

Expert Disputes in EEO Class Actions: What's *Daubert* Got to Do With It?

By Jocelyn D. Larkin
The Impact Fund
125 University Avenue
Berkeley, CA 94710
jlarkin@impactfund.org

Introduction

The Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), clarified the role of district courts in determining the threshold admissibility of expert testimony at trial. The expert battles typically fought in EEO cases – over statistical and social science evidence – do not raise the kinds of issues that *Daubert* is intended to address. Despite this, employers are increasingly filing *Daubert* motions to exclude expert testimony in EEO class actions, particularly at the class certification stage. Numerous courts have concluded, however, that the *Daubert* analysis is ill-suited to the class certification inquiry and unnecessary at this early stage in the litigation.

If *Daubert* is not the correct analytic framework, how then should district judges evaluate expert testimony and statistical evidence on a class certification motion? District courts have answered this question in different ways and their approach often will determine whether or not the class will be certified. Because of this variation in approaches, the Courts of Appeal should provide greater guidance to district courts on this question in order to avoid wasteful evidentiary motions and to minimize the risk of inconsistent and unpredictable results.

Daubert and EEO Class Action Expert Disputes

The United State Supreme Court’s decision in *Daubert* addressed the role of the district court in making threshold admissibility determinations for expert testimony offered at trial. The high court charged the trial courts with the responsibility to act as a “gatekeeper” to ensure that juries were not presented with “junk science.” *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137, 137, 159 (1999). The trial court must “determine whether the testimony has a ‘reliable basis in the knowledge and experience of [the relevant] discipline.’” *Kumho Tire*, 526 U.S. at 149, quoting *Daubert*, 509 U.S. at 592. The inquiry is a “flexible one” which the trial judge has “broad latitude to determine.” *Id.* at 150, 153.¹

Daubert did not erect a high hurdle for expert testimony; “the rejection of expert testimony is the exception rather than the rule.” Fed. R. Evid. 702 Advisory Committee Notes (2000 Amendments). Importantly, it is not the responsibility of the trial court to determine whether an expert’s opinion is factually correct. “The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.” at *Daubert*, 509 U.S. at 595. Once admitted, “[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and

¹ In determining threshold reliability, the trial court may – but is not required to -- consider such factors as: 1) whether the technique has been or can be tested; 2) whether the “technique has been subjected to peer review and publication; 3) what “the known or potential rate of error” is; 4) the “degree of acceptance [of the methodology] within [the relevant scientific] community.” *Daubert*, 509 U.S. at 592 - 594.

appropriate means for attacking shaky but admissible testimony.” *Daubert*, 509 U.S. at 596.²

While there is often fierce debate between each side’s experts in EEO litigation, those disputes rarely involve the kinds of questions that *Daubert* was intended to address. I discuss here the most frequent battles over statistical and social science evidence.

Statistical Evidence – Statistics are, and always have been, the lynchpin of most EEO class certification motions. Plaintiffs use statistical data to demonstrate that there is a common issue as to whether the employer’s policy or practice has had an adverse impact on a protected group. While employers will virtually always attack these statistics and offer their own competing statistical explanations, these battles are typically not the kind of disputes that raise *Daubert* admissibility issues.

Daubert focuses on threshold questions concerning the qualifications of the expert and the statistical techniques used. There is a relatively small group of labor economists and statisticians who routinely do the statistical work in EEO class actions. Among this group, virtually all have the necessary experience to qualify as experts under Fed. R. Evid. 702. This question is rarely in dispute and ordinarily not raised in these motions to strike. Similarly, these statistical experts – whether testifying for the employer or the employees – use the same, well-established statistical methods. There is nothing novel about statistical tests such as regression analyses or cohort studies, which have been used in Title VII class litigation for decades. Nothing cutting edge here.

² Five years after *Daubert*, the Supreme Court clarified that *Daubert* applied to all expert testimony, not just testimony derived from the physical sciences. *Kumho Tire Co.*, 526 U.S. at 147-48.

Instead, the statistical disputes usually involve one or more of three issues. The first, and perhaps the most common, is the question of “explanatory variables:” does the regression analysis include the appropriate variables? While the parties may fiercely dispute this question, it does not present a *Daubert* admissibility issue. The U.S. Supreme Court has said that such disputes go to the weight, not the admissibility of the evidence. “Normally, failure to include variables will affect the analysis’ probativeness, not its admissibility.” *Bazemore v. Friday*, 478 U.S. 385, 400 (1986). This is, moreover, the applicable rule at trial; presumably an even more permissive approach would apply at the early class certification stage.

The second common statistical issue is the question of aggregation versus disaggregation – in simplest terms, what group of employees should be analyzed and to whom should they be compared. Typically, plaintiffs aggregate data and employers complain that aggregation masks variations among sub-units. Employers disaggregate and plaintiffs argue that their intent is to create such small sample sizes that it is difficult to demonstrate statistical significance. *See International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 340 n. 20 (1977). Again, there is no fixed legal or statistical rule governing this issue. *Paige v. California*, 291 F.3d 1141, 1148 (9th Cir. 2002) (aggregated statistical data may be used “where it is more probative than subdivided data”); *McReynolds v. Sodexo Marriott Services, Inc.*, 349 F. Supp. 2d 1, 16 (D.D.C. 2004) (court declines “defendant’s invitation to rule as a matter of law that plaintiffs cannot aggregate statistics on a company-wide basis”). As such, this issue offers no credible argument for excluding statistical evidence under *Daubert*.

The third broad statistical dispute concerns whether the statistical evidence correctly reflects how the employer's policies actually work. This question invariably depends on the amount of discovery that has been completed and will turn on disputed issues of fact about how the employer operates. A court cannot, of course, resolve disputed factual issues that go to the merits of the case at class certification. Even it could, these types of disputes go to the weight of the evidence and do not present the basis for *Daubert* exclusion.

Experts on Sex and Race Stereotyping - Another favorite target for *Daubert* motions are plaintiffs' social science or industrial psychology experts who provide testimony about the mechanisms of stereotyped decision-making. *Dukes v. Wal-Mart Stores*, 222 F.R.D. 189, 191-93 (N.D. Cal. 2004); *Butler v. Home Depot, Inc.*, 984 F. Supp. 1257, 1262 (N.D. Cal. 1997). Where plaintiffs challenge the delegation of subjective decision-making authority to lower level managers, these experts explain how unconscious bias may infect employment decisions.

The employer's primary attack on such testimony is that the methodology is unsound, which – if correct – would be appropriately addressed by *Daubert*. However, the methodology, sometimes referred to as “social framework analysis,” is well-accepted in the field; employers have for the most part been unable to find mainstream social scientists willing to say otherwise. *Dukes*, 222 F.R.D. at 191–92 (social framework analysis is “an acceptable social science methodology”); *Butler*, 984 F. Supp. at 1262 - 66. Moreover, the U.S. Supreme Court specifically endorsed the use of this type of expert testimony in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235-36 (1989).

Employers also argue that these experts do not conduct empirical studies and cannot quantify the extent of the influence of stereotyping, i.e. how many decisions were influenced by bias. There is no requirement, however, that expert testimony must be quantifiable, particularly when the testimony involves social science and psychological testimony. *United States v. Rahm*, 993 F.2d 1405, 1412 (9th Cir. 1993). Indeed, in *Price Waterhouse*, the Supreme Court approved the admission of expert testimony about gender stereotypes even though the expert admitted that she “could not say with certainty whether any particular comment was the result of stereotyping.” 490 U.S. at 236. While courts have recognized that expert testimony on stereotyping may be subject to attack on cross-examination, the issues typically raised by employers do not meet the *Daubert* standard. *See Dukes*, 222 F.R.D. at 191-92.

While the issues that I have described would not be proper under *Daubert*, there may well be other evidentiary motions that could be brought to exclude expert testimony in EEO cases. For example, either party might move to strike the testimony of an individual who lacks sufficient expertise to qualify as an expert under Federal Rule of Evid. 702. *See e.g. Carlson v. C.H. Robinson Worldwide, Inc*, 2005 WL 758602 *5 (D. Minn. 2005) (testimony of plaintiffs’ human resources professional excluded because of lack of sexual harassment expertise). If an expert fails to meet a court-ordered deadline, or relies on information not properly disclosed in discovery, a motion to strike may be granted where prejudice is shown. Fed. R. Civ. Proc. 37(c) (1). If an expert relies on data from a survey that he or she admits was not conducted by accepted scientific standards, opinions based upon it may be excluded. *Yapp v. Union Pacific R. Co.*, 301 F.

Supp. 2d 1030, 1036-37 (E.D. Mo. 2004); *Dukes v. Wal-Mart Stores*, 222 F.R.D. 189, 197 -198 (N.D. Cal. 2004).³

Class Certification Strategy and the Use of *Daubert* Motions

The class certification motion is a crucial procedural hurdle in an EEO putative class action and, in many cases, the most important event in the case. At the risk of understatement, a case on behalf of five individuals is quite different than one on behalf a class of five thousand current and former workers. Many defendants -- after vigorously fighting but losing class certification -- will find the risks of trial too great and choose instead to settle. Similarly, plaintiffs on the losing end of a class certification motion will have substantially lowered expectations and, perhaps, less enthusiasm for the case.

The Supreme Court has given lower courts two specific directives about the consideration of class certification motions. On the one hand, district courts are to conduct a “rigorous analysis” of the Rule 23 requirements, which may require the court to probe beyond the pleadings. *General Telephone of Southwest v. Falcon*, 457 U.S. 147, 160-61 (1982). On the other hand, the class certification motion is not an occasion “to conduct a preliminary inquiry into the merits of the suit. . .” *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974). While these two mandates are invariably cited in tandem at the outset of every class certification opinion, their frequent physical proximity does not suggest an easy or well-understood relationship. Often, the battlefield lies in this uncharted territory between *Eisen* and *Falcon*.

³ In some cases, where plaintiffs offer no statistical evidence at all with the class certification motion, this may properly result in the denial of class certification. See e.g. *Morgan v. Metropolitan Dist. Com’n.*, 222 F.R.D. 220, 231 (D. Conn. 2004).

With the stakes as high as they are, both sides have a strong incentive to fight the class certification battle with all they have got. For employers, their defense will often focus on undermining plaintiffs' statistical evidence. Defendants⁴ are increasingly turning to motions to strike plaintiffs' expert testimony based upon *Daubert* to do so. Analytically, the *Daubert* gatekeeping function has little relevance at class certification and, as explained below, no court has yet held that *Daubert* applies at this early stage. The motions nonetheless provide employers with a vehicle to fully brief their criticisms of the statistical or other expert evidence and showcase their own experts' contrary conclusions.

Does *Daubert* Apply at Class Certification?

The Second Circuit's decision in *In re: VISA Check/MasterMoney Antitrust Litigation*, 280 F.3d 124 (2nd Cir. 2001) is the only published appellate opinion to address whether *Daubert* applies at class certification.⁵ In reaching the conclusion that it did not, the panel noted that the *Daubert* inquiry was analytically distinct from that required for class certification.

We note that a motion to strike expert evidence pursuant to [Daubert], involves a inquiry distinct from that for evaluating expert evidence in support of a motion for class certification, . . . although the parties' substantive arguments in both instances may be similar, as is true in this case. A *Daubert* motion is typically not

⁴ A review of the case law suggests that it is primarily defendants who have used *Daubert* motions at class certification. While I focus here on this particular phenomenon, I am not suggesting that plaintiffs do not also bring evidentiary motions – including *Daubert* motions – to strike expert testimony at class certification.

⁵ In an unpublished *per curiam* decision, the Eleventh Circuit affirmed the grant of class certification in a race discrimination class action and rejected the argument that the district court failed to apply *Daubert* to the statistical evidence. “Appellants have presented no authority establishing a court must perform a *Daubert* inquiry of scientific evidence at this early stage of a class action proceeding.” *Drayton v. Western Auto Supply Co.*, 2002 WL 32508918 *6, n.13(11th Cir. 2002).

made until later stages in litigation, such as in association with a motion for summary judgment, motion *in limine*, or at trial, . . .

280 F. 3d at 132 n. 4. The panel rejected defendant's argument that the district court failed to adequately scrutinize the plaintiffs' expert's report, as an impermissible inquiry into the merits, citing *Eisen* (and, of course, *Falcon*). "A district court may not weigh conflicting expert evidence or engage in 'statistical dueling' of experts" at class certification. *Visa Check*, 280 F. 3d at 135 quoting *Caridad v. Metro-North Commuter RR*, 191 F.3d 283, 292-93 (2nd Cir. 1999). Rather, at class certification, the task of the district court is to "ensure that the basis of the expert [statistical] opinion is not so flawed that it would be inadmissible as a matter of law." *VISA Check*, 280 F.3d at 135.

The question for the district court at the class certification stage is whether plaintiffs' expert evidence is sufficient to demonstrate common questions of fact warranting certification of the proposed class, not whether the evidence will ultimately be persuasive.

Id.

Since the *VISA Check* decision, numerous district courts have concluded that a full *Daubert* inquiry is not appropriate at the class certification stage. *Midwestern Machinery v. Northwest Airlines, Inc.*, 211 F.R.D. 562, 566 (D.Minn. 2001); *Thomas & Thomas Rodmakers, Inc. v. Newport Adhesives and Composites, Inc.*, 209 F.R.D. 159, 162 (C.D. Cal. 2002) ("a lower *Daubert* standard should be employed at [the class certification] stage of the proceedings"). These precedents include a number of decisions in employment discrimination class cases. *Hnot v. Willis Group Holdings, Ltd.*, 228 F.R.D. 476, 484, (S.D.N.Y. 2005) ("Reasonable statisticians can disagree about what tests and what controls should be utilized, but at the class certification stage, only a plausible position needs to be set forth"); *Dukes v. Wal-Mart Stores*, 222 F.R.D. 189,

191 (N.D. Cal. 2004); *Bacon v. Honda of Manufacturing Mtg., Inc.*, 205 F.R.D. 466, 470 (S.D. Ohio 2001) (“a Daubert inquiry is not warranted at this stage of the proceedings”). In *Midwestern Machinery*, the district court noted that “[a] party and its experts should not be expected to have fully evaluated all data at the preliminary stage of class certification.” 211 F.R.D. at 566. ⁶

How Should Courts Evaluate Expert Testimony At Class Certification In EEO Cases?

Although courts that consistently held *Daubert* inapplicable at class certification, these same courts are quick to point out that they will also not “uncritically accept” expert testimony offered for and against class certification. *Dukes*, 222 F.R.D. at 191; *Bacon*, 205 F.R.D. at 470-71. The question then is: against what standard should the evidence be judged? In this regard, how should courts balance the *Falcon* ‘rigorous analysis’ requirement and the *Eisen* ‘no merits’ dictates?

The Second Circuit has provided one answer. In *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 292 (2nd Cir. 1999), a race discrimination class action, the Second Circuit reversed the denial of class certification, concluding that the district judge had improperly weighed the competing expert evidence (which presented a classic “aggregation” dispute). The court concluded that such weighing of the evidence ran afoul of *Eisen*. *Id.* at 293. “Though [the employer’s] critique of the Class Plaintiffs’ evidence may prove fatal at the merits stage, the Class Plaintiffs need not demonstrate at this stage that they will prevail on the merits.” *Id.* at 292. The panel concluded that “‘statistical dueling’ was not relevant to the certification determination.” *Id.* Soon after,

⁶ It is worth considering whether courts would have so decisively rejected the application of *Daubert* at class certification if the moving parties had used these motions to address purely threshold issues of admissibility, rather than as a venue to brief broader expert disputes.

in *VISA Check*, the Second Circuit adopted the standard for expert evidence at class certification discussed above. The district court must “ensure that the basis of the expert [statistical] opinion is not so flawed that it would be inadmissible as a matter of law.” *VISA Check*, 280 F.3d at 135.

Not all courts have agreed with the Second Circuit approach. In *Cooper v. Southern Co.*, 390 F.3d 695 (11th Cir. 2004), the Eleventh Circuit affirmed the denial of class certification in a race discrimination class action, where the trial court conducted an exhaustive analysis of the experts’ opinions, weighed the competing evidence and credited the defense expert’s conclusions over those of the plaintiffs’ expert. The trial court did not limit its review to a determination of whether plaintiffs had established the existence of common questions. Rather, the trial court determined that plaintiffs’ expert testimony failed to “raise a presumption of discrimination” and “fail[ed] to establish a pattern or practice of discrimination.” *Id.* at 716.

On appeal, the Eleventh Circuit rejected plaintiffs’ contention that this weighing of the evidence violated *Eisen*. “[B]efore a district court determines the efficacy of class certification, it may be required to make an informed assessment of the parties’ evidence.” *Id.* at 712. With respect to the statistical evidence, the panel concluded that “it was plainly necessary for the district court to evaluate the statistical evidence the plaintiffs submitted in order to determine whether it *established* the discrimination of which plaintiffs complained.” *Id.* at 716 (emphasis added). The district court professed to evaluate the parties’ expert statistical evidence against the standards set forth in *Bazemore*. *Id.* at 718, n. 11. *Bazemore* is, as noted above, the standard for statistical proof *at trial*, not at class certification. *Bazemore*, 478 U.S. at 400-01.

Not surprisingly, trial courts take different approaches to the problem, reflecting the disparate views of the Second and Eleventh Circuits. Some district courts will avoid the “statistical dueling” entirely. *Satchell v. FedEx Corp.*, 2005 WL 2397522 (N.D. Cal. 2005) (“evaluation of which party has presented more compelling statistical evidence is a question of fact that should be resolved on the merits by the trier of fact and not at the class certification phase”). Others engage in an in-depth summary judgment-like evaluation and weighing of the evidence. *Cooper*, 205 F.R.D. at 610; *Rhodes v. Cracker Barrel Old Country Store, Inc.*, 2002 WL 32058462, *63 (N.D. Ga. 2002) (Rule 23’s rigorous analysis requires “an examination of what the statistical evidence shows and does not show, and preliminary judgments regarding the credibility of the showing made by the plaintiff. . .are necessary”). Others forge a middle ground, considering each objection raised in light of the twin requirements of *Eisen* and *Falcon*. *Carlson v. C.H. Robinson Worldwide, Inc.*, 2005 WL 758602, *4-6 (D. Minn. 2005); *Dukes*, 222 F.R.D. at 191.

Some further clarification of the appropriate standard is needed. The case law suggests some guiding principles:

- The trial court cannot simply accept either expert’s opinion as true without careful review. *Falcon*, 457 U.S. at 160-61.
- The trial court’s class certification order should reflect that it conducted this careful review and that defendant’s objections were considered, such that an appellate court reviewing the decision could ascertain whether the trial court properly exercised its discretion. *Prado v. Bush*, 221 F.3d 1266, 1276 (11th Cir. 2000).

- The focus of the inquiry is Rule 23, and not whether the statistics establish liability. *VISA Check*, 280 F.3d at 135. (“The question for the district court at the class certification stage is whether plaintiffs' expert evidence is sufficient to demonstrate common questions of fact warranting certification of the proposed class, not whether the evidence will ultimately be persuasive.”); *Bacon*, 205 F.R.D. at 470. ([T]he appropriate inquiry is whether the statistics are sufficient to show . . . the existence of common questions”).
- The *Daubert* standard is not appropriate, unless the objection concerns the qualifications of the expert under Rule 702 or a novel methodology or statistical test (not ordinarily the case in EEO litigation); see *Carlson v. C.H. Robinson Worldwide, Inc*, 2005 WL 758602 *4-5 (D. Minn. 2005).
- The trial court should take into account the extent of discovery completed at the time of class certification; see *Midwestern Machinery v. Northwest Airlines*, 211 F.R.D. 562, 566 (D.Minn. 2001).
- The trial court cannot weigh competing expert evidence or resolve legitimate factual disputes that form the basis for differing expert approaches to the data. *VISA Check*, 280 F.3d at 135.
- The classic statistical disputes about aggregation and explanatory variables should not undermine a finding of commonality, unless the analysis is “so flawed that it would be inadmissible as a matter of law;” *VISA Check*, 280 F.3d at 135. So long as plaintiffs’ expert has a plausible explanation for the choice of variables and/or the extent of aggregation, the statistics should be credited and considered in the overall determination of commonality.

- The trial court should evaluate the statistical evidence in conjunction with other non-statistical evidence offered in support of Rule 23. *Craik v. Minnesota State University Bd.*, 731 F.2d 465, 471-2 (8th Cir. 1984).

Conclusion

Given the high stakes in EEO class certification motions, defendants want a means to present their attacks on plaintiffs' statistics and on their experts. *Daubert* offers, at best, an ill-fitting procedural mechanism to do so. To forestall the continued use of inappropriate *Daubert* motions, the appellate courts should provide greater clarity to the lower courts about how to evaluate expert testimony – and particularly statistical proof – at the class certification stage so as to honor the instructions of both *Eisen* and *Falcon*.