Kan. 2007) ("There is no evidence [plaintiff]'s criminal history presents a conflict of interest with other class members or would affect her ability to prosecute the action vigorously on behalf of the class.").

It is not necessarily problematic to be a professional class action plaintiff. *CE Design*, 637 F.3d at 724 ("Indeed, an experienced plaintiff in such an action may be able to ensure that class counsel act as faithful agents of the class."). But, as noted above, defense counsel should scrutinize named plaintiff's incentives and relationship with class counsel as they could be evidence of a conflict. *See, e.g.*, *Aliano*, 2018 WL 3625336, at *5-6.

5. Financial Ability

In light of the trend for class counsel to represent class plaintiffs on contingency, the ability of named plaintiff to finance the litigation is generally less of a concern now. *See* 1 Newberg on Class Actions § 3:69 (5th ed.).

But in a recent case, the district court found it problematic that plaintiff "testified that he is unwilling to bear financial burdens to proceed as a class representative." *Ocampo*, 11/28/18 Mem. Op. at 21. The court noted that "a class representative must have commitment to his case, including exposure to costs under Rule 54(d)." *Id.* at 22. While the court did not deny certification on this basis, it found this was "another reason why [p]laintiff ha[d] failed to establish that he [was] an adequate class representative. *Id.*

Further, numerous courts still recognize that litigation funding and fee agreements can be relevant to the adequacy determination. *Gbarabe v. Chevron Corp.*, No. 14-CV-00173-SI, 2016 WL 4154849, at *2 (N.D. Cal. Aug. 5, 2016) (holding that "the litigation funding agreement is relevant to the adequacy determination" where the claims were expensive to investigate and prepare for trial and class counsel was dependent on outside funding to prosecute the case); *see also Gusman v. Comcast Corp.*, 298 F.R.D. 592, 600 (S.D. Cal. 2014) (concluding that "[p]laintiff's retainer and fee agreement with counsel in this case is relevant to the Rule 23(a)(4) analysis of whether [p]laintiff is an adequate representative of the class"); *Porter v. Nationscredit Consumer Disc. Co.*, No. CIV.A. 03-3768, 2004 WL 1753255, at *2 (E.D. Pa. July 8, 2004), *aff'd sub nom. Porter v. Nationacredit Consumer Disc. Co.*, 285 F. App'x 871 (3d Cir. 2008) ("Fee agreements may be relevant to a plaintiff's ability to protect the interests of potential class members by adequately funding the suit . . . .").

So it may be worth asking named plaintiff about her understanding of how the litigation is financed and his willingness to bear costs.

IV. RULE 23(b)(3)

Rule 23(b)(3) requires that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). Defense counsel can also explore whether named plaintiff can meet these requirements by deposition.

A. Predominance

Defense counsel should investigate all aspects of plaintiff's claims and defenses to develop evidence that individual issues predominate over common issues. While it is reminiscent of commonality,[1] the predominance requirement is "far more demanding because it tests whether the proposed classes are sufficiently cohesive to warrant adjudication by representation." 7AA Fed. Prac. & Proc. Civ. § 1777 n.12 (3d ed.) (citing *Unger v. Amedisys Inc.*, 401 F.3d 316 (5th 2005). Thus, it is not enough for common questions to exist, rather the court must "evaluate the relationship between the common and individual issues in all actions under Rule 23(b)(3)." § 1778.

For example, predominance may be defeated by showing individual questions regarding:

- causation (*see, e.g., Brown v. Electrolux Home Prod., Inc.*, 817 F.3d 1225, 1237 (11th Cir. 2016); *Oscar v. BMW of N. Am., LLC*, 274 F.R.D. 498, 511 (S.D.N.Y. 2011));
- reliance (*see, e.g.*, *Webb v. Carter's Inc.*, 272 F.R.D. 489, 503 (C.D. Cal. 2011); *In re Zurn Pex Plumbing Prod. Liab. Litig.*, 267 F.R.D. 549, 562 (D. Minn. 2010), *aff'd*, 644 F.3d 604 (8th Cir. 2011)); and

[1] The commonality requirement dictates that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). As the Supreme Court has acknowledged, however, it is not so much whether there are "common questions" but rather whether "a classwide proceeding [can] generate common answers apt to drive the resolution of the litigation." *Dukes*, 564 U.S. at 350.

- injury-in-fact (*see, e.g.*, *Estate of Mahoney v. R.J. Reynolds Tobacco Co.*, 204 F.R.D. 150, 157 (S.D. Iowa 2001)).

Also, certain affirmative defenses requiring individualized proof, such as comparative fault and assumption of risk, can defeat predominance. *See id.* at 159. When there is more than one named plaintiff, asking the same questions of each can produce evidence that individual issues predominate.

B. Superiority

The superiority requirement means the class action must be "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Defense counsel can pursue evidence to show a class action is not superior by asking whether plaintiff pursued any other avenues for resolving their claim or whether they could have pursued another avenue, such as an individual lawsuit or a complaint to a government agency.

New York State Bar Association – Class Action Program

The Use of Daubert Challenges at the Class Certification Stage – What Practitioners Should Know Before Bringing/Defending Against Such Challenges

Submitted by Jacqueline Seidel, King & Spalding

I. Overview of the Rules

A. Federal Rule of Evidence 702:

1. The proponent of the expert evidence must show:

   a) The witness is has specialized knowledge which will help the tier of fact

   b) The testimony is reliable

   c) Based on sufficient facts or data

   d) Is the product of reliable principles and methods

   e) The expert has reliably applied the principles and methods to the facts of the case

B. Federal Rule of Evidence 23:

1. For a putative class that is seeking monetary relief, the plaintiff must demonstrate:

   a) Numerosity

      "the class is so numerous that joinder of all members is impractical"

   b) Commonality

      "there are questions of law or fact common to the class"

   c) Typicality

      "the claims or defenses of the representative parties are typical of the claims or defenses of the class"

d) Adequacy

"the representative parties will fairly and adequately protect the interests of the class"

e) Superiority

"the class action is superior to other methods of adjudication"

f) Predominance

"there are common questions of law or fact that predominate over any individual class member's questions"

2. To satisfy this burden: parties often rely on expert evidence/testimony.

II. What Role Do *Daubert* and Expert Testimony Play at the Class Certification Stage?

A. *Daubert* motions are often filed during the class certification stage

1. Class certification often requires plaintiffs to present expert testimony to meet their burden of showing commonality, predominance or ascertainability.

a) *American Honda Motor Co. v. Allen*, 600 F.3d 813, 816 (7th Cir. 2010) (motorcycle design defect class action);

b) *Campbell v. Nat'l R.R. Passenger Corp.*, No. CV 01-1513 (EGS), 2018 WL 1997254, at *9 (D.D.C. Apr. 26, 2018) (employment racial discrimination class action); and

c) *Local 703, I.B. of T. Grocery & Food Employees Welfare Fund v. Regions Fin'l Corp.*, 762 F.3d 1248, 1258 n.7 (11th Cir. 2014) (class consisted of investors who had been allegedly given misrepresentations on the financial health of the company).

2. Thus, if plaintiffs' experts' theories are flawed, they fail to carry their burden and class certification is improper. *See, e.g., In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 187-88 & n.8 (3d Cir. 2015) ("Expert testimony that is insufficiently reliable to satisfy the *Daubert* standard cannot 'prove' that the Rule 23(a) prerequisites have been met 'in fact,' nor can it establish 'though evidentiary proof' that Rule 23(b) is satisfied.").

3. Plaintiffs generally argue that *Daubert* is typically used to shield the fact finder from flawed evidence in a federal trial. However, class certification hearings are not trials; class certification hearings are heard before judges, nor juries; and it is the juries – and not judges - who need *Daubert* protection.

4. However, Defendants will argue that *Daubert* is meant to do more than just protect the jury from flawed evidence; it is meant to ensure that unreliable expert testimony is removed from the case as early as possible.

III. What is the current state of the law on the appropriate standard of scrutiny?

There is currently a split among federal courts regarding how to evaluate the reliability of an expert's testimony for purposes of class certification. As is discussed in more detail below, the 6th, 7th, 9th, and 11th Circuits have applied a "fuller" *Daubert* analysis. Alternatively, the 8th Circuit has endorsed a limited or "tailored" *Daubert* test.

A. Supreme Court Rulings That Discuss *Daubert* at the Class Certification Stage

1. The Supreme Court touched briefly on expert issues as they relate to class certification in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013) (appealed to Supreme Court after was decided by Eastern District of Pennsylvania and appealed to Third Circuit), but did not address *Daubert* directly.

a) The Court did not address whether the expert testimony supporting plaintiffs' damages theory was reliable.

b) But the Court did reaffirm that class certification requires a "rigorous analysis" including an examination of expert opinions and concluded that it was erroneous to "refus[e] to entertain arguments against [the plaintiffs'] damages model that bore on the propriety of class certification simply because those arguments would also be pertinent to the merits determination."

c) The *Comcast* ruling clearly endorses an in-depth analysis of plaintiffs' class action theories at the class certification stage, including expert issues, though it did not directly address how *Daubert* applies.

2. In combination with the Court's dicta in *Wal -Mart v. Dukes,* 131 S. Ct. 2541, 2553-54 (2011), this suggests that the Court may favor a full *Daubert* analysis with regard to experts' class certification opinions.

a) In *Dukes*, the Court noted that "[t]he District Court [for the Northern District of California] concluded that *Daubert* did not apply to expert testimony at the class certification stage of class action proceedings. *We doubt that this is so.*" (emphasis added)

b) At this point, however, it seems unlikely that the Court will make its position on this issue clear any time soon as the recent certiorari petition in *Taylor Farms Pacific, Inc. v. Pena*, No. 17-395 (9th Cir. May 3, 2017), which raised the question of "[w]hether a district court may certify a class action based on information that does not meet the standards of

admissibility set forth in the Federal Rules of Evidence and Civil Procedure," was denied on Feb. 20, 2018.

c) However, as the Supreme Court has acknowledged: "A district court's ruling on the certification issue is often the most significant decision rendered in" class proceedings. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980); *see also Coopers & Lybrand*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense.").

B. Circuits applying the Full *Daubert* Analysis

1. The 6th, 7th, 9th, and 11th Circuits have applied this approach. Generally the reasons for following the "fuller" approach include:

a) A full *Daubert* inquiry was more consistent with the "rigorous analysis" required of certification decisions generally.

b) The 2003 amendments to Rule 23 removed "conditional" certification as an option.

c) The *Dukes* decision obligated courts to consider merits issues at the certification stage.

2. Circuit Cases that have followed the "fuller" approach:

a) The Seventh Circuit was the first appellate court to hold that *Daubert* applied at class certification or at least "if the situation warrants." *American Honda Motor Co. v. Allen*, 600 F.3d 813, 816 (7th Cir. 2010).

There, Plaintiffs alleged that Honda's Gold Wing GL1800 motorcycle had a design defect that made the steering assembly shake excessively. The Plaintiffs relied heavily on their expert to demonstrate the predominance of common issues. Plaintiffs' expert opined that motorcycles should, by design, "exhibit decay of any steering oscillations sufficiently and rapidly so that the rider neither reacts nor is frightened by such oscillations." The Defendants argued the report was unreliable as it was (i) not supported by empirical testing; (ii) not developed through a recognized standard-setting procedure; (iii) not generally accepted; and (iv) not the product of independent research. The Court held that "when an expert's report or testimony is critical to class certification, a district court must conclusively rule on any challenge to the expert's qualifications or submissions prior to ruling on a class certification motion."

b) *Sali v. Corona Regional Medical Center*, No. 15-56460, 2018 WL 2049680, at *7 (9th Cir. May 3, 2018) ("[I]n evaluating challenged expert testimony in support of class certification, a district court should evaluate admissibility under the standard set forth in *Daubert*."). In *Sali*, the Ninth Circuit found that the district court erred by denying certification on the basis that Rule 23(b)(3)'s predominance requirement was not satisfied.

c) *In re Carpenter Co.*, No. 14-0302, 2014 U.S. App. LEXIS 24707, at *11 (6th Cir. Sep. 29, 2014) ("Given the Supreme Court's statement in *Wal-Mart* and the district court's application of *Daubert* to critical

witnesses," district court did not abuse discretion by conducting a *Daubert* analysis at the class certification stage.)

d) *Local 703, I.B. of T. Grocery & Food Employees Welfare Fund v. Regions Fin'l Corp.*, 762 F.3d 1248, 1258 n.7 (11th Cir. 2014) (quoting *American Honda* "We hold that when an expert's report or testimony is critical to class certification, . . . the district court must perform a full *Daubert* analysis before certifying the class . . .").)

3. In some circuits where the court of appeals has not addressed the issue, district courts have applied the full *Daubert* approach:

a) *See, e.g.*, *Campbell v. Nat'l R.R. Passenger Corp.*, No. CV 01-1513 (EGS), 2018 WL 1997254, at *9 (D.D.C. Apr. 26, 2018) ("The Court is persuaded that it must conduct a full *Daubert* inquiry at the class-certification stage."). In *Campbell*, seventy-one African-American employees at Amtrak alleged that Amtrak engaged in racial discrimination in its hiring, promotion, and disciplinary practices. The court granted defendant's motion to exclude plaintiffs' testimony and report that set forth background principles of "good" human-resource management policies and stated that Amtrak did not have adequate mechanisms in place because the opinions were "unreliable."

b) *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 CIV. 5450 (NRB), 2018 WL 1229761, at *12 (S.D.N.Y. Feb. 28, 2018) ("We are persuaded by the view that expert evidence submitted at the class certification stage is subject to the *Daubert* standard."). There, DOJ

argued that defendants' proposed testimony as to the adequacy of the government's discovery, establishment of conspiracy, and benefit or harm was improper.

c) *Coleman v. Union Carbide*, No. 2:11-0366, 2013 WL 5461855 (S.D. W. Va. Sept. 30, 2013) ("[T]he court first turns to the *Daubert* inquiry, inasmuch as the expert opinions in the case are the primary evidentiary means chosen by plaintiffs to discharge their burden under Rule 23.")

d) *Cannon v. BP Prods. North America*, No. 3:10-cv-00622, 2013 WL 5514284, at *5 (S.D. Tex. 2013) ("in one sense scrutiny of expert testimony being used to show that a case is susceptible to class treatment seems less controversial than the normal application of Daubert, because it does not intrude on the jury's role given that class certification is an issue for the court.").

C. The "Focused/Tailored" *Daubert* Analysis

1. In *In re Zurn Pex Plumbing Prod. Liab. Litig.*, 644 F.3d 604 (8th Cir. 2011), the Eighth Circuit held that a "more conclusive *Daubert* inquiry at the class certification stage would [be] impractical." There, plaintiffs were homeowners alleging that certain brass fittings used in the company's plumbing systems were inherently defective. Plaintiffs' proposed experts would opine as to results from testing and examining brass fittings. The court reasoned that a more "focused" inquiry was necessary due to the preliminary nature of class certification rulings:

a) "[A]n 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."

b) *Zurn Pex* was decided before the Supreme Court's decision in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013) but two weeks after its decision in *Walmart Stores, Inc. v. Dukes*.

2. Some courts have rejected the *Zurn Pex* reasoning:

a) *See, e.g.*, *Soutterv. Equifax Info. Servs. LLC*, 299 F.R.D. 126, 130 (E.D. Va. 2014) ("The rationale that animated Lewis and Zurn and their fellow travelers...is at odds with the real world effect of a class certification decision.")

b) *Chen-Oster v. Goldman, Sachs & Co.*, 114 F. Supp. 3d 110, 115 (S.D.N.Y. 2015) (rejecting *Zurn* holding its rationale "must yield to the mandate to conduct a rigorous analysis prior to certifying a class"), objections overruled, No. 10-CIV-6950-ATRWL, 2018 WL 1609267 (S.D.N.Y. Mar. 30, 2018)

Other courts stop short of addressing the issue or are not sure whether there is a real difference between the "full" and "tailored" approaches:

1. *See, e.g.*, *Kottaras v. Whole Foods Market, Inc.*, 281 F.R.D. 16, 24 (D.D.C. 2012) (stating that "it is unclear whether a full analysis of [a class certification expert's] report and testimony is even appropriate at this stage," noting the conflicting approaches)

2. *In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 187-88 & n.8 (3d Cir. 2015) ("We have no occasion to examine whether there might be some variation between the Seventh and Eighth Circuit formulations. Consistent with our holding here, both courts limit the *Daubert* inquiry to expert testimony offered to prove satisfaction of Rule 23's requirements.")

IV. How does discovery set the stage for a successful or unsuccessful pre-certification *Daubert* challenge?

A. Even if a jurisdiction takes a more tailored/focused approach on the *Daubert* inquiry—these jurisdictions may be compelled to conduct a full *Daubert* analysis at the class certification stage if there has been advanced discovery.

1. The *Zurn* court felt compelled to apply a limited *Daubert* analysis at least in part because of the bifurcated discovery in that case (separating discovery for purposes of class certification from merit discovery). *See* 644 F.3d at 612-613.

2. However, other courts distinguish themselves from *Zurn*. *See, e.g., PBProp. Mgmt., Inc. v. Goodman Mfg. Co.*, L.P., No. 3:12-CV-1366-HES-JBT, 2016 WL 7666179, at *9–10 (M.D. Fla. May 12, 2016) (holding that "the reasoning behind the 'tailored' *Daubert* analysis in *Zurn* [wa]s not present" because the parties had conducted merits discovery); *Stone v. Advance Am.*, 278 F.R.D. 562, 566 (S.D. Cal. 2011) ("Unlike the typical case when a motion to certify a class is filed early in the proceedings, this case is at an advanced stage. The parties have completed discovery, exchanged expert reports, and the pretrial conference is imminent. The Court conducts a full *Daubert* analysis now to avoid a duplicative motion *in limine*.")

3. *Zurn Pex* suggests that a full *Daubert* analysis would be permissible where merits discovery has taken place:

"[A]n 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." *In re ZurnPex*, 644 F. 3d 604 (8th Cir. 2011)

V. When is a *Daubert* challenge not an appropriate tactic?

A. Expensive early discovery and motion practice

1. Costs can be prohibitively expensive

B. Expert might be limited without full discovery

C. Might weaken post-certification *Daubert* challenges

VI. How can counsel develop expert testimony to support or withstand a *Daubert* challenge during the class certification stage?

A. Defense experts can be the biggest help to prepare for a *Daubert* challenge to plaintiff's experts, including your strategy for deposing the plaintiff expert

B. Develop questioning that will get the admissions needed

C. Specifically, when deposing a plaintiff expert, draw out mistakes or errors, both big and small.

1. Obviously, greatest amount of time and effort should be placed on glaring errors in the plaintiffs' expert's analysis, however, even errors of nonmaterial facts can help break down the expert's credibility. *See e.g.*, *IBEW Local 90 Pension Fund v. Deutsche Bank AG*, No. 11 CIV. 4209 KBF, 2013 WL 5815472, at *3 (S.D.N.Y. Oct. 29, 2013) (*Daubert* motion granted and class certification denied in a financial misrepresentation class action, where the expert evaluated

the New York Stock Exchange, but failed to analyze the German market, despite the vast majority of the trades occurred outside of the United States, and primarily in Germany).

D. Find variations among class members (i) elements of the cause of action or (ii) proof of causation.

E. Defense counsel should prepare their own expert to testify about the flaws in plaintiffs' expert's analysis.