DOUBT NO MORE: FINDING A HOME FOR *DAUBERT* IN CLASS CERTIFICATION

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The Supreme Court has made clear that a district court may grant class action certification only after conducting a rigorous analysis to ensure that the requirements of Rule 23 of the Federal Rules of Civil Procedure have been met. Less clear, however, is what exactly a rigorous analysis entails. As precertification scrutiny has become more robust, reliance on expert testimony has become nearly indispensable for obtaining class certification. This Note addresses the circuit split surrounding whether expert testimony submitted during the class certification process should be subject to the gatekeeping standard set forth in Daubert v. Merrell Dow Pharmaceuticals, Inc. *This Note argues that the two main approaches, each calling for some form of exclusionary* Daubert *analysis, give rise to concerns relating to efficiency and fairness, thus hindering the purposes of the class action mechanism. Moreover, the two approaches subject expert testimony to admissibility standards unsuitable for a preliminary stage of litigation and rely on a critical misconstruction of the Supreme Court's rigorous analysis requirement as a gatekeeping standard rather than a fact-finding standard. This Note proposes that courts should instead adopt the approach put forth by the Ninth Circuit and consider the* Daubert *factors as part of an overall assessment of the probative value, rather than the admissibility, of expert testimony.*

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INTRODUCTION

Over the past decade, the Supreme Court has engaged in an internal game of tug-of-war over the proper scope of a district court's scrutiny during class certification proceedings. The contest kicked off in 2011 with *Wal-Mart Stores, Inc. v. Dukes*, in which the Court required inquiry into the merits of a putative class's underlying claims to the extent necessary to determine satisfaction of Rule 23 requirements.[1] Two years later, the match flipped when the Court, in *Amgen Inc. v. Connecticut Retirement Plans &*

1. 564 U.S. 338, 350–51 (2011).

Trust Funds, limited the proper scope of precertification scrutiny in securities fraud class actions.[2] This apparent retreat from *Wal-Mart*, however, was short-lived. Just a month later, in *Comcast Corp. v. Behrend*, the Court doubled down on its *Wal-Mart* holding, requiring district courts to entertain arguments against the propriety of class certification even when doing so would touch on the merits of class claims.[3] Finally, in 2016, the tide shifted once more, with the Court lowering the bar for the kind of evidence that can be sufficiently probative to support class certification.[4]

Thus far, the Court's key decisions in this class certification skirmish have pertained to a district court's fact-finding role in determining whether Rule 23 requirements have been satisfied.[5] The battle may soon shift, however, into new territory: judicial gatekeeping of expert testimony intended to support or oppose certification. As reliance on expert opinions during class certification proceedings has increased,[6] a circuit split has developed surrounding whether expert testimony at this stage of litigation should be subject to the standard set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, which requires judges to screen out unreliable expert testimony at trial.[7] The two most established sides of the split apply differing levels of *Daubert* scrutiny prior to a district court's consideration of expert testimony for the class certification inquiry. On one side, four circuits require that expert testimony pass muster under the full *Daubert* scrutiny typically applied at trial.[8] On the other, the Eighth Circuit employs a "tailored" *Daubert* analysis, which limits the admissibility evaluation to the reliability of the evidence for the purpose of class certification.[9] Meanwhile, in what this Note proposes comprises an entirely distinct third side of the split, the Ninth Circuit recently held that inadmissibility under *Daubert*, while relevant for assessing the probative value of expert testi-

2. See 568 U.S. 455, 467 (2013) (holding that precertification inquiry into the "materiality" prong of a fraud on the market claim was unnecessary for an evaluation of predominance). The Court emphasized that "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." Id. at 466.

3. 569 U.S. 27, 34 (2013).

4. See Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1049 (2016) (finding representative evidence sufficiently probative to demonstrate predominance in the instant case).

5. See infra notes 181–184 and accompanying text.

6. See infra notes 63–67 and accompanying text.

7. 509 U.S. 579, 589 (1993).

8. See infra section I.D.1.

9. See infra section I.D.2.

mony for the certification inquiry, should not bar evidence from consideration.[10] While the Supreme Court has danced around the split on two occasions, the *Daubert* issue remains unresolved.[11]

Significant issues arise from each of the two predominant approaches. The full *Daubert* approach diminishes the efficiency of the precertification discovery process and disproportionately harms plaintiffs.[12] The tailored *Daubert* approach, meanwhile, is rife with procedural ambiguity, which creates doubts as to its workability and efficiency.[13] Perhaps most significantly, however, each side employs a version of *Daubert* wherein the results of the analysis determine whether or not a judge may consider the evidence at all in their certification inquiry. This imposition of an exclusionary rule improperly subjects the class certification proceeding to admissibility standards unsuitable for a preliminary stage of litigation and unduly limits judicial discretion. Furthermore, applying an exclusionary rule here fundamentally misconstrues the Supreme Court's directive that district courts should conduct a rigorous analysis at the certification stage as a gatekeeping standard rather than as a fact-finding standard.[14]

This Note analyzes the problems arising from the use of exclusionary standards to bar expert testimony from judicial consideration during class certification proceedings. Part I provides an overview of class certification, the *Daubert* standard, and the circuit split. Part II considers the problems posed by the full *Daubert* approach and the tailored *Daubert* approach and further considers the impropriety of engaging in either exclusionary analysis. Finally, Part III proposes that, in engaging in a rigorous analysis of expert testimony at the class certification stage, courts should adopt the recent guidance of the Ninth Circuit and consider the factors of reliability and relevance espoused by *Daubert* without adopting the exclusionary consequences linked to the standard's application to trial evidence.

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10. Sali v. Corona Reg'l Med. Ctr. (*Sali II*), 909 F.3d 996, 1006 (9th Cir. 2018), cert. dismissed, 139 S. Ct. 1651 (2019) (mem.) (holding that while a judge should fully consider the *Daubert* factors, inadmissibility under *Daubert* should not be dispositive).

Some commentators addressing the *Daubert* split since the Ninth Circuit's decision in *Sali II* treat the Ninth Circuit and the Eighth Circuit approaches as identical due to their common view that district courts are not limited to consideration of evidence admissible at trial. See, e.g., Cianan M. Lesley, Note, Making Rule 23 Ideal: Using a Multifactor Test to Evaluate the Admissibility of Evidence at Class Certification, 118 Mich. L. Rev. 149, 162–63 (2019). This Note argues, however, that the Ninth Circuit, by declining to apply *Daubert* in an exclusionary fashion, differs significantly from the Eighth Circuit. See infra section I.D.3.

11. See infra notes 52–53, 58–59 and accompanying text.

12. See infra section II.A.

13. See infra section II.B.

14. See infra section II.C.

I. THE RELATIONSHIP BETWEEN CLASS CERTIFICATION AND EXPERT TESTIMONY

The class action, governed by Rule 23 of the Federal Rules of Civil Procedure (FRCP), is a form of aggregate litigation allowing for the adjudication of individual claims in one representative suit.[15] Although Rule 23 enumerates specific requirements for class certification, the Rule does not stipulate a putative class's burden of proof or specify standards of admissibility for evidence submitted relating to these requirements.[16] This Part discusses the emergence of standards controlling class certification decisions and the current discord among circuits regarding the specific contours of these standards as applied to expert testimony. Section I.A provides a brief overview of class certification requirements. Section I.B describes the *Daubert* standard governing the admissibility of expert testimony at trial. Section I.C details how the rigorous analysis requirement, first adopted by the Supreme Court in 1982, has evolved over the past ten years. Finally, section I.D provides an overview of the current circuit split regarding the proper admissibility standards for expert testimony during class certification proceedings.

A. *Overview of Class Certification*

To obtain certification, a putative class must demonstrate all four requirements of Rule 23(a): numerosity, commonality, typicality, and adequacy of representation.[17] In addition, the class representatives must establish that the class qualifies as one of the three "types" of class actions permitted under Rule 23(b).[18] The 23(b)(3) class, the most common type,[19] provides a mechanism for representatives to seek monetary damages on behalf of absent and unnamed class members.[20] To certify such a class, a court must find that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for

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15. See Fed. R. Civ. P. 23.

16. See id.

17. Fed. R. Civ. P. 23(a).

18. Fed. R. Civ. P. 23(b).

19. See Louis W. Hensler III, Class Counsel, Self-Interest and Other People's Money, 35 U. Mem. L. Rev. 53, 60 (2004) ("Most attempts to certify cases in federal court now invoke Rule 23(b)(3) . . . .").

20. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614–15 (1997) ("In the 1966 class-action amendments, Rule 23(b)(3) . . . was 'the most adventuresome' innovation . . . add[ing] to the complex-litigation arsenal class actions for damages designed to secure judgments binding all class members save those who affirmatively elected to be excluded." (citing Benjamin Kaplan, A Prefatory Note, 10 B.C. Indus. & Com. L. Rev. 497, 497 (1969))). The (b)(3) class action is intended to capture controversies where class-wide adjudication would be "convenient and desirable" for the purposes of "economies of time, effort, and expense." See Fed. R. Civ. P. 23 advisory committee's note on 1966 Amendment, subdiv. (b)(3).

fairly and efficiently adjudicating the controversy."[21] Because establishing the predominance of common questions typically requires plaintiffs to demonstrate their planned methodology for proving the merits of their class claims at trial, the class certification inquiry is fact intensive and usually involves consideration of expert testimony.[22]

B. *A Brief History of Expert Testimony and* Daubert

Prior to 1993, courts evaluated the admissibility of expert testimony using the *Frye* standard, wherein only expert opinions stemming from techniques generally accepted by the relevant scientific community were admissible.[23] In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the Supreme Court held that Rule 702 of the Federal Rules of Evidence (FRE) had superseded *Frye* and established a new standard of reliability and relevance for expert testimony.[24] The standard, which the Court characterized as a "liberal one,"[25] requires expert testimony to be "not only relevant, but reliable,"[26] considering factors including: (1) whether the expert's theory or technique has been or can be tested; (2) whether the theory or technique has been subjected to peer review or publication; (3) the error rate of the theory or technique; and (4) general acceptance by the scientific community.[27] In addition to evaluating the reliability of an expert's methodology, the *Daubert* analysis requires a reasonable "fit" between the expert's

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21. Fed. R. Civ. P. 23(b)(3).

22. See Libby Jelinek, Comment, The Applicability of the Federal Rules of Evidence at Class Certification, 65 UCLA L. Rev. 280, 282 (2018); see also Michelle Lowery & Jodie Williams, Waging the Merits War at Class Certification: Does Expert Evidence Streamline the Process?, Antitrust Source 5 (2019), https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/2018-2019/atsource-february2019/feb19_lowery_2_18f.pdf [https://perma.cc/7DQ5-5WR5] ("Plaintiffs need expert evidence, particularly to demonstrate predominance.").

23. See Ashley Panaggio, Note, To Analyze or Not to Analyze: A Practical Solution to the Love-Hate Relationship Between *Daubert* and Certification in Class Action Proceedings, 44 Stetson L. Rev. 953, 965 (2015) ("[P]rior to *Daubert*, as long as an expert's conclusions were generally accepted, the testimony was admissible."); see also Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923), superseded by Fed. R. Evid. 702, as recognized in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

24. 509 U.S. 579, 587 (1993). Rule 702, amended in 2000, currently provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702.

25. *Daubert*, 509 U.S. at 587.

26. Id. at 589.

27. Id. at 592–94. In 2000, the advisory committee supplemented this list with additional factors. See Fed. R. Evid. 702 advisory committee's note on 2000 Amendment.

opinion on the facts at issue in the case and the data from which it arises.[28] Furthermore, while *Daubert* itself addressed only testimony based in science, the Supreme Court has since extended the standard to apply to all expert testimony, including testimony based on technical or specialized knowledge.[29]

C. *The Supreme Court's Rigorous Analysis Requirement*

Because Rule 23 does not specify standards governing evidence submitted during the class certification process,[30] courts are left with the task of establishing standards to control the scope and nature of precertification scrutiny. To understand the underpinnings of the *Daubert* circuit split, one must first understand the development of the rigorous analysis requirement, a standard established by the Supreme Court in the early days of the modern class action. The rule is responsible in part for the prevalence of expert testimony in class certification proceedings and serves as a primary justification for courts applying exclusionary *Daubert* analyses.[31] This section delineates the evolution of the requirement.

1. *Rigorous Analysis Pre-*Wal-Mart. — In the decades after the establishment of the modern class action in 1966, courts generally viewed class actions favorably and interpreted Rule 23 generously,[32] certifying classes without much inquiry into evidentiary support for the Rule's requirements.[33] Instead, courts focused on whether class certification would accomplish Rule 23's goals of fairness and efficiency, thereby steering clear

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28. See, e.g., Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997) (holding that a court may exclude expert testimony based on a finding that there is "simply too great an analytical gap between the data and the opinion proffered"); *Daubert*, 509 U.S. at 591 ("'An additional consideration under Rule 702 . . . is whether expert testimony proffered in the case is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute' . . . . The consideration has been aptly described . . . as one of 'fit.'" (quoting United States v. Downing, 753 F.2d 1224, 1242 (3d Cir. 1985))). *Daubert* provides a simple example illustrating the "fit" requirement: Scientific evidence about the phases of the moon would be admissible to assist the jury in determining whether it was dark on a certain night but would be inadmissible to assist the jury in determining whether an individual was likely to behave irrationally on a night with a full moon. Id. at 591.

29. See Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147 (1999).

30. See Jelinek, supra note 22, at 285 ("FRCP 23 does not identify a standard of proof, require the judge to hold an evidentiary hearing before certifying a class, or identify any evidentiary rules applicable to the class certification proceeding.").

31. See Lowery & Williams, supra note 22, at 1 ("Against this backdrop [of rigorous analysis], plaintiffs are often unwilling to assume the risk of an adverse ruling for lack of sufficient evidence. As a result, class certification motions are generally supported by complex economic testimony . . . ."); see also infra notes 185–195 and accompanying text.

32. See Jelinek, supra note 22, at 290.

33. See Linda S. Mullenix, Putting Proponents to Their Proof: Evidentiary Rules at Class Certification, 82 Geo. Wash. L. Rev. 606, 614 (2014) ("[T]hroughout the 1980s and 1990s, any number of courts willingly certified class actions based on the plaintiffs' pleadings alone, without supporting evidence and in absence of any judicial hearings.").

of any scrutiny relating to the merits of the class claims.[34] The Supreme Court supported a merits-free inquiry in *Eisen v. Carlisle & Jacquelin*, where it stated that Rule 23 did not permit "preliminary inquiry into the merits" of a class action during certification proceedings.[35]

In the years following the *Eisen* decision, the Court appeared to backtrack on its merits inquiry prohibition in *Coopers & Lybrand v. Livesay*[36] and *General Telephone Co. of the Southwest v. Falcon*.[37] In *Livesay*, the Court recognized that class certification "generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'"[38] Meanwhile, in *Falcon*, the Court held that judges must engage in a "rigorous analysis" to evaluate Rule 23 requirements, stressing that "actual, not presumed, conformance with Rule 23(a) . . . [is] indispensable."[39] The Court stated that, in ensuring conformance, "sometimes it may be necessary for the court to probe behind the pleadings."[40] Without clear guidance on how to reconcile *Eisen*'s merits-inquiry prohibition with *Falcon*'s rigorous analysis requirement, courts adopted varying approaches to both admitting and weighing evidence submitted at the class certification stage.[41]

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34. See Jessica Bachetti, Note, The Ninth Circuit Enters the Class Certification Fray: *Sali*'s Rejection of Evidentiary Formalism and Its Implications, 60 B.C. L. Rev. E-Supplement II.-292, II.-299 (2019), https://lawdigitalcommons.bc.edu/cgc/viewcontent.cgi?article=3767&contcon=bclr [https://perma.cc/9EYL-S8DD].

35. 417 U.S. 156, 177 (1974).

36. 437 U.S. 463, 469 (1978), superseded by Fed. R. Civ. P. 23(f), as recognized in Microsoft Corp. v. Baker, 137 S. Ct. 1702 (2017).

37. 457 U.S. 147, 160–61 (1982).

38. *Livesay*, 437 U.S. at 469 (quoting Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555, 558 (1963)).

39. *Falcon*, 457 U.S. at 160–61.

40. Id. at 160.

41. See generally Heather P. Scribner, Rigorous Analysis of the Class Certification Expert: The Roles of *Daubert* and the Defendant's Proof, 28 Rev. Litig. 71 (2008) (providing a detailed analysis of the circuit split pre-*Wal-Mart*).

Scribner notes that, when considering expert testimony, some courts cited *Eisen* to support decisions not to strike or weigh expert testimony at all unless such testimony was "fatally flawed." Id. at 89; see also, e.g., Kurihara v. Best Buy Co., No. C 06-01884 MHP, 2007 WL 2501698 (N.D. Cal. Aug. 30, 2007). Meanwhile, after the *Daubert* decision in 1993, some courts opted to balance *Eisen* and *Falcon* by applying *Daubert* to determine admissibility for the purposes of the certification inquiry while refusing to engage in any weighing of the evidence after admission. Thus, submitting admissible expert testimony all but guaranteed class certification. See, e.g., Ellis v. Costco Wholesale Corp., 240 F.R.D. 627, 651 (N.D. Cal. 2007), aff'd in part, vacated in part, 657 F.3d 970 (9th Cir. 2011); In re Monosodium Glutamate Antitrust Litig., No. Civ. 00-MDL-1328 (PAM), 2003 WL 244729, at *1 (D. Minn. Jan. 29, 2003). Still other courts construed *Eisen*'s prohibition of merits inquiries narrowly and conducted both an admissibility inquiry and a rigorous analysis, first applying *Daubert* to determine admissibility and then weighing the admitted testimony among all other evidence. See, e.g., Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 677 (7th Cir. 2001).

2. Wal-Mart *and* Comcast *Solidify Rigorous Analysis.* — In *Wal-Mart Stores, Inc. v. Dukes*[42] and *Comcast Corp. v. Behrend*,[43] the Supreme Court at last weighed in on the parameters of the rigorous analysis requirement. In *Wal-Mart*, plaintiffs commenced suit on behalf of a nationwide class of 1.5 million female employees, alleging gender discrimination under Title VII of the Civil Rights Act of 1964.[44] The plaintiffs alleged that Wal-Mart policy allowed managers to disproportionately favor male employees in exercising their discretion to issue pay increases and promotions, and they submitted expert testimony from a sociologist to demonstrate satisfaction of 23(a)(2)'s commonality requirement.[45] Wal-Mart moved to strike the expert's testimony pursuant to *Daubert*, but the district court denied the motion, holding that a *Daubert* inquiry would improperly delve into the merits of the discrimination claim.[46] The district court certified the class, and a divided en banc Ninth Circuit affirmed.[47]

The Supreme Court reversed and decertified the class, finding that 23(a)'s commonality requirement had not been satisfied by the sociologist's testimony.[48] Steering clear of the *Daubert* issue, the Court instead found error in the district court's evaluation of the testimony's probative value, ruling that Rule 23 requirements must be met "in fact," regardless of overlap with merits issues.[49] After citing to *Falcon*'s rigorous analysis requirement, the Court stated: "Frequently . . . 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim."[50] Meanwhile, addressing *Eisen* in a footnote, the Court narrowly construed that holding as applying only to the facts presented in that case.[51] The Court did not rule on whether the sociologist's testimony needed to be admissible under *Daubert*, finding that even if the testimony were admitted, the evidence was insufficient to demonstrate commonality.[52] But

42. 564 U.S. 338, 350–52 (2011).

43. 569 U.S. 27, 29 (2013).

44. *Wal-Mart*, 564 U.S. at 343.

45. Id. at 344–46.

46. Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 155 (N.D. Cal. 2004). In this case, both demonstrating commonality and proving that Wal-Mart engaged in a pattern of discrimination required showing a singular reason for the employment decisions at issue. See *Wal-Mart*, 564 U.S. at 352.

47. *Wal-Mart*, 564 U.S. at 347.

48. Id. at 354–55. The Court additionally found that the class could not be certified under 23(b)(2), holding that claims for individualized monetary relief could not be supported by that provision. Id. at 360–63.

49. Id. at 350–51.

50. Id.

51. Id. at 351 n.6 ("To the extent [the *Eisen* holding] goes beyond the permissibility of a merits inquiry for any other pretrial purpose, it is the purest dictum and is contradicted by our other cases.").

52. Id. at 354–55.

in dicta addressing the district court's assertion that *Daubert* did not apply during class certification, the Court stated: "We doubt that is so."[53]

In *Comcast Corp. v. Behrend*, decided two years after *Wal-Mart*, plaintiffs alleged anticompetitive conduct by Comcast in violation of federal antitrust law.[54] The plaintiffs submitted expert testimony from an economist to demonstrate the 23(b)(3) requirement that common questions predominate over individual ones, and the class was certified.[55] On appeal, Comcast challenged the testimony, arguing the expert's methodology was flawed due to its failure to properly attribute damages to the one remaining theory of injury.[56] The Third Circuit affirmed certification, citing to *Eisen* and reasoning that Comcast's challenges were "attacks on the merits of the methodology that have no place in the class certification inquiry."[57] The Supreme Court granted certiorari on the issue of whether *Daubert* applies during class certification.[58]

Finding that Comcast failed to properly raise the *Daubert* issue in the lower court, the Court instead addressed the question of whether the plaintiffs adequately satisfied 23(b)(3)'s predominance requirement.[59] Echoing the *Wal-Mart* decision, the Court ruled that the Third Circuit's refusal to scrutinize the economist's methodology merely because it touched on the merits of the case constituted a failure to fulfill the requisite rigorous analysis.[60] The Court went on to conduct the analysis by evaluating the probative value of the expert's report, ultimately finding that it failed to establish that damages were capable of proof on a classwide basis.[61]

Although the Supreme Court left the *Daubert* issue unresolved in both *Wal-Mart* and *Comcast*, the two cases provide some clarity on the question of how courts should handle expert evidence at the class certification stage. First, the decisions sharpened the contours of the rigorous analysis requirement. The Court resolved the seemingly inconsistent holdings of *Eisen* and *Falcon*, holding that the standard obliges courts to engage in merit inquiries at the class certification stage insofar as they are necessary to ascertain whether the requirements of Rule 23 have been satisfied.[62] The Court also demonstrated the methodology of the analysis, scrutinizing

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53. Id. at 354.

54. 569 U.S. 27, 29 (2013).

55. Id. at 32.

56. Id.

57. Behrend v. Comcast Corp., 655 F.3d 182, 207 (3d Cir. 2011), rev'd, 569 U.S. 27 (2013).

58. *Comcast*, 655 F.3d 182, cert. granted, 567 U.S. 933 (2012) (mem.).

59. See *Comcast*, 569 U.S. at 33 n.4.

60. Id. at 33–34.

61. Id. at 34.

62. This is of import within the context of this Note, which argues that courts predicating the application of exclusionary *Daubert* analyses on the rigorous analysis standard misapply the requirement. See infra section II.C.2.

the probative value of the testimony in each case. Second, through dictum in *Wal-Mart*, the Court expressed "doubt" that *Daubert* does not apply at the class certification stage but failed to hold so explicitly or clarify how *Daubert* might be properly applied. This has led to continued discord among district courts regarding the proper admissibility standard for expert testimony during class certification proceedings.

D. *The* Daubert *Analysis Split*

Expert opinions have become nearly indispensable for obtaining class certification as plaintiffs attempt to present evidence sufficiently probative to withstand the robust rigorous analysis required by *Wal-Mart* and *Comcast*.[63] For example, plaintiffs might submit econometric models in an antitrust case to demonstrate that anticompetitive impact may be evaluated on a class-wide basis,[64] results of durability tests in a products liability case to prove the existence of a common defect predominating over individual issues,[65] or sociological testimony in an employment case to show a general policy of discrimination affecting the entire class.[66] Defendants, in turn, typically develop their own expert models and often challenge the reliability of the opposing expert's testimony by filing *Daubert* motions.[67] In the absence of clear guidance from the Supreme Court,[68] circuits have developed differing standards for evaluating the admissibility of expert testimony at the class certification stage.

This section will describe the current split among the circuits surrounding the proper admissibility standard for expert testimony at the certification stage and the key arguments relied upon by the courts on each side. The Third,[69] Fifth,[70] Seventh,[71] and Eleventh[72] circuits have expressly held that a full *Daubert* analysis is required, while the Eighth Circuit has adopted a tailored *Daubert* analysis.[73] The Ninth Circuit recently innovated

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63. See supra note 31 and accompanying text.

64. See, e.g., In re Polypropylene Carpet Antitrust Litig., 996 F. Supp. 18, 25 (N.D. Ga. 1997).

65. See, e.g., In re Zurn Pex Plumbing Prods. Liab. Litig., 267 F.R.D. 549, 557 (D. Minn. 2010), aff'd, 644 F.3d 604 (8th Cir. 2011).

66. See, e.g., Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 346 (2011).

67. See Lowery & Williams, supra note 22, at 6 ("Defendants have hired their own experts to analyze the models and form rebuttals to those models . . . . Defendants then file *Daubert* motions to highlight to the court that the model won't do what it is supposed to do.").

68. The Court danced around the issue in *Wal-Mart* and *Comcast*. See supra notes 52–53, 58–59 and accompanying text.

69. In re Blood Reagents Antitrust Litig., 783 F.3d 183, 187 (3d Cir. 2015).

70. Prantil v. Arkema Inc., 986 F.3d 570, 574–76 (5th Cir. 2021).

71. Am. Honda Motor Co. v. Allen, 600 F.3d 813, 815–16 (7th Cir. 2010).

72. Sher v. Raytheon Co., 419 Fed. App'x 887, 890–91 (11th Cir. 2011).

73. See In re Zurn Pex Plumbing Prods. Liab. Litig., 644 F.3d 604, 614 (8th Cir. 2011).

an entirely distinct third approach, a standard that this Note characterizes as the "nonexclusionary *Daubert*" analysis.[74]

1. American Honda *and the Full* Daubert *Approach.* — The Seventh Circuit became the first to require a full *Daubert* analysis during class certification proceedings in its 2010 holding in *American Honda Motor Co. v. Allen*.[75] The plaintiffs in the case, seeking certification pursuant to Rule 23(b)(3), alleged that a design defect in a Honda motorcycle caused excessive wobbling of the steering assembly.[76] During district court proceedings, in support of 23(b)(3)'s predominance requirement, the plaintiffs submitted a report prepared by a motorcycle engineering expert wherein the expert evaluated the oscillations of a single bike and concluded that the motorcycle failed to meet the requisites of his self-devised "wobble decay standard."[77] Honda moved to strike the testimony under *Daubert*, arguing the expert's standard was not developed or tested with adequate scientific rigor.[78] The district court conducted a thorough analysis of the *Daubert* factors and acknowledged "definite reservations" about the testimony's reliability[79] but "decline[d] to exclude the report in its entirety at this early stage of the proceedings."[80]

On appeal, the Seventh Circuit vacated the grant of certification and 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."[81] Removing any doubt as to its meaning, the court added: "[T]he district court must perform a full *Daubert* analysis before certifying the class if the situation warrants."[82] This standard requires the district court to determine whether expert testimony would be admissible at trial before it can consider the testimony in determining whether or not to certify a class.

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74. See *Sali II*, 909 F.3d 996, 1006 (9th Cir. 2018).

75. 600 F.3d at 816.

76. Id. at 814.

77. Id.

78. Id. Honda argued that the "wobble decay standard was unreliable because it was not supported by empirical testing, was not developed through a recognized standard-setting procedure, was not generally accepted in the relevant scientific, technical, or professional community, and was not the product of independent research." Id.

79. Allen v. Am. Honda Motor Co., 264 F.R.D. 412, 425–28 (N.D. Ill. 2009), order vacated, 600 F.3d 813 (7th Cir. 2010) (addressing Honda's concerns about the expert's wobble decay standard, including the lack of peer review, the fact that the standard was developed to assist with a lawsuit, and the use of a sample size of just a single motorcycle).

80. Id. at 428.

81. *Am. Honda*, 600 F.3d at 815–16. Although the court did not define "critical," a subsequent Seventh Circuit opinion defined it as "important to an issue decisive for the motion for class certification." Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 812 (7th Cir. 2012).

82. *Am. Honda*, 600 F.3d at 816.

In support of its bright-line holding, the court cited to precedent indicating that "a district court must make the necessary factual and legal inquiries and decide all relevant contested issues prior to certification."[83] Several district courts have adopted the *American Honda* court's approach,[84] and three other circuits have expressly required a full *Daubert* analysis: the Eleventh Circuit in its 2011 decision in *Sher v. Raytheon Co.*,[85] the Third Circuit in its 2015 decision in *In re Blood Reagents Antitrust Litigation*,[86] and most recently, the Fifth Circuit in its 2021 decision in *Prantil v. Arkema Inc.*[87]

2. Zurn Pex *and the Tailored* Daubert *Approach.* — The Eighth Circuit's 2011 decision in *In re Zurn Pex Plumbing Products Liability Litigation* typifies the tailored *Daubert* approach.[88] In *Zurn Pex*, a putative class of homeowners brought an action against Zurn Pex, Inc. and Zurn Industries, Inc. (Zurn) alleging defects in the brass pipe fittings used in the company's plumbing systems.[89] In satisfaction of the predominance requirement of 23(b)(3), plaintiffs relied on expert opinions from a statistician and a corrosion expert to demonstrate that the pipe fittings were susceptible to premature failure.[90] Zurn, alleging that some of the values used by the experts in their calculations were assumed or inaccurate, moved to strike the testimony.[91] While acknowledging that some of the experts' testimony "may or may not be admissible" at trial, the district court denied the motion to exclude the testimony and held that, in class certification

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83. Id. at 817 (citing West v. Prudential Sec., Inc., 282 F.3d 935, 938 (7th Cir. 2002); Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 676 (7th Cir. 2001)). Notably, the two cases cited relate to the district court's obligations to weigh competing evidence and inquire into the merits of the underlying claims as necessary for deciding Rule 23 issues. *American Honda* thereby serves as an example of courts retrofitting fact-finding requirements for gatekeeping purposes. See infra section II.C.2.

84. See, e.g., Cole's Wexford Hotel, Inc. v. Highmark, Inc., No. 10-1609, 2019 WL 988655, at *5 (W.D. Pa. Mar. 1, 2019) (holding that a district court must conduct a full *Daubert* analysis even where the defendant explicitly chose not to issue a *Daubert* challenge); In re Chocolate Confectionary Antitrust Litig., 289 F.R.D. 200, 208 (M.D. Pa. 2012) (finding that a "thorough *Daubert* analysis is appropriate at the class certification stage . . . in light of the court's responsibility to apply a 'rigorous analysis' to determine if the putative class has satisfied the requirements of Rule 23").

85. 419 F. App'x 887, 890 (11th Cir. 2011). In fact, the Eleventh Circuit misapplied the *American Honda* holding: The court in *Raytheon* considered whether the district court erred by not properly weighing the probative value of conflicting expert testimony once it was admitted, not whether the district court utilized the proper evidentiary standard in admitting the evidence in the first place. See id. at 890. *Raytheon* thus serves as an example of courts blurring the line between the district court's roles as gatekeeper and fact-finder. See infra section II.C.2.

86. 783 F.3d 183, 185 (3d Cir. 2015).

87. 986 F.3d 570, 574–76 (5th Cir. 2021).

88. 644 F.3d 604, 611–14 (8th Cir. 2011).

89. Id. at 608.

90. See id. at 609.

91. In re Zurn Pex Plumbing Prods. Liab. Litig., 267 F.R.D. 549, 555–57 (D. Minn. 2010).

decisions, "the *Daubert* inquiry is tailored to the purpose for which the expert opinions are offered."[92]

On appeal, Zurn argued that the district court should have adopted the Seventh Circuit's holding in *American Honda* and subjected the expert testimony to a full *Daubert* analysis.[93] The Eight Circuit declined, stating that the court was "not convinced that the approach of *American Honda* would be the most workable in complex litigation or that it would serve case management better than the one followed by the district court here."[94] Instead, the court held that the district court properly screened the testimony at issue by engaging in a "tailored" *Daubert* analysis considering the reliability of the expert opinions "in light of the available evidence and the purpose for which they were offered."[95] The court did not expound upon the exact methodology of the tailored approach.[96]

The Eighth Circuit provided three rationales for their tailored *Daubert* analysis. First, the court reasoned that the limited scope of precertification discovery created evidentiary "gaps" preventing the district court from engaging in a true *Daubert* analysis.[97] Second, the court cited to the "'inherently tentative' . . . [and] preliminary" nature of class certification,[98] stating that "[the defendant's] desire for an 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."[99] Finally, the court reasoned that the absence of a jury rendered a full *Daubert* analysis unnecessary at the class certification stage since "[t]he main purpose of *Daubert* exclusion is to protect juries from being swayed by dubious scientific testimony."[100]

Several district courts have followed the guidance of the *Zurn Pex* court by refusing to engage in a full *Daubert* analysis during class certification proceedings.[101] While no other courts of appeals have adopted the

92. Id. at 556.

93. See *Zurn Pex*, 644 F.3d at 611.

94. Id. at 612.

95. Id.

96. See infra section II.B.1.

97. See *Zurn Pex*, 644 F.3d at 612–13.

98. Id. at 613 (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 n.11 (1978), superseded by Fed. R. Civ. P. 23(f), as recognized in Microsoft Corp. v. Baker, 137 S. Ct. 1702 (2017)).

99. Id.

100. Id.

101. See, e.g., In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Pracs. & Antitrust Litig., No. 17-MD-2785-DDC-TJJ, 2019 WL 1569294, at *4 (D. Kan. Apr. 11, 2019) ("A district court . . . should apply 'a focused *Daubert* analysis which scrutinize[s] the reliability of the expert testimony in light of the criteria for class certification and the current state of the evidence.'" (quoting *Zurn Pex*, 644 F.3d at 614)); Bruce v. Harley-Davidson Motor Co., No. CV 09-6588 CAS RZX, 2012 WL 769604, at *4 (C.D. Cal. Jan. 23, 2012) ("The Court believes that the approach adopted by the district court and affirmed by the Eighth Circuit in *In re Zurn* is the appropriate application of *Daubert* at the class certification stage.").

Eighth Circuit's tailored *Daubert* approach, in 2013, the Second Circuit, citing to the absence of a clear ruling from the Supreme Court on the matter, declined to find an abuse of discretion when a district court refused to conduct any *Daubert* hearing at all in determining the admissibility of expert testimony.[102]

3. *A Third Option: The Nonexclusionary* Daubert *Approach.* — In 2018, the Ninth Circuit altered the landscape of the *Daubert* split by holding that district courts may not refuse to consider evidence during class certification merely due to inadmissibility.[103] In *Sali v. Corona Regional Medical Center* (*Sali II*), individuals formerly employed by a hospital in California filed a putative class action alleging employment policies that resulted in underpayment of wages.[104] In support of the typicality requirement of Rule 23(a), the class representatives submitted testimony from a paralegal who reviewed their payroll records and concluded that the hospital's time-rounding policies resulted in undercounting of each representative's time worked.[105] The district court denied class certification, holding in part that the class representatives failed to satisfy the typicality requirement due to the inadmissibility of the paralegal's testimony.[106]

On appeal, the Ninth Circuit held that the district court abused its discretion by refusing to consider the testimony solely due to its inadmissibility.[107] Much like the Eighth Circuit in *Zurn Pex*,[108] the court emphasized the preliminary and tentative nature of class certification decisions and reasoned that the evidentiary gaps at the class certification stage make it an improper time to engage in "an evidentiary shooting match."[109] However, while the Eighth Circuit employed this reasoning to support a narrower application of evidentiary standards—i.e., tailoring the *Daubert* analysis to the "purpose" of class certification[110]—the Ninth Circuit cited this rationale to eliminate exclusionary standards for evidence in the class certification inquiry altogether. In other words, where

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102. In re U.S. Foodservice Inc. Pricing Litig., 729 F.3d 108, 129 (2d Cir. 2013) ("The Supreme Court has not definitively ruled on the extent to which a district court must undertake a *Daubert* analysis at the class certification stage.").

103. See *Sali II*, 909 F.3d 996, 1006 (9th Cir. 2018).

104. Id. at 1000.

105. Id. at 1003.

106. Id. at 1002–03. The district court found the testimony inadmissible for three reasons: (1) The paralegal could not authenticate the data used in his analysis due to his lack of personal knowledge of its accuracy; (2) the paralegal's declaration included improper opinion testimony; and (3) the paralegal's methodology was "the technical or specialized work of an expert witness," and thus the paralegal lacked the qualifications for the use of such methodology. Id. at 1003 (internal quotation marks omitted) (quoting Sali v. Universal Health Servs. of Rancho Springs, Inc., No. CV 14-985, 2015 WL 12656937, at *10 (C.D. Cal. June 3, 2015)).

107. Id. at 1006.

108. See supra notes 97–99 and accompanying text.

109. *Sali II*, 909 F.3d at 1004.

110. See supra note 95 and accompanying text.

the Eighth Circuit sought to limit the scope of evidentiary gatekeeping during class certification, the Ninth Circuit sought to throw the gate wide open. The *Sali II* court reasoned that the "manner and degree of evidence" required during class certification proceedings differs from that which is required at trial.[111]

In the Ninth Circuit's view, then, what is the role of *Daubert* during class certification proceedings? Although failure to satisfy *Daubert* had not been the basis of the inadmissibility of the evidence at issue in *Sali II*,[112] the court addressed the *Daubert* issue by way of demonstrating how courts may consider a wider pool of evidence while still satisfying the Supreme Court's rigorous analysis requirement for class certification.[113] The court directed district courts to evaluate the admissibility of expert testimony with a full *Daubert* analysis but to utilize the results of the analysis in a nonexclusionary fashion.[114] Instead, the district courts should adjust the probative value of the evidence (vis-à-vis its tendency to prove or disprove Rule 23's requirements) according to its satisfaction of the *Daubert* standards.[115]

The significance of the *Sali II* opinion lies in its rejection of a fundamental assumption of both the full *Daubert* and tailored *Daubert* courts—that whatever form of *Daubert* scrutiny a district court applies, the analysis controls whether the court must strike the testimony, barring itself from considering the evidence. Instead, *Sali II* innovates an approach wherein *Daubert*'s reliability analysis functions not as a test of admissibility but rather as an evaluation of persuasiveness affecting the overall weight of evidence considered in favor of or in opposition to class certification.

II. PROBLEMS WITH EXCLUSIONARY APPLICATIONS OF *DAUBERT* DURING CLASS CERTIFICATION PROCEEDINGS

In *Sali II*, the Ninth Circuit eschewed the use of exclusionary rules at the class certification stage and thus cast doubt on the conventional wisdom employed on both sides of the circuit split regarding *Daubert*'s role in the certification context.[116] This development calls for an evaluation of the

111. *Sali II*, 909 F.3d at 1006 (internal quotation marks omitted) (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 561 (1992)). The court supported this rejection of evidentiary formalism by analogizing Supreme Court guidance on the admissibility standards applied to evidence submitted to demonstrate the elements of standing, in which the Court noted that evidentiary standards vary at different stages of litigation. See *Lujan*, 504 U.S. at 561.

112. See supra note 106.

113. *Sali II*, 909 F.3d at 1006 ("When conducting its 'rigorous analysis' into whether the Rule 23(a) requirements are met, the district court need not dispense with the standards of admissibility entirely.").

114. Id. ("[I]n evaluating challenged expert testimony in support of class certification, a district court should evaluate admissibility under the standard set forth in *Daubert* . . . . But admissibility must not be dispositive." (citation omitted)).

115. Id. ("Instead, an inquiry into the evidence's ultimate admissibility should go to the weight that evidence is given at the class certification stage.").

116. See supra section I.D.3.

two predominant approaches to screening expert testimony during class certification: Do they serve the goals of the class action mechanism? Are they practicable and predictable? And more fundamentally, is there even a proper basis for exclusionary gatekeeping during class certification? This Part endeavors to answer these questions. Sections II.A and II.B describe problems posed by the full *Daubert* analysis and the tailored *Daubert* analysis, respectively. Section II.C then argues that both approaches suffer from the same critical flaw—namely, the assumption that an exclusionary *Daubert* standard should be employed at the class certification stage at all.

A. *Practical Problems with the Full* Daubert *Approach*

1. *The Full* Daubert *Approach Reduces Efficiency and Wastes Resources.* — Merits discovery in class action suits often involves large expenditures of time and resources for both plaintiffs and defendants.[117] As such, conducting full-blown discovery into the merits prior to class certification can result in unnecessary expenses if certification is ultimately denied.[118] To prevent this sort of waste, courts frequently utilize their broad discretion to control discovery under Rule 26(c) of the Federal Rules of Civil Procedure to bifurcate the process,[119] thereby limiting discovery at the class certification stage to issues relevant to Rule 23 requirements rather than issues relevant to the merits of the claims.[120] However, the line between certification and merits issues is not always clear, and the two frequently overlap.[121]

Legislative action and judicial precedent make clear that, where overlap exists, discovery relating to the merits is permitted insofar as necessary to determine satisfaction of certification requirements. In the 2003 amendments to Rule 23(c), Congress removed the district courts' power to grant "conditional certification" and changed the requirement to make certification decisions "as soon as practicable" to "at an early practicable time."[122] The legislative history of the amendments indicates that the changes were intended to promote "discovery on the nature of the merits issues, which may be necessary for certification decisions, while

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117. See 1 Joseph M. McLaughlin, McLaughlin on Class Actions § 3:10 (16th ed. 2019) (detailing why courts defer merits discovery until after class certification is decided).

118. See Manual for Complex Litigation (Fourth) § 21.14 (2004) ("[I]n cases that are unlikely to continue if not certified, discovery into aspects of the merits unrelated to certification delays the certification decision and can create extraordinary and unnecessary expense and burden.").

119. See Fed. R. Civ. P. 26(c) ("The court may, for good cause, issue an order to protect a party or person from . . . undue burden or expense, including . . . forbidding the disclosure or discovery . . . .").

120. See Manual for Complex Litigation (Fourth), supra note 118, § 21.14.

121. Id. ("Generally, discovery into certification issues pertains to the requirements of Rule 23 . . . ; discovery into the merits pertains to the strength or weaknesses of the claims or defenses and tests whether they are likely to succeed. There is not always a bright line between the two.").

122. Fed. R. Civ. P. 23(c) advisory committee's note on 2003 Amendments.

postponing discovery pertaining to the probable outcome on the merits until after the certification decision has been made."[123] Meanwhile, in *Wal-Mart* and *Comcast*, the Supreme Court explicitly permitted precertification discovery relating to merits issues where necessary for determining satisfaction of Rule 23 requirements.[124]

Although it is well settled that precertification discovery may go to the merits of the claims to the extent that they overlap with Rule 23 issues, judicial discretion still plays a key role in the scope of precertification discovery.[125] This is precisely where the application of the full *Daubert* analysis, which applies trial-level standards of admissibility, becomes a problem. Subjecting precertification expert testimony to full *Daubert* scrutiny requires the testimony to meet the same admissibility standards for class certification purposes as for merits purposes, even when these purposes are distinct.[126] While the court is prohibited from deciding a merits issue unnecessary for its evaluation of Rule 23 requirements,[127] so long as the merits issues are intertwined with the expert testimony, the full *Daubert* analysis demands that the evidence be robust enough for admission at trial. This needlessly increases the burden of precertification discovery because parties submitting expert testimony are effectively required to conduct discovery related to merits issues raised by that testimony that would otherwise be unnecessary for the court's determination of Rule 23 issues. By inflating the degree of merits discovery required prior to certification, *Daubert* diminishes the efficiency of bifurcation.[128]

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123. Report of the Judicial Conference Committee on Rules of Practice and Procedure 11 (2002), https://www.uscourts.gov/sites/default/files/fr_import/ST9-2002.pdf [https://perma.cc/4EK3-95BY]; see also Fed. R. Civ. P. 23(c) advisory committee's note on 2003 Amendments ("[I]t is appropriate to conduct controlled discovery into the 'merits,' limited to those aspects relevant to making the certification decision on an informed basis.").

124. See supra section I.C.2.

125. See In re Initial Pub. Offerings Sec. Litig. (*In re IPO*), 471 F.3d 24, 41 (2d Cir. 2006) ("[O]verlap between a Rule 23 requirement and a merits issue justifies some adjustment in a district court's procedures at the class certification stage . . . . [A] district judge must be accorded considerable discretion to limit both discovery and the extent of the hearing on Rule 23 requirements."), decision clarified on denial of reh'g sub nom. In re Initial Pub. Offering Sec. Litig., 483 F.3d 70 (2d Cir. 2007).

126. For example, in a securities fraud class action, plaintiffs might submit expert testimony from an economist demonstrating the elements necessary to establish a fraud on the market presumption. Such a report would not need to demonstrate materiality at the class certification stage. See Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 474 (2013) ("Because a failure of proof on the issue of materiality . . . does not give rise to any prospect of individual questions overwhelming common ones, materiality need not be proved prior to Rule 23(b)(3) class certification."). A full *Daubert* inquiry, however, would require that the expert's report meet trial-level standards of admissibility, even though materiality need not be demonstrated at this stage of the litigation.

127. *In re IPO*, 471 F.3d at 41 ("[I]n making [certification] determinations, a district judge should not assess any aspect of the merits unrelated to a Rule 23 requirement . . . .").

128. See Panaggio, supra note 23, at 981–82. Panaggio argues that bifurcated discovery leads to evidentiary gaps in merits issues during certification proceedings and that the incompatibility of these gaps with a full *Daubert* analysis would decrease the circuit court's

Even when courts choose not to bifurcate discovery and instead make certification decisions later in the discovery process, doubts remain as to whether the full *Daubert* analysis allocates judicial resources efficiently. *Daubert* assessments are lengthy and expensive endeavors, often involving hundreds of pages of memoranda from both parties and hearings that can stretch into days-long ordeals.[129] When courts do not bifurcate and make certification decisions closer to the completion of discovery, two more opportunities to subject expert testimony to *Daubert* scrutiny—at the summary judgment and pretrial phases[130]—are just around the corner. The addition of another round of admissibility hearings in such close proximity to other gatekeeping hurdles compounds judicial resource expenditures without resulting in significant savings in the event that the court decides to strike the testimony.[131]

2. *The Full* Daubert *Approach Disproportionately Harms Plaintiffs.* — Although *Daubert*, when applied, subjects the testimony of plaintiff and defendant experts to equal levels of scrutiny, empirical data show that plaintiff experts are significantly more likely to be challenged.[132] Plaintiffs tend to rely more on expert testimony than defendants since they bear the

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incentive to bifurcate discovery in the first place. Id. But it is worth distinguishing Panaggio's assessment, which accepts evidentiary gaps as necessary corollaries of bifurcated discovery, from the point presently made, which argues that, even though evidentiary gaps could in fact be filled in during bifurcated discovery due to judicial and legislative authority to inquire into merits issues during the certification process, the benefits of the bifurcation would be significantly diminished. The Second Circuit embraced this view in *In re IPO*, holding that the district court "has ample discretion to circumscribe both the extent of discovery concerning Rule 23 requirements and the extent of a hearing to determine whether such requirements are met in order to assure that a class certification motion does not become a pretext for a partial trial of the merits." 471 F.3d at 41.

129. See Christine P. Bartholomew, Death by *Daubert*: The Continued Attack on Private Antitrust, 35 Cardozo L. Rev. 2147, 2190 (2014).

130. See id. at 2186.

131. See id. at 2189 ("Each repeated expert challenge exhausts more judicial resources. Allowing these challenges to occur over and over again quickly adds up, with the cost and delay of the repeated *Daubert* motions outweighing any minimal savings from early exclusions.").

132. See, e.g., Doug Branch, Charles Reddin & Saleema Damji, PwC, *Daubert* Challenges to Financial Experts: A Yearly Study of Trends and Outcomes (2000–2016) 22 (2017), https://www.pwc.com/us/en/forensic-services/assets/pwc-daubert-challenges-study.pdf [https://perma.cc/K5X4-32AY] (finding that, between 2000 and 2016, sixty-seven percent of *Daubert* challenges against financial experts were directed at plaintiff experts); Lloyd Dixon & Brian Gill, RAND Inst. for Civ. Just., Changes in the Standards for Admitting Expert Evidence in Federal Civil Cases Since the *Daubert* Decision 20 (2001), https://rand.org/content/dam/rand/pubs/monograph_reports/2005/MR1439.pdf [https://perma.cc/MW9N-LAAY] (finding that challenges to plaintiff experts accounted for eighty percent of total *Daubert* challenges in the six years after the *Daubert* decision); D. Michael Risinger, Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?, 64 Alb. L. Rev. 99, 111 (2000) (noting that eighty-two percent of *Daubert* challenges to experts in state civil cases were directed at plaintiff experts, forty percent of which were successful).

burden of demonstrating the substantive elements of their claims.[133] If a full *Daubert* analysis were required, plaintiffs would need to engage in more costly and time-consuming discovery before certification, wading deeper into the facts relevant to their expert's testimony than otherwise needed.[134] Practically, this would entail taking more detailed depositions, paying experts higher fees to more fully develop their reports, and conducting more class discovery.[135] Furthermore, because a great deal of class actions are brought on a contingent-fee basis wherein the plaintiffs' attorneys expend time and resources without any assurance of compensation, the added obstacle of *Daubert* disincentivizes plaintiffs' attorneys from pursuing claims in the first place.[136]

There is thus little doubt that engaging in a full *Daubert* analysis at the certification stage imposes significantly greater costs on plaintiffs than defendants. This matters because the class action mechanism is supposed to enable plaintiffs to pursue claims that would be too small to litigate individually.[137] This policy goal has been increasingly sidelined in recent years by changes restricting access for plaintiffs, including heightened pleading rules, enhanced precertification scrutiny of merits issues, and loosened standards for summary judgment.[138] Of course, some argue that adopting a full *Daubert* analysis would be in line with the recent trend toward heightened precertification scrutiny, which is motivated by concerns of frivolous suits and coercive settlements.[139] Solutions to these

133. See Andrew W. Jurs & Scott DeVito, Et Tu, Plaintiffs? An Empirical Analysis of *Daubert*'s Effect on Plaintiffs, and Why Gatekeeping Standards Matter (a Lot), 66 Ark. L. Rev. 975, 985 (2013) ("Generally, in our civil-justice system, a plaintiff filing a case has the burden of establishing the necessary elements to succeed on a claim. Since so many cases involve expert testimony, even a small shift in expert admissibility standards will necessarily raise the burden on those claimants.").

134. See supra section II.A.1.

135. See Bartholomew, supra note 129, at 2191.

136. See Arthur R. Miller, Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure, 88 N.Y.U. L. Rev. 286, 313 (2013).

137. See Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." (internal quotation marks omitted) (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997))).

138. See Miller, supra note 136, at 314–22 (discussing how recent class certification limitations have undermined the access-enhancing policy goals of class actions); A. Benjamin Spencer, Class Actions, Heightened Commonality, and Declining Access to Justice, 93 B.U. L. Rev. 441, 448 (2013) (describing the recent pattern of decisions limiting plaintiffs' ability to bring class action claims).

139. See, e.g., Mullenix, supra note 33, at 611–16 (describing the shift to heightened scrutiny at the certification stage as a reaction to the unfair pressure defendants faced to settle under the earlier liberal certification standard).

concerns, however—to the extent that such concerns are warranted[140]—should be balanced with the chilling effects they may have on Rule 23's goal of improving access to the courts. At the very least, it is worth considering that the heightened restrictions of the past decade have not even been afforded time to take effect in a quantifiable way. Absent compelling evidence that abusive litigation is a genuine and ongoing issue, courts should be hesitant to further increase precertification burdens for plaintiffs who, very often, have no other means of seeking justice.

B. *Practical Problems with the Tailored* Daubert *Approach*

1. *The Tailored* Daubert *Approach Is Ambiguous and Unworkable.* — The most significant flaw in the tailored *Daubert* approach espoused by the Eighth Circuit is that the exact methodology of the approach is unclear and impracticable.[141] The court in *Zurn Pex* characterized its analysis as one examining the "reliability of the expert opinions in light of the available evidence and the purpose for which they were offered" but offered no practical guidance as to what such an analysis entails.[142] At first glance, it might appear that the modifications involved in a tailored analysis would simply pertain to *Daubert*'s "fit" requirement, wherein the judge scrutinizes the gap between the methodology used and the expert's opinion on the case:[143] Instead of analyzing whether an expert's methodology could reasonably support a theory related to the merits of the class's claims, the judge would evaluate whether the methodology could reasonably support a theory related to a Rule 23 requirement. As was the case in *Zurn Pex*, however, the two theories are often one and the same.[144] The *Zurn Pex* plaintiffs sought to demonstrate predominance by using expert testimony showing a widespread common defect in Zurn's pipe fittings.[145] Similarly, showing a defect would be necessary for an ultimate finding in favor of the plaintiffs at trial. The expert's theory—that a defect exists—would be the same at both the certification and trial stages, rendering the nexus between the expert's methodology and opinion identical for both purposes. Therefore, it cannot be the case that the tailored *Daubert* analysis simply alters the judge's scrutiny of "fit."

The analytical process envisioned by the Eighth Circuit is not made any clearer by the court's actual application of the analysis, in which the

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140. See Miller, supra note 136, at 360–62 (arguing that claims of widespread abusive and frivolous litigation are overstated and speculative); see also infra section III.C.1 (challenging the claim that coercive settlement pressure warrants heightened precertification scrutiny).

141. See Bartholomew, supra note 129, at 2161 n.86 ("[The] tailored *Daubert* test does little to assess an expert or avoid improper gatekeeping, as the contours of this modified approach are not spelled out.").

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

143. See supra note 28 and accompanying text.

144. See supra note 22 and accompanying text.

145. See supra notes 88–90 and accompanying text.

court seemingly subjected the testimony of the plaintiffs' experts to exactly the same sort of scrutiny typically applied in a standard *Daubert* analysis.[146] In dismissing each of Zurn's challenges to the validity and reliability of the experts' testimony, the court either found that the challenges went to the weight, rather than the admissibility, of the evidence,[147] or else found that the experts used sufficient data to warrant admissibility under *Daubert*.[148] The court never clarified how demonstrating a product defect for predominance purposes requires a lesser degree of scientific reliability than demonstrating the defect for merits purposes at trial and failed to explain which elements of their analysis were actually "tailored" to the class certification proceedings.

The ambiguity of the tailored *Daubert* approach raises concerns as to the standard's efficiency and predictability.[149] While the approach theoretically mitigates inefficiencies arising from a full *Daubert* analysis by better accommodating bifurcated discovery[150] and avoids striking expert testimony for failure to satisfy *Daubert* on noncertification-related merits issues,[151] it also renders the *Daubert* framework flexible to the point of unpredictability.[152] This unpredictability could lead to inefficient discovery as parties struggle to satisfy a standard they do not understand. *Daubert* itself is already a flexible standard, granting the judge considerable discretion in determining admissibility.[153] The addition of another layer of discretion atop judges' existing latitude in a typical *Daubert* analysis would create a standard with very little substance. Indeed, since *Zurn Pex* was decided, the Eighth Circuit has yet to find one abuse of discretion in

146. See *Zurn Pex*, 644 F.3d at 614–16.

147. See id. at 614 (considering Zurn's challenge to the strain values used in one of the experts' analyses and concluding that objections to the accuracy of values used in a generally reliable methodology go to weight rather than admissibility).

148. See id. at 615 (considering Zurn's challenge to the validity of an input used in one of the expert's calculations and concluding that the judge's significant discretion under *Daubert* permitted admission of the evidence).

149. Somewhat ironically, the *Zurn Pex* court cited to its skepticism "that the approach of *American Honda* would be the most workable in complex litigation" as justification for rejecting the Seventh Circuit's full *Daubert* approach. Id. at 612.

150. See Bruce v. Harley-Davidson Motor Co., No. CV 09-6588 CAS RZx, 2012 WL 769604, at *4 (C.D. Cal. Jan. 23, 2012) (applying a tailored *Daubert* analysis in a case with bifurcated discovery); see also supra section II.A.1.

151. See Tait v. BSH Home Appliances Corp., 289 F.R.D. 466, 496 (C.D. Cal. 2012) (applying a tailored *Daubert* analysis and finding that the challenges to the expert's testimony went to the merits of the case rather than Rule 23 issues).

152. See Meredith M. Price, Note, The Proper Application of *Daubert* to Expert Testimony in Class Certification, 16 Lewis & Clark L. Rev. 1349, 1357 n.39 (2012) (positing that the tailored analysis "go[es] beyond the flexibility permissible under *Daubert*").

153. See Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 594 (1993) ("The inquiry . . . is, we emphasize, a flexible one."); see also Kumho Tire Co. v. Carmichael, 526 U.S. 137, 153 (1999) ("[W]hether *Daubert*'s specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine.").

admission of expert testimony during class certification proceedings.[154] When discretion becomes broad enough to justify the admission of virtually any expert testimony, it invites the question: Why use an exclusionary standard at all?

C. *Impropriety of Applying Either Exclusionary* Daubert *Approach*

Having considered the particular problems arising from each of the major sides of the *Daubert* split, this section proceeds to argue that both types of *Daubert*-based exclusionary approach to expert testimony are improper at the class certification stage. Proponents of the exclusionary *Daubert* approaches often fail to consider the nonapplicability of the Federal Rules of Evidence and reason that the judicially established rigorous analysis requirement demands scrutiny of expert testimony prior to admission at the class certification stage.[155] As this section will demonstrate, however, the applicability of the FRE during class certification proceedings is far from certain, and the rigorous analysis requirement is properly understood as a fact-finding standard rather than an admissibility-centered gatekeeping standard. Furthermore, obliging a judge to engage in an exclusionary *Daubert* analysis during class certification runs counter to judges' discretion to control their own pending litigation.[156] Therefore, the imposition of an additional gatekeeping hurdle during class certification is unnecessary, improper, and unduly restrictive.

1. *The Federal Rules of Evidence Do Not Apply.* — Although it is well settled that Rule 23 requires a court's analysis to go beyond the pleadings[157] and demands that plaintiffs affirmatively demonstrate compliance with class certification requirements,[158] the Rule does not require an evidentiary hearing,[159] nor does it specify whether the FRE apply.[160] The Supreme Court has yet to issue a holding on the applicability of the FRE

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154. A February 2021 Lexis search disclosed thirty-one decisions by Eighth Circuit district courts positively citing to *Zurn Pex*. None have been successfully appealed on the *Daubert* issue. See, e.g., Asarco LLC v. NL Indus. Inc., 106 F. Supp. 3d 1015 (E.D. Mo. 2015); Smith v. ConocoPhillips Pipe Line Co., 298 F.R.D. 575 (E.D. Mo. 2014), rev'd on other grounds, 801 F.3d 921 (8th Cir. 2015).

155. See, e.g., In re Blood Reagents Antitrust Litig., 783 F.3d 183, 187 (3d Cir. 2015) (citing to the rigorous analysis requirement to support a finding that *Daubert* applies at the class certification stage); Mullenix, supra note 33, at 611 ("In light of the evolving rigorous analysis standard for class certification and the increased use of evidentiary hearings, courts ought to recognize that rules of evidence should be applied at class certification hearings.").

156. See infra section II.C.3.

157. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011) ("Rule 23 does not set forth a mere pleading standard.").

158. See supra section I.C.2.

159. See 1 McLaughlin, supra note 117, § 3:13.

160. In this respect, class certification may be distinguished from summary judgment proceedings, in which evidence must be admissible. Fed. R. Civ. P. 56(c)(2) ("A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.").

to class certification proceedings. Meanwhile, as exemplified by the *Daubert* split, lower courts have yet to reach consensus on the Rules' applicability.[161]

The most common argument in favor of strict application of the FRE to class certification proceedings is the absence of class certifications from the list of proceedings excepted from the FRE in Rule 1101(d).[162] Courts in multiple circuits, however, have found 1101(d) to constitute a nonexhaustive list[163] and have employed a three-part framework to evaluate whether a given proceeding should be subject to the Rules.[164] This framework considers congressional intent, analogy to similar proceedings, and the nature of the proceeding.[165] Libby Jelinek has identified and applied this framework to argue that the FRE should not apply to class certification proceedings.[166] While the first two prongs of congressional

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161. See supra section I.D. Compare, e.g., Unger v. Amedisys Inc., 401 F.3d 316, 325 (5th Cir. 2005) ("When a court considers class certification based on the fraud on the market theory, it must engage in thorough analysis . . . and base its ruling on admissible evidence."), Sicav v. Wang, No. 12 Civ. 6682(PAE), 2015 WL 268855, at *6 (S.D.N.Y. Jan. 21, 2015) ("[T]he Court must ensure that there is a basis in admissible evidence for each factual representation made in support of class certification . . . ."), and DeRosa v. Mass. Bay Commuter Rail Co., 694 F. Supp. 2d 87, 95 (D. Mass. 2010) ("The court considers only admissible evidence in determining whether Rule 23's requirements are met."), with *Sali II*, 909 F.3d 996, 1006 (9th Cir. 2018) ("[W]e license greater evidentiary freedom at the class certification stage . . . ."), In re Zurn Pex Plumbing Prods. Liab. Litig., 644 F.3d 604, 611 (8th Cir. 2011) ("We have never required a district court to decide conclusively at the class certification stage what evidence will ultimately be admissible at trial."), and Kristensen v. Credit Payment Servs., 12 F. Supp. 3d 1292, 1302 (D. Nev. 2014) ("The Court may consider inadmissible evidence to determine class certification.").

162. Jelinek, supra note 22, at 295 ("The most cited reason for applying the FRE . . . is the text of the FRE itself."). The FRE generally apply to "civil cases and proceedings." Fed. R. Evid. 1101(b). 1101(d), however, states that the Rules do not apply to:

> 1. [T]he court's determination, under Rule 104(a), on a preliminary question of fact governing admissibility; 2. grand-jury proceedings; and 3. miscellaneous proceedings such as: extradition or rendition; issuing an arrest warrant, criminal summons, or search warrant; a preliminary examination in a criminal case; sentencing; granting or revoking probation or supervised release; and considering whether to release on bail or otherwise.

Fed. R. Evid. 1101(d).

163. See, e.g., United States v. Frazier, 26 F.3d 110, 112 (11th Cir. 1994) (finding that the FRE do not apply to supervised release revocation proceedings, even though the proceeding was not included in 1101(d)); Arista Recs. LLC v. Does 1–27, 584 F. Supp. 2d 240, 255 (D. Me. 2008) ("[S]ubsection (d) does not 'represent an exclusive and exhaustive list.'" (quoting United States v. Zannino, No. 83-235-N, 1985 WL 2305, at *3 (D. Mass. June 5, 1985))). For an exploration of how decisions finding the list nonexhaustive remain intact despite a 2011 restyling of the FRE removing the qualifier that the FRE apply "generally," see Jelinek, supra note 22, at 300–02.

164. See Jelinek, supra note 22, at 303 ("Courts in several districts have applied the same general framework when considering whether the FRE apply to a proceeding.").

165. See id.

166. Id. at 308–23.

intent[167] and analogy to similar proceedings excluded from the FRE[168] offer some support, the preliminary nature of class certification provides the strongest basis for excluding certification proceedings from the Rules.

The FRE do not typically apply to preliminary procedural decisions, including determinations of jurisdiction, venue, and joinder.[169] Since class certification determines only whether a claim may proceed as an aggregate claim and, if so, who comprises the class, it would seem to fall into this category.[170] The Eighth Circuit acknowledged as much in *Zurn Pex* by emphasizing that class certification decisions are "tentative" and "preliminary."[171] Additionally, as noted by Jelinek, the Supreme Court has directly compared Rule 23 to the rules of joinder and consolidation, where the FRE do not apply, emphasizing that certification "alter[s] only how the claims are processed."[172] Support may also be found in Rule 23 itself, which establishes that an order granting or denying class certification may be altered or amended before final judgment.[173] In light of the legislative and judicial guidance on the nature of the certification proceeding and

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167. Jelinek argues that, although FRCP 23 predates FRE 1101 by almost a decade, there is good reason to believe that Congress did not consider including class certification in the list of exceptions because evidentiary issues seldom arose in class certification proceedings until courts imposed higher evidentiary burdens decades later. See id. at 308–09. These slowly evolving evidentiary standards weaken a presumption that Congress intentionally omitted class certification proceedings from 1101(d). Id.

168. Jelinek compares class certification proceedings to the 1101(d)-excepted preliminary examination in a criminal case, which is required to determine whether there is "probable cause to believe an offense has been committed and the defendant committed it." Fed. R. Crim. P. 5.1(e). Both proceedings theoretically avoid addressing merits issues and do not touch on issues of liability. Additionally, Congress's concerns about administrative necessity and efficiency in excluding the preliminary examination from the FRE are also implicated to some extent during class certification proceedings. See Jelinek, supra note 22, at 309–11. Alternatively, preliminary injunctions may serve as a useful analogy to class certification. Preliminary injunctions are not included in 1101(d), but courts consistently hold that the FRE do not apply. See, e.g., Mullins v. City of New York, 626 F.3d 47, 52 (2d Cir. 2010) ("[H]earsay evidence may be considered by a district court in determining whether to grant a preliminary injunction."); Sierra Club, Lone Star Chapter v. Fed. Deposit Ins. Corp., 992 F.2d 545, 551 (5th Cir. 1993) ("[A]t the preliminary injunction stage, . . . the district court may rely on otherwise inadmissible evidence, including hearsay evidence."). Like class certification decisions, preliminary injunctions are based on incomplete discovery and are nonbinding at future stages of litigation to the extent that they involve findings of fact. See Indus. Bank of Wash. v. Tobriner, 405 F.2d 1321, 1324 (D.C. Cir. 1968).

169. See Jelinek, supra note 22, at 313 n.184 (citing Arthur R. Miller, Keynote Address, The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative, 64 Emory L.J. 293, 298 n.22 (2014)).

170. See id. at 312–13.

171. In re Zurn Pex Plumbing Prods. Liab. Litig., 644 F.3d 604, 613 (8th Cir. 2011) (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 n.11 (1978), superseded by Fed. R. Civ. P. 23(f), as recognized in Microsoft Corp. v. Baker, 137 S. Ct. 1702 (2017)).

172. Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 559 U.S. 393, 408 (2010) (plurality opinion); see also Jelinek, supra note 22, at 313.

173. See Fed. R. Civ. P. 23(c)(1)(C).

absent legislative or Supreme Court guidance to the contrary, the FRE should not apply.[174]

2. *Rigorous Analysis Is a Standard for Fact-Finding, Not Gatekeeping.* — Evaluating the propriety of the exclusionary *Daubert* standards requires an understanding of the particular role the judge serves during class certification proceedings. When parties submit expert testimony at trial, there is a clear division of responsibility between judge and jury. The judge, serving as gatekeeper, determines whether the testimony is admissible, and the jury, serving as fact-finder, evaluates the testimony's probative value to make legal conclusions.[175] At the class certification stage, however, the judge takes on both of these roles and acts as fact-finder as well as gatekeeper.[176] Despite that duality of responsibilities, the judge's two roles remain distinct and, for the reasons outlined below, should be governed by independently derived standards.

Fact-finding requirements operate on a different plane than standards of admissibility. Admissibility standards are crafted, in large part, with an eye toward considerations that change throughout the litigation process,[177] such as the presence of a lay jury that might be prejudiced by unreliable or irrelevant information and the degree of finality associated with decisions based upon the evidence.[178] Fact-finding requirements, on the other hand, are focused on the substantive decision before the court and are intended to set the level of probabilistic reasoning sufficient for making legal conclusions.[179] The considerations involved in establishing

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174. Proponents of the Rules' applicability to certification proceedings raise concerns that settlement pressure created by certification effectively equates certification with holding the defendant liable. These arguments are unpersuasive for the reasons explained in section III.C.1.

175. See Apple Inc. v. Motorola, Inc., 757 F.3d 1286, 1314 (Fed. Cir. 2014) (discussing the judicial gatekeeping role), overruled by Williamson v. Citrix Online, LLC, 792 F.3d 1339 (Fed. Cir. 2017).

176. See Gariety v. Grant Thornton, LLP, 368 F.3d 356, 366 (4th Cir. 2004) (discussing how "the factors spelled out in Rule 23 must be addressed through findings," which necessitate factual considerations by the judge); see also Sher v. Raytheon Co., 419 F. App'x 887, 890 (11th Cir. 2011) ("A district court is the gatekeeper.").

177. See Lujan v. Defs. of Wildlife, 504 U.S. 555, 561 (1992) ("[E]ach element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., *with the manner and degree of evidence required at the successive stages of the litigation*." (emphasis added)).

178. See United States v. Brown, 415 F.3d 1257, 1268 (11th Cir. 2005) ("[Standards governing the admissibility of expert testimony] are even more relaxed in a bench trial situation, where the judge is serving as factfinder and we are not concerned about 'dumping a barrage of questionable scientific evidence on a jury.'" (quoting Allison v. McGhan Med. Corp., 184 F.3d 1300, 1310 (11th Cir. 1999))); see also supra notes 163–169 and accompanying text (demonstrating the propensity for the preliminary nature of a proceeding to affect the applicability of the FRE).

179. See Ronald J. Allen & Alex Stein, Evidence, Probability, and the Burden of Proof, 55 Ariz. L. Rev. 557, 558 (2013) ("Legal factfinding, like most real life decision-making, involves decision under uncertainty. Consequently, the legal system has adopted a set of decision rules to instruct judges and jurors how to decide cases in the face of uncertainty.");

whether a given conclusion must be found by a preponderance of the evidence or beyond a reasonable doubt are distinct from the considerations involved in establishing whether certain forms of testimony are admissible.[180] Therefore, fact-finding requirements are not a logical place to look when crafting gatekeeping standards, and vice versa.

An examination of the judicial history of the rigorous analysis requirement demonstrates that it is firmly rooted in the fact-finding sphere. In *Falcon*, the origin of rigorous analysis, the Court was concerned not with the admissibility of evidence but rather with the level of scrutiny the district court applied in assessing whether that evidence demonstrated the requirements of Rule 23.[181] Indeed, in the thirty-eight years since *Falcon*, courts have invoked the rigorous analysis requirement to adopt standards requiring district courts to resolve factual disputes relating to Rule 23 requirements,[182] weigh the probative value of conflicting evidence,[183] and inquire into merits issues when they overlap with class certification prerequisites.[184] All of these standards govern the judge's role as fact-finder rather than as gatekeeper.

Courts requiring an exclusionary *Daubert* analysis frequently predicate its application on the rigorous analysis requirement.[185] These decisions conflate the judge's dual roles without any acknowledgment that

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Ronald J. Allen & Brian Leiter, Naturalized Epistemology and the Law of Evidence, 87 Va. L. Rev. 1491, 1527–28 (2001) ("[L]egal fact finding involves a determination of the comparative plausibility of the parties' explanations . . . .").

180. For example, in criminal cases, the fact-finder may only convict if the defendant is found guilty beyond a reasonable doubt. Allen & Stein, supra note 179, at 558. This fact-finding standard is the same for both jury trials and bench trials. See, e.g., *Brown*, 415 F.3d at 1272 (enforcing a "beyond a reasonable doubt" standard for a criminal bench trial). However, admissibility standards are relaxed during bench trials due to the absence of a jury. See id. at 1268. Therefore, the jury's absence is relevant to the admissibility rules but not to the court's fact-finding obligations.

181. Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 158 (1982) ("[I]t was error for the District Court to presume that respondent's claim was typical of other claims . . . .").

182. See *In re IPO*, 471 F.3d 24, 41 (2d Cir. 2006) ("[Rule 23] determinations can be made only if the judge resolves factual disputes relevant to each Rule 23 requirement . . . and is persuaded to rule, based on the relevant facts and the applicable legal standard, that the requirement is met . . . ."), decision clarified on denial of reh'g sub nom. In re Initial Pub. Offering Sec. Litig., 483 F.3d 70 (2d Cir. 2007).

183. See In re Hydrogen Peroxide Antitrust Litig. (*Hydrogen Peroxide*), 552 F.3d 305, 323 (3d Cir. 2008) ("Weighing conflicting expert testimony at the certification stage is not only permissible; it may be integral to the rigorous analysis Rule 23 demands.").

184. See, e.g., Comcast Corp. v. Behrend, 569 U.S. 27, 33–34 (2013); Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 465–66 (2013); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350–51 (2011).

185. See, e.g., In re Zurn Pex Plumbing Prods. Liab. Litig., 644 F.3d 604, 614 (8th Cir. 2011) ("[By applying a tailored *Daubert* analysis,] the district court conducted the requisite 'rigorous analysis' of the parties' claims . . . ."); Cole's Wexford Hotel, Inc. v. Highmark Inc., No. CV 10-1609, 2019 WL 988655, at *6 (W.D. Pa. Mar. 1, 2019) ("The court *must* undertake a rigorous analysis of the evidence, which includes a threshold determination under *Daubert* about whether the evidence is admissible at trial.").

gatekeeping and fact-finding are fundamentally distinct inquiries. For example, in *In re Blood Reagents Antitrust Litigation*, the Third Circuit invoked the rigorous analysis requirement in support of its full *Daubert* holding.[186] The court cited to *Comcast* and *Hydrogen Peroxide* to support the notion that "'rigorous analysis' applies to expert testimony critical to proving class certification requirements."[187] While the two cited cases indeed "applied" the rigorous analysis standard to expert testimony, neither decision did so in a gatekeeping context; instead, both applied it to require a district court to scrutinize the probative value of expert testimony.[188] By presuming without explanation that gatekeeping standards could be derived from fact-finding standards, *Blood Reagents* and similar decisions improperly retrofit the rigorous analysis requirement envisioned by *Falcon* and subsequent decisions.

In addition to misappropriating the rigorous analysis requirement to impose unduly restrictive gatekeeping standards, some courts utilizing an exclusionary *Daubert* analysis have done so at the direct expense of their fact-finding obligations. For instance, in *Ellis v. Costco Wholesale Corp.*, Costco employees alleging gender discrimination in the company's promotion and management practices submitted reports from three experts to demonstrate 23(a)'s commonality requirement.[189] Costco moved to strike the testimony on various grounds of relevance and reliability.[190] The district court engaged in a thorough *Daubert* analysis of the experts' methodology and data but, after finding most of the testimony admissible, failed to engage in any scrutiny of the probative value of the experts' opinions.[191] On appeal, the Ninth Circuit vacated and remanded the district court's finding of commonality, remarking that the district court confused its gatekeeping and fact-finding roles.[192] A district court in

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Courts have also invoked the rigorous analysis requirement to support the general applicability of the FRE to class certification proceedings. See, e.g., Soutter v. Equifax Info. Serv. LLC, 299 F.R.D. 126, 131 (E.D. Va. 2014) ("The demand for a rigorous analysis of the class qualifying factors at the critical class certification stage makes it important that the evidence to be used in making that decision be reliable. The Federal Rules of Evidence teach that personal knowledge is the predicate of reliability.").

186. 783 F.3d 183, 187 (3d Cir. 2015).

187. Id.

188. See *Comcast*, 569 U.S. at 34 ("By refusing to entertain arguments against respondents' damages model that bore on the propriety of class certification, . . . the Court of Appeals ran afoul of our precedents requiring precisely that inquiry."); *Hydrogen Peroxide*, 552 F.3d at 323 ("Weighing conflicting expert testimony at the certification stage is not only permissible; it may be integral to the rigorous analysis Rule 23 demands.").

189. 240 F.R.D. 627, 632, 644 (N.D. Cal. 2007), aff'd in part, vacated in part, 657 F.3d 970 (9th Cir. 2011).

190. Id. at 644.

191. See id. at 644–51. This case was decided before the Ninth Circuit adopted a nonexclusionary *Daubert* approach in *Sali II*. See supra section I.D.3.

192. Ellis v. Costco Wholesale Corp., 657 F.3d 970, 982 (9th Cir. 2011) ("[T]he district court seems to have confused the *Daubert* standard it correctly applied . . . with the 'rigorous analysis' standard to be applied when analyzing commonality. Instead of judging the

the Second Circuit erred similarly while applying a tailored *Daubert* analysis.[193] The decision, ultimately abrogated by the Second Circuit in *In re IPO*,[194] certified a class after finding their expert's testimony admissible without weighing the expert's opinion against the directly opposing opinion of the defendant's expert.[195] These decisions demonstrate the importance of preserving the independence of the district court's gatekeeping and fact-finding responsibilities.

3. *Exclusionary* Daubert *Analyses Unduly Limit Judicial Discretion.* — The broad discretion afforded to district courts in class action proceedings has long been recognized by the federal rules, courts, and scholars alike.[196] Rule 23 acknowledges this discretion by instructing judges to evaluate whether aggregating the claims would be "superior" to other methods of adjudication, allowing them to consider factors including "the desirability or undesirability of concentrating the litigation of the claims in the particular forum" and "the likely difficulties in managing a class action."[197] The judge also exercises discretion in determining the scope of discovery, appointing class counsel, and opting not to certify a class even when Rule 23 requirements are met.[198] Discretion is so highly emphasized in the context of certification decisions because the judge is recognized to be in the best position to evaluate whether aggregating individual claims would best serve Rule 23's purposes of efficiency, manageability, and fairness.[199]

The exclusionary *Daubert* approaches, by requiring judges to limit the corpus of evidence available for their evaluation of Rule 23 requirements, undercut the discretionary nature of class certification proceedings. In the absence of obligation by either the FRE or the rigorous analysis requirement to do so, there is little reason for courts to impose an exclusionary rule that could severely limit a judge's universally recognized discretion to evaluate whether a given claim would be best adjudicated in the form of a class action. Some commentators argue that *Daubert* would protect a

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persuasiveness of the evidence presented, the district court seemed to end its analysis . . . after determining such evidence was merely admissible.").

193. See In re Visa Check/Mastermoney Antitrust Litig. (*Visa Check*), 192 F.R.D. 68, 76–84 (E.D.N.Y. 2000), aff'd sub nom. In re Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124 (2d Cir. 2001).

194. *In re IPO*, 471 F.3d 24, 42 (2d Cir. 2006) ("[W]e also disavow the suggestion in *Visa Check* that an expert's testimony may establish a component of a Rule 23 requirement simply by being not fatally flawed."), decision clarified on denial of reh'g sub nom. In re Initial Pub. Offering Sec. Litig., 483 F.3d 70 (2d Cir. 2007).

195. See *Visa Check*, 192 F.R.D. at 84.

196. See generally Tobias Barrington Wolff, Discretion in Class Certification, 162 U. Pa. L. Rev. 1897 (2014) (detailing the history and function of judicial discretion in class certification proceedings).

197. Fed. R. Civ. P. 23(b)(3).

198. See Jelinek, supra note 22, at 320.

199. Id. at 320–21.

judge's discretion from corruption by unreliable evidence.[200] Judges, however, are generally assumed to have the ability to identify bad evidence and assign testimony its proper probative value.[201] Additionally, the very nature of the *Daubert* analysis undermines the notion that judges are incapable of accurately assessing reliability. *Daubert* trusts judges to prevent juries from attributing undue credibility to dubious science and thereby presumes a judge equipped with the *Daubert* factors is adept at recognizing when expert testimony is unreliable.[202] If a judge is capable of sorting good evidence from bad, little is gained by the self-screening mechanism of an exclusionary *Daubert* analysis; instead, the discretionary nature of the class certification proceeding should be preserved. As the court in *Zurn Pex* noted, "There is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself."[203]

III. WHERE *DAUBERT* BELONGS

This Part suggests how courts can best satisfy the Supreme Court's rigorous analysis requirement during class certification proceedings while avoiding the issues associated with subjecting expert testimony to an exclusionary *Daubert* analysis. Section III.A, embracing the Ninth Circuit's view in *Sali II*,[204] describes how courts may engage in thorough consideration of the *Daubert* factors to determine the probative value, rather than the admissibility, of expert opinions. This section further considers how the Supreme Court's analysis of the expert testimony in *Comcast Corp. v. Behrend* serves as an illustration of such an approach. Section III.B explains how the proposed approach mitigates the issues outlined in Part II. Finally, section III.C addresses arguments against the approach. Ultimately, efficiency and fairness during the class certification process will be maximized not by creating additional gatekeeping hurdles where none exist, but rather by embracing the Supreme Court's recent emphasis in *Wal-Mart* and *Comcast* on the court's obligation to find actual conformance with the requirements of Rule 23.

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200. See Mullenix, supra note 33, at 626–29 (criticizing the strategic introduction of unreliable evidence to sway judges' class certification decisions).

201. Jelinek, supra note 22, at 321.

202. See In re Zurn Pex Plumbing Prods. Liab. Litig., 644 F.3d 604, 613 (8th Cir. 2011) ("[T]he main purpose of *Daubert* exclusion is to protect juries from being swayed by dubious scientific testimony."); Metavante Corp. v. Emigrant Sav. Bank, 619 F.3d 748, 760 (7th Cir. 2010) ("[T]he usual concerns of the [*Daubert*] rule—keeping unreliable expert testimony from the jury—are not present in [bench trials] . . . .").

203. 644 F.3d at 613 (internal quotation marks omitted) (quoting United States v. Brown, 415 F.3d 1257, 1269 (11th Cir. 2005)).

204. See supra section I.D.3.

A. *Adapting* Daubert *to Evaluate Persuasiveness Rather than Admissibility*

When faced with motions to strike expert testimony pursuant to *Daubert* during class certification proceedings, judges sympathetic to the issues presented in Part II can simply deny the *Daubert* motions and instead evaluate the probative value of expert testimony along with other evidence relevant to class certification. The absence of obligation under either the Federal Rules of Evidence[205] or the rigorous analysis requirement[206] to bar expert testimony from consideration should serve as a sufficient basis for the denial of *Daubert* motions. Furthermore, judges may reason that the absence of a jury from class certification proceedings renders the chief concerns of *Daubert* moot,[207] that subjecting expert testimony to the rigors of *Daubert* before the completion of merits discovery would impose undue cost upon the court and upon the party presenting the testimony,[208] and that preserving judicial discretion at the class certification stage serves the goals of aggregate litigation.[209]

Of course, a judge's inquiry into the reliability and relevance of challenged expert testimony would not end with the denial of a *Daubert* motion. The mere existence of an expert opinion attesting to the satisfaction of Rule 23 requirements hardly serves as a sufficient basis for class certification. The court must, pursuant to the Supreme Court's holdings in *Falcon*, *Wal-Mart*, and *Comcast*, engage in a rigorous analysis to ensure the certification requirements are actually satisfied.[210] In fulfillment of that obligation, courts should elect to implement the approach offered by the Ninth Circuit in *Sali II* when determining the probative value of expert testimony.[211] Following the guidance of that court, judges may employ a nonexclusionary *Daubert* analysis, evaluating the relevance and reliability of expert testimony in order to shed light on the persuasiveness of the evidence rather than as a determination of whether or not the evidence may be considered at all.

In practice, the nonexclusionary *Daubert* analysis would look much like a standard *Daubert* analysis, with the main difference lying in the consequences of the inquiry. The court would evaluate the testimony's reliability, considering factors such as whether the expert's methodology has been subject to peer review, whether the expert's technique is generally accepted by the scientific community, and whether there is a reasonable "fit" between the expert's data and the opinion proffered.[212] If the judge requires more information to assess the persuasiveness of the testimony,

205. See supra section II.C.1.
206. See supra section II.C.2.
207. See supra note 202 and accompanying text.
208. See supra section II.A.1.
209. See supra section II.C.3.
210. See supra section I.C.2.
211. See supra section I.D.3.
212. See supra notes 24–28 and accompanying text.

they may hold an evidentiary hearing to clarify any ambiguities.[213] If the judge determines that the expert testimony is unreliable after consideration of the *Daubert* factors, they may discount the probative value of the testimony as they see fit, just as they would with any other evidence submitted during the certification proceedings.

The Supreme Court's opinion in *Comcast Corp. v. Behrend*[214] provides a helpful glimpse into what a nonexclusionary application of *Daubert* would look like. In *Comcast*, after ruling that the lower court had failed to rigorously analyze the testimony of the plaintiffs' expert, the Court proceeded to scrutinize the probative value of the economist's report.[215] The expert had employed a statistical regression model to create a "but-for" baseline showing what prices would have been if not for Comcast's anticompetitive conduct; the model was intended to help determine damages by comparing the baseline to the actual prices during the relevant period.[216] However, the Court identified a flaw in the expert's methodology: The model calculated the baseline assuming that all four of the plaintiffs' theories of antitrust impact affected the price, whereas, in reality, the district court had rejected all but one of these theories.[217] For this reason, the Court found that the expert's model was insufficient to demonstrate that damages were capable of proof on a class-wide basis and decertified the class.[218] By scrutinizing the gap between the proposed model's calculation of damages and the remaining disputed facts in the case, the Court's analysis of the expert's regression model essentially replicated a "fit" evaluation of the sort frequently seen in standard *Daubert* analyses of regression models in antitrust cases.[219] The *Comcast* decision thus demonstrates how courts may employ *Daubert* factors to evaluate the probative value, rather than the admissibility, of expert testimony.

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213. While no circuit requires formal evidentiary hearings with live witnesses for class certification, such hearings are permitted if they would be useful for analyzing the evidence. 3 William B. Rubenstein, Newberg on Class Actions § 7:19 (5th ed. 2011).

214. 569 U.S. 27 (2013).

215. See id. at 36–38.

216. Id.

217. Id.

218. Id.

219. See, e.g., Reed Const. Data Inc. v. McGraw-Hill Cos., 49 F. Supp. 3d 385, 396–403 (S.D.N.Y. 2014) (analyzing whether the results of an expert's regression model "stand for what he claims they do"), aff'd, 638 F. App'x 43 (2d Cir. 2016); In re Linerboard Antitrust Litig., 497 F. Supp. 2d 666, 672–84 (E.D. Pa. 2007) (assessing the "fit" of an economic expert's regression model); see also Steven Messer, Comment, "We Doubt That Is So": Expert Witness Certification After *Wal-Mart* and *Comcast*, 17 U. Pa. J. Bus. L. 293, 315 (2014) (stating that the *Comcast* Court's scrutiny of the expert testimony "look[s] very much like [a] *Daubert* inquir[y]").

B. *Maximizing Efficiency, Fairness, and Fulfillment of the Rigorous Analysis Requirement*

Utilizing *Daubert* in a nonexclusionary fashion serves the efficiency interests of class actions[220] and relieves parties of discovery costs that are unnecessary so early in the adjudication process.[221] In particular, the proposed analysis preserves the cost-saving benefits of bifurcated discovery by allowing judges to minimize the degree of discovery into merits issues completed before the certification decision. Under the nonexclusionary *Daubert* approach, because expert reports need not satisfy trial-level standards of admissibility, parties may avoid conducting discovery into merits issues that are not otherwise required to demonstrate Rule 23 requirements. Furthermore, the approach avoids the flaws of the tailored *Daubert* analysis by removing a poorly defined hurdle from the certification process. The absence of this specter of ambiguous gatekeeping allows parties to more efficiently plan their precertification discovery.[222] Moreover, both litigants and the court conserve resources by avoiding a litany of formalistic evidentiary objections and *Daubert* hearings, which often take days to complete.[223] Of course, because the judge must nevertheless rigorously analyze the probative value of the testimony and weigh it against competing evidence to ensure that Rule 23 requirements are satisfied, plaintiffs will still be deterred from bringing frivolous suits and will be motivated to present expert reports reflecting comprehensive and in-depth discovery on issues related to class certification requirements.

The nonexclusionary approach also facilitates the court's proper fulfilment of the rigorous analysis requirement emphasized in *Wal-Mart* and *Comcast*.[224] In addition to avoiding a costly procedure outside the boundaries of the requirement,[225] the nonexclusionary *Daubert* approach actually helps judges more completely fulfill their fact-finding role by allowing them to consider evidence that carries probative value for class certification issues but may not reach trial levels of admissibility. In *Sali II*, the Ninth Circuit highlighted this very issue, noting that the district court's enforcement of evidentiary formalism at the class certification stage prevented the court from properly ascertaining whether Rule 23 requirements were satisfied.[226] The Ninth Circuit noted that, by relying on evidentiary rules to bar evidence that likely could have been adapted into an admissible form by the time the case reached trial, the district court

220. See supra note 20 and accompanying text.

221. See supra section II.A.1.

222. See supra section II.B.1.

223. See supra notes 129–131 and accompanying text.

224. See supra section I.C.2.

225. See supra section II.C.2.

226. See *Sali II*, 909 F.3d 996, 1006 (9th Cir. 2018), cert. dismissed, 139 S. Ct. 1651 (2019) ("By relying on formalistic evidentiary objections, the district court unnecessarily excluded proof that tended to support class certification.").

struck evidence that would have been useful for determining whether the typicality requirement had been satisfied.[227] To the extent that the *Daubert* analysis prevents judges from considering evidence useful for determining class certification requirements, it does so at the direct expense of the rigorous analysis requirement. The nonexclusionary *Daubert* approach, by contrast, through its elimination of a class of formalistic objections, allows courts to more fully consider and weigh probative evidence in fulfillment of their fact-finding obligations.

C. *Considering Challenges to the Nonexclusionary Approach*

1. Daubert *Is Not the Solution for Settlement Pressure.* — Proponents of an exclusionary *Daubert* analysis argue that class certification is effectively case dispositive and should thus be subject to the same gatekeeping standards typically applied during other case-dispositive proceedings, such as summary judgment and trial.[228] The thrust of the argument arises from the belief that certification can lead to "blackmail" settlements, wherein defendants settle nonmeritorious claims to avoid high litigation costs and potentially devastating liability should the jury find in favor of the plaintiffs.[229] Court and commentators alike often cite to the dangers of unwarranted settlement pressures in support of employing stricter standards for certification.[230] Thus, commentators argue that *Daubert* should be used to

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227. Id. ("[B]y relying on admissibility alone as a basis to strike the [evidence at issue], the district court rejected evidence that likely could have been presented in an admissible form at trial . . . . That narrow approach tells us nothing about the satisfaction of the typicality requirement . . . .").

228. See, e.g., L. Elizabeth Chamblee, Comment, Between "Merit Inquiry" and "Rigorous Analysis": Using *Daubert* to Navigate the Gray Areas of Federal Class Action Certification, 31 Fla. St. U. L. Rev. 1041, 1075–79, 1084–86 (2004) (analogizing the applicability of *Daubert* in summary judgment to class certification and highlighting the risk that certification can make settlement inevitable); Messer, supra note 219, at 313 (arguing for the application of *Daubert* by analogy to summary judgment).

229. See Bruce Hay & David Rosenberg, "Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy, 75 Notre Dame L. Rev. 1377, 1391–92 (2000) (discussing the phenomenon of blackmail settlements).

230. See, e.g., *Hydrogen Peroxide*, 552 F.3d 305, 310 (3d Cir. 2008) ("[T]he potential for unwarranted settlement pressure 'is a factor we weigh in our certification calculus.'" (quoting Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 168 n.8 (3d Cir. 2001), as amended (Oct. 16, 2001))); In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1299 (7th Cir. 1995) (expressing a concern of "forcing these defendants to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability"); Robert G. Bone & David S. Evans, Class Certification and the Substantive Merits, 51 Duke L.J. 1251, 1254 (2002) ("Loose certification standards risk high costs by inviting frivolous class action suits that defendants settle rather than face potentially crippling, even bankrupting, damage awards."); Chamblee, supra note 228, at 1085 ("Plaintiffs may capitalize on these lenient [certification] standards to gain an undue advantage in negotiating settlements.").

screen expert testimony so as to ensure that decisions granting class certification—which, in their view, is functionally identical to holding a defendant liable—do not enhance opportunities for coercive settlements.[231]

Empirical data, however, have not shown that class certification creates undue pressure to settle.[232] Professor Charles Silver notes that, while a 1986 study by the Federal Judicial Center found that an average of seventy-three percent of certified class actions across four federal districts ended in settlement,[233] similar rates of settlement were found in studies of ordinary tort and contract claims.[234] These data support the view that class certification is not coercive relative to settlement pressure existing across the board.

Additionally, it is unclear why high settlement rates, to the extent that they do exist, should lead to a conclusion that the settlements are unwarranted. In conventional cases, fear of an adverse outcome at trial is viewed as a healthy motivation for settlement, not as the equivalent of blackmail.[235] As Professor Silver aptly noted, fear of an adverse verdict at trial "is a reason for thinking that a defendant is right to settle, not for thinking that a defendant is coerced."[236] Moreover, far from subverting the goals of class actions, settlements promote the explicit goals of Rule 23 to "achieve economies of time, effort, and expense."[237]

To the extent that blackmail settlements are a valid concern, establishing trial-level gatekeeping rules during class certification proceedings is not the solution. A finding of admissibility under a full *Daubert* analysis during class certification, while not binding at future stages of litigation,[238] sends a strong signal that the expert testimony is sufficiently reliable not only to support certification but also to support a finding on the merits of the class's claims at trial.[239] Thus, while *Daubert* may weed out some nonmeritorious claims otherwise overlooked by the court's rigorous analysis,

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231. See Chamblee, supra note 228, at 1084–86; Messer, supra note 219, at 313.

232. See Jelinek, supra note 22, at 316–17.

233. See Charles Silver, "We're Scared to Death": Class Certification and Blackmail, 78 N.Y.U. L. Rev. 1357, 1399 (2003) (citing Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 179 tbl.39 (1996)).

234. Id. at 1401–02 (citing to studies by the Bureau of Justice Statistics finding that seventy-three percent of torts cases and roughly half of contracts cases disposed of in state courts ended in settlement).

235. See Jelinek, supra note 22, at 316–17.

236. Silver, supra note 233, at 1366.

237. Fed. R. Civ. P. 23 advisory committee's note on 1966 Amendment, subdiv. (b)(3).

238. See 1 McLaughlin, supra note 117, § 3:12 ("[T]he findings made in deciding class certification are made solely for the purpose of deciding certification and will not bind the finder of fact in subsequent stages of the litigation.").

239. George G. Gordon & Irene Ayzenberg-Lyman, The Role of *Daubert* in Scrutinizing Expert Testimony in Class Certification, 82 Geo. Wash. L. Rev. Arguendo 132, 154 (2014) ("Once the court has concluded [at the class certification stage] that the expert's

it also significantly strengthens the blackmail value of any claims that survive the analysis.[240]

2. *Distinguishing from* Twombly *and* Iqbal*'s Heightened Pleading Standards.* — Arguing in favor of the full *Daubert* analysis, Steven Messer analogizes the philosophy behind the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*[241] and *Ashcroft v. Iqbal*[242] (collectively, *Twiqbal*) to the concerns motivating an application of the full *Daubert* analysis during certification proceedings.[243] In *Twombly*, the Court raised the pleading standard for antitrust class actions,[244] reasoning that the available tools of judicial discretion such as case management and summary judgment were insufficient to mitigate discovery costs that would motivate defendants to settle.[245] *Iqbal* extended this standard to all civil federal cases, again citing to the burdens of proceeding with litigation.[246] Messer argues that *Twiqbal* "distrusts the ability of judges to weed out bad cases through judicial management[,]" and that, similarly, "*Daubert* distrusts the ability of judges to informally consider evidence."[247] This argument mischaracterizes both *Twiqbal* and *Daubert*. The *Twiqbal* holdings do not distrust the judge's ability to weed out bad cases; rather, they recognize that the tools of judicial discretion to do so are inherently limited during the discovery-laden phase between the pleading stage and summary judgment.[248] This concern lacks potency with regard to *Daubert* issues prior to class certification because judges must still rigorously analyze the evidence, using the full force of their discretion, before certifying a class. Moreover, the addition of an exclusionary *Daubert* analysis at this stage would likely enhance the very issue *Twiqbal* sought to avoid, increasing discovery costs between pleading and certification through inefficient discovery and arduous *Daubert* hearings.[249] At bottom, a standard limiting judicial discretion at the pleading stage does not inherently call for a similar standard at the class certification stage.

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methodology is reliable and admissible, there will be at least a de facto presumption against the *Daubert* challenge at the merits stage.").

240. By transplanting a trial standard into the class certification proceeding, the full *Daubert* analysis would make a class certification decision seem even more dispositive than a certification decision based upon evidence that hasn't been subjected to a full *Daubert* inquiry.

241. 550 U.S. 544 (2007).

242. 556 U.S. 662 (2009).

243. See Messer, supra note 219, at 315–17.

244. *Twombly*, 550 U.S. at 570.

245. Id. at 559.

246. *Iqbal*, 556 U.S. at 685.

247. Messer, supra note 219, at 316.

248. See *Twombly*, 550 U.S. at 559 ("Judges can do little about impositional discovery when parties control the legal claims to be presented and conduct the discovery themselves." (internal quotation marks omitted) (quoting Frank H. Easterbrook, Discovery as Abuse, 69 B.U. L. Rev. 635, 638 (1989))).

249. See supra section II.A.1.

CONCLUSION

Class actions are expensive and time-consuming endeavors for plaintiffs, defendants, and the courts. Recognizing the high stakes of class certification, recent Supreme Court decisions have emphasized the importance of judicial scrutiny in ensuring that Rule 23 requirements are satisfied. Not all scrutiny is proper scrutiny, however, and serious concerns of efficiency and fairness arise when unduly restrictive gatekeeping standards are imposed during class certification proceedings. To the extent that exclusionary *Daubert* analyses run counter to the purposes of the class action and impede proper satisfaction of the rigorous analysis requirement, the standards should be reconsidered. When making certification decisions, courts should embrace the substantive factors of reliability and relevance espoused by *Daubert* without adopting the exclusionary results ordinarily linked to its application at trial. By utilizing *Daubert* to evaluate the probative value, rather than the admissibility, of expert testimony during certification proceedings, courts can more completely fulfill the rigorous analysis requirement and better serve the purposes of the class action mechanism.