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Eighth Circuit concludes that admissibility at class certification is a "red-herring"

by Michele Floyd

In *Cody v. City of St. Louis*, 103 F.4th 523 (8th Cir. 2024), the Eight Circuit maintained its position that admissibility standards do not apply strictly at the class certification stage, thereby solidifying a circuit split on whether expert evidence must be admissible for purposes of class certification.

While the issue of admissibility had been simmering in lower courts, the split formed with a now famous comment made in *Wal-Mart Stores, Inc. v. Dukes,* 564 U.S. 338, 350 (2011): "The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that this is so . . . ."

Two years later, in *Comcast Co. v. Behrend,* 569 U.S. 27 (2013), the Supreme Court certified the question of expert admissibility standards at class certification, but ultimately declined to decide the issue. Instead, it stated that "evidentiary proof" was required to show that all Rule 23 requirements were satisfied, and "emphasized that it 'may be necessary for the court to probe behind the pleadings before coming to rest on the certification question'". *Id.* at 33.

The simmer rose to a boil in the wake of *Dukes* and *Comcast,* ultimately resulting in what is now a split between the Third, Fifth, Seventh, Ninth, Eleventh (and probably the Second) Circuits, on the one hand, and the Sixth and Eighth Circuits, on the other.

The Third, Fifth, Seventh, and Eleventh Circuits have long required that class certification evidence be admissible and that *Daubert* challenges were appropriate, and indeed required in some instances, at the class certification stage. *See In re Blood Reagents Antitrust Litig.,* 783 F.3d 183, 187 (3d Cir. 2015); *Prantil v. Arkema Inc.*, 986 F.3d 570, 575 (5th Cir. 2021); *Am, Honda Motor Co. v. Allen,* 600 F.3d 813, 815–816 (7th Cir. 2010); *Messner v. NorthShore Univ. Health Sys.,* 669 F.3d 802 (7th Cir. 2012); *Olean Wholesale Grocery v. Bumble Bee Foods*, 31 F.4th 651 (9th Cir. 2022) (en banc); *Sher v. Raytheon Co.*, 419 F. App'x 887, 890 (11th Cir. 2011).

Despite the increasing strength of the majority position, the Sixth and Eighth Circuits have held steadfast to their

view that Rule 23 can be satisfied with inadmissible evidence. *Lyngaas v. Curaden AG*, 992 F.3d 412 (6th Cir. 2021) ("'evidentiary proof' need not amount to admissible evidence"); *Cody v. City of St. Louis*, 103 F.4th 523 (8th Cir. 2024). While *Cody* presented the Eighth Circuit with an opportunity to join the majority, it declined.

Before *Cody*, *In re Zurn Pex Plumbing Products Liability Litigation*, 644 F.3d 604 (8th Cir. 2011), had been the last word on the issue in the Eighth Circuit, even though it was issued just two weeks after *Dukes* and well before *Comcast.* The Eighth Circuit doubled down, however, and, relying on *Zurn*, maintained its position that the Rule 23 analysis does not require admissible evidence. 103 F.4th at 535 ("*Zurn* expressly recognized that '[t]he main purpose of *Daubert* exclusion is to protect juries from being swayed by dubious scientific testimony. That interest is not implicated at the class certification stage where the judge is the decision maker.'").

In the end, *Cody* concluded that admissibility was a "red-herring:" "While the City complains that there was no admissible evidence in the record . . . the argument is beside the point. . . . Because 'class certification decisions are generally made before the close of merits discovery, the court's analysis is necessarily prospective and subject to change and there is bound to be some evidentiary uncertainty.' The ultimate admissibility of an expert's opinion is therefore a red herring at the class-certification stage." *Id.* at 535 (emphasis original) (quoting *Zurn*, 644 F.3d at 613).