Death by Daubert: The Continued Attack on Private Antitrust

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DEATH BY *DAUBERT*: THE CONTINUED ATTACK ON PRIVATE ANTITRUST

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In 2011, with five words of dicta, the Supreme Court opened Pandora's box for private antitrust enforcement.[1] By suggesting trial courts must evaluate the admissibility of expert testimony at class certification, the Court placed a significant obstacle in the path of antitrust class actions. Following the Supreme Court's lead, most courts now permit parties to bring expert challenges far earlier than the traditional summary judgment or pre-trial timing. Premature rejection of expert testimony dooms budding private antitrust suits—cases that play an essential role in modern antitrust enforcement. The dangers for private antitrust plaintiffs are compounded by the Court's opaque pronouncements on how to assess expert testimony. Confusion over how to evaluate antitrust economic experts, both substantively and procedurally, allows courts to use their gatekeeping power to undermine private antitrust enforcement.

Despite a large body of scholarship on *Daubert* (the test for expert admissibility), little has been written on its unique intersection with antitrust class actions. This Article fills that void by exploring how *Daubert* analysis at class certification hamstrings antitrust enforcement. The Article begins by discussing how judicial evaluation of expert testimony has evolved, with a particular eye to how courts address antitrust economic expert testimony at class certification. It then explains why this new barrier potentially places an impassible, unjustified roadblock in private antitrust enforcement's path.

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[1] Dukes v. Wal-Mart Stores, Inc., 131 S. Ct. 2541, 2554 (2011).

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INTRODUCTION

Private antitrust class actions are under attack. Through the guise of judicial gatekeeping, courts have increasingly limited consumers' ability to seek recourse for anticompetitive conduct.[2] Antitrust cases were already on life support thanks to heightened pleading and evidentiary hurdles.[3] The final nail in the coffin may be a new judicial barrier: pre-class certification review of expert testimony under Federal Rule of Evidence 702, commonly called *Daubert*. The Supreme Court seems determined to decide soon whether such an evaluation is mandatory.[4] For now, focusing on five words of dicta from the Supreme Court's 2011 *Wal-Mart v. Dukes* decision,[5] lower courts are evaluating whether parties' proffered expert testimony is admissible before determining whether individual claims can be aggregated under Federal Rule of Civil Procedure 23[6]—a marked departure from prior practice.

On its face, such pre-certification review may not seem that problematic. *Daubert* challenges are intended to evaluate whether expert

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[2] *See, e.g.*, Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2312 (2013) (upholding bar of antirust class action claims in cases with anti-class action arbitration provisions); Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1433-34 (2013) (increasing the rigor of Rule 23 antitrust class certification determinations); Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) (increasing the evidence needed for antitrust class actions to survive a motion to dismiss); *see also* Joshua D. Wright, *The Roberts Court and the Chicago School of Antitrust: The 2006 Term and Beyond*, 3 COMPETITION POL'Y INT'L 25 (2007).

[3] *See infra* § III(A) (discussing new gatekeeping hurdles in antitrust class actions); *see also* Arthur Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Defamation of Federal Procedure*, 88 N.Y.U.L. REV. 286, 313-14 (2013); E. Thomas Sullivan & Robert B. Thompson, *The Supreme Court and Private Law: The Vanishing Importance of Securities and Antitrust*, 53 EMORY L. J. 1571, 1608-10 (2004) (exploring empirically the impact of *Matsushita* on summary judgment motions).

[4] The Supreme Court also granted *certiorari* in two *Daubert* class certification questions in both 2012 and 2013. Behrend v. Comcast Corp., 655 F.3d 182 (3d Cir. 2011), *cert. granted in part*, 133 S. Ct. 24 (2012); *In re* Zurn Pex Plumbing Products Liab. Litig., 644 F.3d 604 (8th Cir. 2011), *cert. dismissed*, 133 S. Ct. 1752 (2013). However, one case was decided on Rule 23 grounds rather than Rule 702. Behrend v. Comcast Corp., 133 S. Ct. 1426 (2013). The other settled before a full briefing. *In re Zurn*, 133 S. Ct. at 1752. Hence, *Daubert* as a prerequisite to certification is not yet black letter law.

[5] 131 S. Ct. 2541, 2554 (2011). The Court reversed class certification based on lack of commonality, but in passing commented on the Ninth Circuit's holding that *Daubert* was not appropriate at class certification by stating, "We doubt that is so...." *Id.*

[6] *See, e.g.*, Sher v. Raytheon Co., 419 Fed. Appx. 887, 890 (11th Cir. 2011); Am. Honda Motor Co. v. Allen, 600 F.3d 813, 815-16 (7th Cir. 2010); *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d. 305, 323 (3d Cir. 2008); Regents of the Univ. of Cal. v. Credit Suisse First Boston (USA), 482 F.3d 372, 379-80 (5th Cir. 2007); *see also infra* § I(B) (discussing the timing of *Daubert* in antitrust class actions and the rise of precertification assessments).

testimony is sufficiently reliable and relevant to justify admissibility.[7] In its most innocuous articulation, such a requirement prevents class certification from being based on potentially unreliable expert testimony.[8] In practice, however, premature *Daubert* review triggers real concerns for the future of antitrust. Certification is essential to consumer enforcement of antitrust laws,[9] and economist testimony plays a critical role in establishing the requirements for class certification. Individually, the stakes in antitrust suits filed on behalf of consumers are too minimal to support multi-year litigation.[10] As a result, consumer class actions are the dominant form of private antitrust enforcement in the United States.[11] Federal private antitrust cases exceed U.S. government actions (civil and criminal) by more than 25 to one.[12] But if a *Daubert* challenge under Rule 702 is used to reject economic testimony before class certification, plaintiffs are powerless to satisfy Rule 23.

By potentially rendering economic experts' testimony inadmissible, early *Daubert* review jeopardizes this primary form of antitrust enforcement. Such a requirement might be of less concern if it was applied in an evenhanded and consistent manner. But the preliminary evidence shows otherwise. Courts enjoy tremendous discretion in evaluating the admissibility of expert testimony.[13] This leeway allows some courts to

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[7] Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 589 (1993).

[8] *Id*. at 589; Heather P. Scribner, *Rigorous Analysis of the Class Certification Expert: The Roles of Daubert and the Defendant's Proof*, 28 REV. LITIG. 71, 106 (2008); Harvey Brown, *Eight Gates for Expert Witnesses*, 36 HOUS. L. REV. 743, 785 n.302 (1999).

[9] William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law' Nature of Antitrust Law*, 60 TEX. L. REV. 661, 691 (1982); *see also* Douglas H. Ginsburg, *Costs and Benefits of Private and Public Antitrust Enforcement: An American Perspective*, *in* COMPETITION LAW AND ECONOMICS: ADVANCES IN COMPETITION POLICY ENFORCEMENT IN THE EU AND NORTH AMERICA 39, 42 (Abel M. Mateus & Teresa Moreira, eds. 2010) ("[T]he U.S. antitrust system depends overwhelmingly upon private plaintiffs to police compliance.").

[10] Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 161 (1974) ("A critical fact . . . is that petitioner's individual stake . . . is only $70. No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. Economic reality dictates that petitioner's suit proceed as a class action or not at all."); J. Douglas Richards, *What Makes an Antitrust Class Action Remedy Successful?: A Tale of Two Settlements*, 80 TUL. L. REV. 621, 631 (2005) ("In the context of modern commerce, in which corporate defendants often are larger and more financially powerful in comparison to the individual consumer than was true at the time of enactment of the Sherman Act, the only viable procedure for effective private enforcement of the antitrust laws is the class action.").

[11] ABA SECTION OF ANTITRUST LAW, ANTITRUST CLASS ACTIONS HANDBOOK 1 (2010).

[12] *See* AMERICAN ANTITRUST INSTITUTE, THE NEXT ANTITRUST AGENDA 222 (Albert A. Foer ed. 2008).

[13] *See, e.g.*, Gen. Elec. Co. v. Joiner, 522 U.S. 136, 141 (1997) (limiting judicial review of *Daubert* decisions to abuse of discretion).

apply a more relaxed standard while others morph the expert evaluation into an improperly stringent analysis that wrongly excludes sufficiently reliable testimony. Without such testimony, class certification is impossible.[14] There is no doubt that the discretionary nature of *Daubert* review disproportionately benefits antitrust defendants: a plaintiffs' expert in private antitrust cases is four times more likely to be excluded than a defendants' expert.[15]

Apart from the private class actions threatened by early *Daubert* review, there are few mechanisms to curb anticompetitive acts covered by antitrust law, such as price fixing, bid rigging, and unlawful monopolistic conduct. Competitor lawsuits and government enforcement cannot fill the void. Competitors often have business-related reasons for hesitating to undertake litigation: today's rival could be tomorrow's partner or essential supplier.[16] Hence, competitor antitrust suits form only a nominal portion of the antitrust ecosystem.

Government-side enforcement is an equally limited threat given the decline of such cases in the last quarter century.[17] Government enforcement ebbs and flows with an administration's politics[18] or ability to fund such efforts.[19] Consequently, at least 90 percent of antitrust enforcement is

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[14] *See, e.g.*, Christopher B. Hockett & Frank M. Hinman, *Admissibility of Expert Testimony in Antitrust Cases: Does Daubert Raise a New Barrier for the Entries of Economists?*, 10 ANTITRUST 40, 45 (Summer 1996).

[15] *See* James Langenfeld & Christopher Alexander, *Daubert and Other Gatekeeping Challenges of Antitrust Experts*, 25 ANTITRUST 21, 22 (Summer 2011); D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?*, 64 ALB. L. REV. 99, 109-10 (2000) (stating nearly 90% of challenges are brought against plaintiffs' experts). At class certification, exclusion was a bit lower but still disproportionately affected plaintiffs' experts. *Id.* at 24-25. The study contributes the lower exclusion rate at class certification to some courts' application of a modified or lower *Daubert* evaluation at class certification during the study period. *Id.* Given the push for full *Daubert* analyses, the exclusion rate will likely continue to rise and match summary judgment levels.

[16] Clare Deffense, *A Farewell to Arms: The Implementation of a Policy-Based Standing Analysis in Antitrust Treble Damages Actions*, 72 CAL. L. REV. 437, 464 (1984).

[17] William Kolasky, *Antitrust Litigation: What's Changed in Twenty-Five Years?*, 27 ANTITRUST 9, 9 (Fall 2012).

[18] Daniel R. Shulman, *A New U.S. Administration and U.S. Antitrust Enforcement*, 10 SEDONA CONF. J. 1, 5 (2009); Spencer Weber Waller, *Symposium: Private Law, Punishment, and Disgorgement: The Incoherence of Punishment in Antitrust*, 78 CHI. KENT L. REV. 207, 230 (2003) ("[E]nforcement priorities change from administration to administration, or with appointment of a new Assistant Attorney General or FTC chair. Criminal antitrust cases are not much better. They are rare and when brought, often result much lower fines than antitrust class actions.").

[19] Joseph P. Bauer, *Multiple Enforcers and Multiple Remedies: Reflections on the Manifold Means of Enforcing the Antitrust Laws: Too Much, Too Little, or Just Right?*, 16 LOY. CONSUMER L. REV. 303, 310-11 (2004); *see also* Georg Berrisch, Eve Jordan &

addressed through private actions.[20] While antitrust critics are quick to argue these private actions often just tag along with government enforcement,[21] this is more rhetoric than truth. More than half of antitrust violations are uncovered by private attorneys, not the government.[22] Further, the amount recovered in private cases is significantly higher than from criminal antitrust fines—thus making private action arguably a stronger deterrent.[23]

Once one accepts the necessity of private antitrust enforcement, early *Daubert* review represents a potentially existential threat to antitrust law as a whole. This Article details the nature of that threat, maintaining that *Daubert* should not be a prerequisite for certification. Part I examines the machinery of *Daubert* review with a particular eye to its application in antitrust class actions. It documents the trend towards applying Rule 702 at class certification and describes the critical role of economist testimony in antitrust class actions. Part II discusses how early *Daubert* review invites improper judicial gatekeeping, which distorts each of the three part Rule 702 analysis. These problems are only compounded when *Daubert* is completed prior to a class certification determination. Part III refutes proponents' proffered reasons for early *Daubert* assessments, showing the rationales do not justify the requirement's harm to antitrust enforcement.

Rocio Salvador Roldan, *E.U. Competition and Private Actions for Damages*, 24 NW. J. INT'L L. & BUS. 585, 586 (2004) ("Government antitrust authorities will never have the resources to prosecute all infringements which should be pursued….").

[20] *See* BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE: ANTITRUST CASES FILED IN UNITED STATES DISTRICT COURTS BY TYPE OF CASE, 1975-2006, http://www.albany.edu/sourcebook/pdf/t5412006.pdf (last visited July 10, 2013); *see also* Katherine Holmes, *Public Enforcement or Private Enforcement? Enforcement of Competition Law in the EC and UK*, E.C.L.R. 25(1), 25-26 (2004). United States antitrust enforcement is split between private and governmental actors. Private rights of action for Sherman Act violations are expressly permitted under Section 4 of the Clayton Act. 15 U.S.C. § 15(a).

[21] *See, e.g.*, John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working*, 42 MD. L. REV. 215, 223-26 (1983). *But see* John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: the Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 681 n.36 (1986) (questioning prior claims that class action tag along government actions).

[22] Robert H. Lande & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. L. REV. 879, 880 (2008); *see also* Stephen Calkins, *Coming to Praise Criminal Antitrust Enforcement* in EUROPEAN COMPETITION LAW ANNUAL 2006: ENFORCEMENT OF PROHIBITION OF CARTELS 343, 355 (Claus-Dieter Ehlermann & Isabela Atanasius eds., 2007).

[23] Lande & Davis, *supra* note 22 at 895 (detailing how criminal antitrust actions since 1990 resulted in $4.232 billion, while private action generated $18.006 billion of damages).

Instead of strangling private antitrust cases in their infancy, *Daubert* should be confined to the later stages of litigation where its judicial gatekeeping function more appropriately applies.

I. *DAUBERT* REVIEW IN ANTITRUST CLASS ACTIONS

Understanding the danger of adding *Daubert* as a prerequisite to certification requires some background on Rule 702 and the role of economists in antitrust classes. To provide such a foundation, this part discusses: (1) the vast discretion given to trial courts in evaluating expert testimony; (2) the unprecedented early timing of *Daubert* review; and (3) the requirements for plaintiffs' experts in private antitrust cases.

A. Evaluating Expert Testimony

The modern approach to evaluating expert testimony began in 1993.[24] Previously, only expert testimony that was generally accepted in the field was admissible.[25] *Daubert* sought to liberalize the admissibility standard,[26] thus allowing more expert testimony than before. Under this new, more liberal standard, even "shaky" expert testimony is admissible.[27] Rather than seeking to exclude the testimony, the parties should rely on the traditional screens of "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof."[28] To provide some limit, though, expert testimony must be relevant and reliable[29] to protect jurors from relying on junk science and to avoid trial courts admitting all expert testimony wholesale.[30]

The Supreme Court shaped the current iteration of *Daubert* through a

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[24] Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 583 (1993).

[25] *See id*. at 587-89.

[26] *Id.* at 595-97; *see also* Anthony Z. Roisman, *The Courts, Daubert, and Environmental Torts: Gatekeepers or Auditors?*, 14 PACE ENVTL. L. REV. 545, 552 (1997) ("Subsequent decisions by various circuit courts have confirmed that the effect of the *Daubert* decision was to liberalize the admissibility of evidence, not restrict it.").

[27] *Daubert*, 509 U.S. at 596.

[28] *Id.*

[29] *Id.* at 589.

[30] U.S. v. Ozuna, 561 F.3d 728, 737 (7th Cir. 2009) (internal citation omitted); *Assessment of the Commonsense Psychology Underlying Daubert: Legal Decision Makers' Abilities*, 8 PSYCHOL. PUB. POL'Y & L. 180 (2002); *see also* Daniel J. Capra, *The Daubert Puzzle*, 32 GA. L. REV. 699, 704 (1998) (arguing *Daubert* gives a "mixed message" that is "schizophrenic" by simultaneously recognizing both the need for liberality and the need for limitations); G. Michael Fenner, *The Daubert Handbook: The Case, Its Essential Dilemma, and Its Progeny*, 29 CREIGHTON L. REV. 939, 951-53 (1996) (arguing *Daubert* creates a dilemma because it simultaneously loosens and tightens the standard for admissibility).

series of decisions aimed at broadening the test's scope and breadth. The test is not articulated in a single case but rather a series of related cases and a statutory amendment that collectively form the current contours of expert evaluation.[31] This jurisprudence clarified *Daubert* applies to all expert testimony, including economists' testimony in private antitrust suits.[32]

The amendment to Federal Rule of Evidence 702 in 2000 echoed much of *Daubert*'s reliability and relevancy concepts.[33] Rule 702 states expert testimony is admissible so long as: (1) the testimony is based upon sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the witness has applied the principles and methods reliably to the facts of the case.[34] Under the first two prongs, courts consider several optional factors, including whether the expert's methodology is testable[35] and subject to peer review.[36]

The third prong, "application," is slightly different. This concept, often described as an "analytical fit," considers whether an expert's proposed theory fits the facts of the case. Fit is defined generously.[37] The Supreme Court first described fit through a hypothetical involving expert testimony regarding phases of the moon. The Court explained that such testimony would help a juror determine whether a certain night was dark, assuming

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[31] The four primary Supreme Court *Daubert* decisions are: Daubert v. Merrell Dow Pharms., Inc., 409 U.S. 579 (1993); Gen. Elec. Co. v. Joiner, 522 U.S. 136 (1997); Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999); and Weisgram v. Marley, 528 U.S. 440 (2000). These cases provided opportunities to clarify the post-*Daubert* confusion. While the Court elaborated on some of *Daubert*'s unanswered questions in *Kumho*, *Joiner*, and *Weisgram*, it also added new posts to judicial gatekeeping without first securing the existing ones. Thus, how to evaluate expert testimony in light of these cases remains highly controversial. *See generally* David L. Faigman, *The Daubert Revolution and the Birth of Modernity: Managing Scientific Evidence in the Age of Science*, 46 U.C. DAVIS L. REV. 893, 911-14 (2013).

[32] Kumho Tire Co. v. Carmichael, 526 U.S. 137, 140, 149 (1999). *Kumho* is not without its critics. *Daubert* placed particular emphasis on the rule of scientific testing in evaluating reliability. *Daubert*, 509 U.S. at 593. Yet, by expanding *Daubert* beyond scientific experts, lower courts are left with little guidance on whether this aspect of "testability" is relevant to determining the admissibility of evidence.

[33] Rule 702 did not technically codify *Daubert*. FED. R. EVID. 702 advisory committee's note ("No attempt has been made to 'codify' [*Daubert*'s] specific factors.").

[34] *Id.*

[35] *Id*. "Testable" in this context means the expert's theory can be challenged in some objective sense, rather than just being a subjective, conclusory approach that cannot reasonably be assessed for reliability.

[36] *Daubert*, 509 U.S. at 593.

[37] The Supreme Court explained the concept by reference to *United States v. Downing*. *Daubert*, 509 U.S. at 591-95, *citing* United States v. Downing, 753 F.2d 1224, 1242 (3d Cir. 1985). There, the defendant's expert sought to testify regarding cross-racial identification issues, though the case did not involve any such identification. Accordingly, the expert testimony was excluded. *Downing*, 753 F.2d at 1242.

darkness was a question of fact in the case.[38] Because the testimony is legally relevant and assists the trier of fact, the expert testimony sufficiently "fits" the case and thus is admissible.

Rather than provide concrete guidance, the Supreme Court has repeatedly emphasized the flexibility afforded trial courts in assessing expert testimony.[39] The trial court's broad latitude is affirmed by the generous abuse of discretion standard of review given such decisions.[40] An appellate court may overturn a trial court's decision only if the trial court "acted without [regard] to any guiding [principles] [or] act[ed] arbitrar[ily] or unreasonabl[y]."[41] This limited judicial review means parties on the losing side of a *Daubert* evaluation are not given an opportunity to cure on remand, even when expert testimony is essential to the case like in antitrust class actions.[42]

This discretion has resulted in significant judicial inconsistency. Despite several opportunities to spell out an expert admissibility standard, subsequent Supreme Court *Daubert* cases more frequently muddied rather than clarified the test. This has left courts sharply divided on basic aspects of Rule 702.

For example, in evaluating sufficiency and reliability, whether the *Daubert* factors are even applicable "is a matter that the law grants the trial judge broad latitude to determine."[43] Consequently, which factors count varies from judge to judge.[44] As Professor Faigman describes, "the ultimate

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[38] *Daubert*, 509 U.S. at 591-95.

[39] *Kumho*, 526 U.S. at 138 (discussing judicial flexibility in expert evaluations); United States v. Scheffer, 523 U.S. 303, 322 (1998).

[40] Previously, such rulings were subject to a stricter *de novo* standard. *See* Gen. Elec. Co. v. Joiner, 522 U.S. 136, 142 (1997) ("But *Daubert* did not address the standard of appellate review for evidentiary rulings at all.").

[41] *See, e.g.*, Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 241-42 (Tex. 1985).

[42] Weisgram v. Marley, 528 U.S. 440, 445 (2000). Exclusion of an expert under *Daubert*, even when outcome-determinative, would not be subject to a more searching appellate review. Kilpatrick v. Breg, Inc., 613 F.3d 1329, 1334 (11th Cir. 2010); Daubert v. Merrell Dow Pharms, Inc., 43 F.3d 1311, 1315 (9th Cir. 1995) (*Daubert* II); Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 152 (1999); City of Tuscaloosa v. Harcros Chems, Inc., 158 F.3d 548, 556 (11th Cir. 1998).

[43] *Kumho*, 526 U.S. at 152-53. This same lack of guidance is echoed in Rule 702's amendment, where Congress stated its absence of *Daubert* factors was intentionally aimed at giving trial courts flexibility in evaluating experts. FED R. EVID. 702 (advisory committee's notes).

[44] Some courts go as far as to forego the factors altogether. *See, e.g.*, *Jacobs v. N. King Shipping Co.*, No. 97-772, 1998 WL 28234, at *1 (E.D. La. Jan. 23, 1998) (not applying any of the Daubert factors but rather evaluating the expert testimony to determine if it is aligned with Daubert's overall goal); *see also* Patrica A. Krebs & Bryan J. De Tray, Kumho Tire Co. v. Carmichael*: A Flexible Approach to Analyzing Expert Testimony Under*

question is whether the expert testimony is based on good grounds. But what grounds are good is something of a moving target."[45] As a result, some courts rely on factors poorly suited for economist testimony, as discussed in Part II.[46]

Second, courts differ as to whether Rule 702's sufficiency evaluation allows judges to weigh competing expert testimony. When opposing experts clash, some courts resolve the battle by deeming one unreliable rather than leaving such determinations to the trier of fact.[47] Others view such weighing of expert testimony as beyond the scope of judicial gatekeeping.[48]

Third, in evaluating application, the degree of fit necessary varies widely by court. Some contend the fit standard is "not that high,"[49] while others require a degree of precision unrealistic for economic analyses.[50] Thus, whether an economist's testimony is admitted depends heavily on which judge is evaluating it.

As discussed later, judicial discretion gives courts free reign to apply *Daubert* in an overly rigorous way at odds with its liberalizing intent. Instead of permitting potentially reliable expert testimony, it screens out plaintiffs' experts disproportionately. Despite these problems, *Daubert* opened the floodgates for challenges to expert testimony. From 2000-2009 alone expert challenges rose over 340%.[51] Now, this trend is catching a second wind, with courts increasingly seeing Rule 702 motions earlier in antitrust class actions, particularly before Rule 23 rulings. This trend is discussed next.

Daubert, 34 TORT & INS. L. J. 989, 995 (1999) (arguing a court must consider the expert's qualifications in the particular area he is testifying).

[45] Faigman, *supra* note 31 at 910.

[46] *See infra* § II(B)(1).

[47] Stephen Mahle, Ch. 13, *Daubert and Commercial Litigation Expert Testimony*, in BUSINESS LITIGATION IN FLORIDA (Florida Bar 2007).

[48] *See, e.g., In re* MSG Antitrust Litig., No. 00-MDL-1328(PAM), 2003 WL 244729, at *1 (D. Minn. Jan. 29, 2003) (discussing how *Daubert* was not intended to be a battle of the experts).

[49] *In re* Paoli R.R. Yard PCB Litig., 35 F.3d 717, 745 (3d Cir. 1994); *In re* Flonase Antitrust Litig., 884 F. Supp. 2d 184, 189 (E.D. Pa. 2012); *see also* Kordek v. Becton, Dickinson and Co., No. 10-7040, 2013 WL 420332, at *6 (E.D. Pa. Feb. 4, 2013); Safeco Ins. Co. v. S & T Bank, No. 07-01086, 2010 WL 786257, at *5 (W.D. Pa. Mar. 3, 2010).

[50] *See infra* § II(B)(2) and accompanying footnotes.

[51] PRICEWATERHOUSECOOPERS, DAUBERT CHALLENGES TO FINANCIAL EXPERTS: A TEN-YEAR STUDY OF TRENDS AND OUTCOMES 2002-2009 5 (2010), *available at* http://www.pwc.com/us/en/forensic-services/assets/2009-*Daubert*-study.pdf.

B. Timing of Daubert *Assessments in Antitrust Class Actions*

Even when applied at summary judgment or on the eve of trial, both a trial court's broad discretion and the troubling concept of analytical fit make *Daubert* problematic in private antitrust cases. Nonetheless, there has been a rise in earlier *Daubert* motions, namely at class certification.

Evaluating expert testimony at class certification is a marked change of course for antitrust class actions. Prior to *Wal-Mart v. Dukes*, many courts outright rejected motions to exclude experts at class certification,[52] instead focusing their analysis on the testimony's role in satisfying Rule 23.[53] These cases demonstrated a cogent understanding of the limited purpose of *Daubert*, although their rationales for denying the motions varied. Some courts pointed to the early procedural posture of class certification determinations:[54] plaintiffs' expert need only propose a methodology, not actually complete the model at class certification, making it premature to evaluate the testimony for admissibility.[55] Other courts were wary of making unnecessary merit-based determinations at class certification.[56]

The Supreme Court has yet to explicitly make *Daubert* a pre-requisite to certification, but it tipped its hand towards supporting such a requirement in

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[52] *See, e.g.*, *In re* Polypropylene Carpet Antitrust Litig., 996 F. Supp. 18, 26 n.6 (N.D. Ga. 1997).

[53] *In re* Zurn Pex Plumbing Prods. Liab. Litig., 267 F.R.D. 549, 556 (D. Minn. 2010), *aff'd* 644 F.3d 604 (8th Cir. 2011) ("Several district courts in the Eighth Circuit have declined to engage in a full *Daubert* at the class certification stage, considering only whether the expert testimony is helpful in determining whether the requisites of class certification have been met."); *see also* Ellis v Costco Wholesale Corp., 240 F.R.D. 627, 635 (N.D. Cal. 2007) ("At this early stage, robust gatekeeping of expert evidence is not required; rather, the court should ask only if expert evidence is useful in evaluating whether class certification requirements have been met.") (internal quotations and citations omitted).

[54] *See, e.g.*, Drayton v. Western Auto Supply Co., No. 01-10415, 2002 WL 32508918, at *6 n.13 (11th Cir. Mar. 11, 2002); *In re* Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 132 n.4 (2nd Cir. 2001) *overruled on other grounds by In re IPO*, 471 F.3d 24 (2d Cir.2006), and *superseded by statute on other grounds as stated in* Attenborough v. Const. & Gen. Bldg. Laborers' Local 79, 238 F.R.D. 82, 100 (S.D.N.Y. 2006) (recognizing *Daubert* motions are typically not made until summary judgment or trial); *In re* Netbank, Inc., Sec. Litig., 259 F.R.D. 656, 670 n.8 (N.D. Ga. 2009).

[55] *In re* Polypropylene Carpet, 996 F. Supp. at 26 n.6.

[56] *See, e.g.*, Moore v. Hughes Helicopters Inc., 708 F.2d 475, 480 (9th Cir. 1983) (internal citation omitted); LaBauve v. Olin Corp., 231 F.R.D. 632, 644 (S.D. Ala. 2005) (citation and internal quotations omitted); O'Connor v. Boeing N. Am. Inc., 184 F.R.D. 311, 321 n.7 (C.D. Cal. 1998); *see also* Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 292 (2d Cir. 1999), *overruled on other grounds by* Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc., 546 F.3d 196, 203 (2d Cir. 2008); Thomas & Thomas Rodmakers v. Newport Adhesives & Composites, 209 F.R.D. 159, 162-63 (C.D. Cal. 2002).

Wal-Mart v. Dukes.[57] In the trial court, Wal-Mart's motion to exclude Plaintiffs' expert testimony under *Daubert* was denied.[58] Wal-Mart appealed this ruling and the subsequent class certification determination.[59] The Ninth Circuit rejected the challenge as an improper merits inquiry, but its reasoning only added confusion to the *Daubert* issue. The Ninth Circuit stated: "At the class certification stage, it is enough that [Plaintiffs' expert] presented scientifically reliable evidence tending to show that a common question of fact—*i.e.*, 'Does Wal-Mart's policy of decentralized, subjective employment decision making operate to discriminate against female employees?'—exists with respect to all members of the class."[60] This language repeats key *Daubert*-esque terms like scientific reliability, but instead suggests that inquiry is already part of the Rule 23 analysis—beginning a trend of conflating Rule 23 and *Daubert*.[61]

On appeal, the specific issue was whether Plaintiffs met Rule 23(a)(2)'s "commonality" requirement.[62] The Supreme Court did not squarely address the Ninth Circuit's *Daubert* ruling beyond noting the appellate court ruled that *Daubert* at class certification was inappropriate.[63] The Supreme Court's response: "[w]e doubt that is so…."[64] Many scholars and practitioners have subsequently relied on these five words of dicta to justify full-blown *Daubert* evaluations at class certification.[65]

Despite legitimate concerns about earlier Rule 702 rulings, post-*Dukes* the prevailing trend is to assess the expert testimony's reliability.[66] Most

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[57] Dukes v. Wal-Mart Stores, Inc., 131 S. Ct. 2541, 2553-54 (2011).

[58] Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 602 (9th Cir. 2010).

[59] *Dukes*, 131 S. Ct. at 2544.

[60] *Dukes*, 603 F.3d at 603.

[61] *See infra* § II and accompanying notes.

[62] *Dukes*, 131 S. Ct. at 2550-51.

[63] *Id.* at 2554.

[64] *Id.* The Supreme Court also granted cert to two cases involving *Daubert* evaluations before class certifications. However, both cases resolved without clarifying the timing for Rule 702. *See supra* note 4 (discussing *Behrend* and *Zurn Pex Plumbing*).

[65] *See, e.g.*, Price, *The Proper Application of Daubert to Expert Testimony in Class Certification*, 16 LEWIS & CLARK L. REV. 1349, 1355 (Winter 2012); Zachary W. Biesanz & Thomas H. Burt, *Everything That Requires Discovery Must Converge: A Counterintuitive Solution to A Class Action Paradox*, 47 U.S.F. L. REV. 55, 68 (2012); Julie Slater, *Reaping the Benefits of Class Certification: How and When Should "Significant Proof" Be Required Post-Dukes?*, 2011 B.Y.U. L. REV. 1259, 1275 (2011); John M. Husband & Bradford J. Williams, *Wal-Mart v. Dukes Redux: The Future of the Sprawling Class Action*, 40 COLO. LAW. 53, 55 (Sept. 2011) (internal citation omitted).

[66] *See, e.g.*, Am. Honda Motor Co. v. Allen, 600 F.3d 813, 815-16 (7th Cir. 2010); *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 323 (3d Cir. 2008); *In re* Aftermarket Auto. Lighting Prods. Antitrust Litig., 276 F.R.D. 364, 370-71 (C.D. Cal. 2011). While this article focuses primarily on federal antitrust class actions, state courts are also conflicted on when to apply *Daubert*. *Compare* Howe v. Microsoft Corp., 656 N.W.2d

courts engage in a full or nearly full *Daubert* assessment at certification.[67] The Seventh Circuit was the first circuit court to mandate this new hurdle.[68] Soon after, other circuits followed suit: the First, Second, Third, Fourth, Fifth, Eleventh, and portions of the Ninth Circuit adopt a similar requirement.[69] However, the nature of these *Daubert* assessments differs among the courts. Some reflect a broad-brush form,[70] with the court applying *Daubert* more as a guidepost than an exclusionary assessment.[71] Other judges use a full *Daubert* test as a barrier to class certification. Rather than applying *Daubert* as it was originally intended, these courts improperly assert judicial gatekeeping and use Rule 702 to exclude reliable

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285, 295 (N.D. 2003) (refusing to complete *Daubert* during certification), *with In re* S.D. Microsoft Antitrust Litig., 657 N.W.2d 668, 675 (S.D. 2003) (applying a modified *Daubert* test at class certification).

[67] Only the Eighth Circuit has expressly rejects requiring a full *Daubert* assessment at class certification. *See In re* Zurn Pex Plumbing Products Liab. Litig., 644 F.3d 604, 611 (8th Cir. 2011), *cert. dismissed*, 133 S. Ct. 1752 (2013). There, the defendant appealed the Eighth Circuit's approach of using a tailored *Daubert* analysis, which looks at the reliability of the expert testimony in terms of class certification criteria, recognizing the limited evidence available at that stage of litigation. *In re Zurn*, 644 F.3d at 614 (internal citation omitted). This modified approach was intended to temper *Dukes* with the challenges of completing *Daubert* early in a complex litigation case. *Id*. at 612, 612 n.5. In actuality, though, this tailored *Daubert* test does little to assess an expert or avoid improper gatekeeping, as the contours of this modified approach are not spelled out. Andrew J. Trask, *FEDERALISM, CIVIL PROCEDURE, AND THE PROPER JUDICIAL ROLE: Wal-Mart v. Dukes: Class Actions and Legal Strategy*, 2010-11 CATO SUP. CT. REV. 319, n. 160 (2010-2011). The parties settled dismissed the appeal before full briefing before the Supreme Court. 133 S. Ct. at 1752.

[68] Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 812 (7th Cir. 2012), *reh'g denied* (Feb. 28, 2012); *Am. Honda*, 600 F. 3d at 815-16.

[69] *See, e.g.*, Sher v. Raytheon Co., 419 Fed. Appx. 887, 890 (11th Cir. 2011); *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d. 305, 316-20 (3d Cir. 2008); Regents of the Univ. of Cal. v. Credit Suisse First Boston (USA), 482 F.3d 372, 379-80 (5th Cir. 2007); *In re* Polymedica Sec. Litig., 432 F.3d 1, 5-6 (1st Cir. 2005); Williams v. Wells Fargo Bank, N.A., 280 F.R.D. 665, 670 (S.D. Fla. 2012); *In re* Intel Corp. Microprocessor Antitrust Litig., MDL 05-1717, 2010 WL 8591815, at *15 (D. Del. July 28, 2010); *In re* NYSE Specialists Sec. Litig., 260 F.R.D. 55, 65-66 (S.D.N.Y. 2009). The Ninth Circuit is still unsettled on the question, with at least some courts requiring a Rule 702 analysis precertification. *Compare* Cholakyan v. Mercedes-Benz USA, 281 F.R.D. 534, 541, 547 (C.D. Cal. 2012) (applying a full *Daubert* inquiry), *with* Pryor v. Aerotek Scientific, LLC, 278 F.R.D. 516, 534 n.63 (C.D. Cal. 2011) (declining to utilize *Daubert*).

[70] *See, e.g.*, *In re* S.D. Microsoft Antitrust Litig., 657 N.W. 2d 668, 675 (S.D. 2003) (applying a lower *Daubert* standard to determine whether the expert's testimony rests on a reliable foundation and is relevant to the task at hand).

[71] *Id.* Some courts that initially adopted a hard-line "full-blown" *Daubert* position post-*Dukes* have been trending towards this moderate position. *See, e.g.*, Bruce v. Harley-Davidson Motor Co., Inc., 09–6588, 2012 WL 769604, at *4 (C.D. Cal. 2012) (arguing for a tailored *Daubert* analysis at class certification on a strained argument that the Ninth Circuit required *Daubert* but never mandated it be a full-blown *Daubert* analysis).

economic testimony.[72]

In these courts, an early *Daubert* exclusion can make or break an antitrust case. Historically, certain types of anticompetitive wrongdoing were viewed as *per se* harmful, meaning plaintiffs could pursue antitrust claims without proving anticompetitive impact. As the categories of *per se* anticompetitive violations diminished, the need for economist testimony increased.[73] While antitrust class actions have involved economic testimony for several decades, economists are increasingly vital to class certification.[74] The next part discusses the critical role this testimony plays in private antitrust litigation.

C. Economic Testimony in Antitrust Class Actions

Adding *Daubert* to class certification in antitrust class actions imports the present confusion over its application into an already complicated, nuanced area of law. In all antitrust cases, economist testimony helps evaluate antitrust impact and damages. But in class actions, economists also opine on predominance, a requirement for class certification under Rule 23(b)(3).[75]

To prove predominance, plaintiffs rely heavily on economists to establish that the stated claims are sufficiently homogenous to satisfy Rule 23.[76] Questions of law and fact common to class members must

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[72] *See infra* § III and accompanying footnotes.

[73] *See* Rebecca Haw, *Adversarial Economics in Antitrust Litigation: Losing Academic Consensus in the Battle of the Experts*, 106 NW. U. L. REV. 1261, 1271 (2012) (attributing the increased reliance on expert testimony to more rule of reason determinations and increased emphasis on structure and performance, rather than misconduct).

[74] *See* Carol Krafka, *Judge and Attorney Experiences, Practices, and Concerns Regarding Expert Testimony in Federal Civil Trials*, 8 PSYCHOL. PUB. POL'Y & L. 309, 318-19 (2002) (discussing survey finding 80% of antitrust actions involve expert testimony); *accord* Phillip E. Areeda & Herbert Hovenkamp, ANTITRUST ¶ 309 (noting that "economic testimony is both ubiquitous and essential in antitrust cases").

[75] Most private antitrust class actions request monetary relief, not just injunctive relief. ABA Section of Antitrust Law, ANTITRUST CLASS ACTIONS HANDBOOK 174 (2010). Accordingly, plaintiffs must satisfy Fed. R. Civ. P. 23(b)(3). While defendant classes exist, they are uncommon since defendants are rarely willing to concede a conspiracy and generally defend by denying participation. *See* Rios v. Marshall, 100 F.R.D. 395, 412 (S.D.N.Y. 1983). Hence, this article focuses solely on plaintiffs' classes.

[76] Predominance looks at "whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *In re* Ins. Broker. Antitrust Litig., 579 F.3d 241, 266 (3rd Cir. 2009) (internal citation omitted). Cohesion ensures proceeding as a class is efficient and results in promoting uniform decisions. FED. R. CIV. P. 23 (b)(3) advisory committee's notes.

predominate over any questions affecting only individual members.[77] Generally, courts find predominance if common evidence establishes: (1) an antitrust violation; (2) common impact, meaning class members suffered some recognized antitrust injury as a result of the anticompetitive conduct; and (3) a reasonable estimation of damages suffered by class members.[78]

Plaintiffs' experts can have a harder job at class certification than defendants' experts. To prove predominance, the plaintiffs' economist must propose an econometric method to establish that anticompetitive impact and damages can be evaluated on a class-wide basis.[79]

At class certification, the economist need only proffer models, not completed studies using these models. He starts by looking at the evidence produced during class certification discovery, looking for industry information to evaluate the relevant product and geographic markets.[80] This evidence is the product of hard-fought battles with the defendants regarding what data allegedly exist yet can be produced and shared with an expert. Unless a great deal of public information is available, the data are often less than ideal: for example, they may not be fully complete; they may be from a different time period; or they may not include all pricing components.[81] So at class certification, the plaintiffs' expert must develop not a perfect model, but the best model possible under the circumstances.[82]

From there, a plaintiffs' expert sees if some common pricing structure applies to the class. If price impact is quantified, the class-wide impact can

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[77] FED. R. CIV. P. 23(b)(3). Plaintiffs also must show class actions are a superior way of resolving the dispute. *Id.*

[78] *See, e.g.*, Danvers Motor Co. v. Ford Motor Co., 543 F.3d 141, 148-49 (3d Cir. 2008); *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311-12 (3d Cir. 2008); Bell Atl. Corp. v. AT&T Corp., 339 F.3d 294, 302-04 (5th Cir. 2003).

[79] *See* Hal J. Singer, *Economic Evidence of Common Impact for Class Certification in Antitrust Cases: A Two-Step Analysis*, 25 ANTITRUST 34, 34 (Summer 2011); ABA SECTION OF ANTITRUST LAW, ECONOMETRICS LEGAL, PRACTICAL, AND TECHNICAL ISSUES 197-201 (2005); *see, e.g.*, Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985) (regression model for evaluating damages for exclusionary conduct); *In re* Chicken Antitrust Litig., 560 F. Supp. 963 (N.D. Ga. 1980) (regression model to calculate customer overpayment).

[80] Paul A. Johnson, *The Economics of Common Impact in Antitrust Class Certification*, 77 ANTITRUST L. J. 533, 537 (2011) (discussing how economists should qualitatively review allegations and evidence to identify potentially significant economic factors).

[81] *See* John L. Solow & Daniel Fletcher, *Doing Good Economics in the Courtroom: Thoughts on Daubert and Expert Testimony in Antitrus*t, 31 J. CORP. L. 489, 495-96 (2006).

[82] *In re* Katrina Canal Breaches Consol. Litig., No. 05-4182, 2007 WL 3245438, *2 (E.D. La. 2007); *In re* Polypropylene Carpet Antitrust Litig., 996 F. Supp. 18, 22 (N.D. Ga. 1997).

be comparatively established.[83] Sometimes experts turn to price lists or statistical correlations.[84] When the market is too complex to argue for a uniform pricing structure, experts use regression analyses.[85] These regression models rely on transaction-level data to identify the relevant determinants of price.[86] These models are used to argue that all the relevant pricing information needed to establish impact and damages can be quantified using common evidence, thus establishing predominance. However, how to run these models and what variables must be included are often fact-specific, hotly-contested questions—even among economists.[87]

In contrast, the defendants' role tends to be a far easier one, as they generally attack these models in one of two ways. They point out flaws in the plaintiffs' expert testimony and/or advance their own model to argue there are too many individualized issues.[88] Rather than coming up with a methodology to provide clarity to the chaos, as plaintiffs must, the defendants can just pick apart the expert report by pointing out some aspect

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[83] *See, e.g.*, John H. Johnson & Gregory K. Leonard, *In the Eye of the Beholder: Price Structure as Junk Science in Antitrust Class Certification Proceedings*, 22 ANTITRUST 108, 109 (Summer 2008) (describing price structure arguments advanced to establish common impact).

[84] ABA SECTION OF ANTITRUST ECONOMETRICS 220-224 (2005); *see e.g.*, *In re* Screws Antitrust Litigation, M.D.L. 443, 1981 WL 669928 (D. Mass. July 15, 1981).

[85] Michelle M. Burtis & Darwin V. Neher, *Correlation and Regression Analysis in Antitrust Class Certification*, 77 ANTITRUST L.J. 495, 498 (2011); *see also* Daniel I. Rubenfeld, *Reference Guide on Multiple Regression*, in FED. JUDICIAL CTR. REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 179-227 (2d ed. 2000) ("if the wide price dispersion that exists across a given putative class can be adequately explained by a common economic model, then . . . the determination of antitrust impact is predominately common.").

[86] Roy J. Epstein, *An Econometrics Primer for Lawyers*, 25 ANTITRUST 29, 32 (Summer 2011). As the rigor of Rule 23 increases, plaintiffs' economists advance more nuanced means of establishing common impact, particularly when the anticompetitive conduct alleged occurred in markets with complicated distribution methods, non-homogenous products, or price dispersion. *See, e.g.*, *In re* Graphics Processing Units Antitrust Litig., 253 F.R.D. 478, 505 (N.D. Cal. 2008); *In re* Flat Glass Antitrust Litig., 191 F.R.D. 472, 486 (W.D. Pa. 1999); Burtis & Neher, *supra* note 85 at 502-03.

[87] *Compare* John C. Beyer, *The Role of Economics in Class Certification and Class-Wide Impact*, in LITIGATING CONSPIRACY: AN ANALYSIS OF COMPETITION CLASS ACTIONS, 325 (Stephen G.A. Pitel ed. 2006) (discussing a list of facts that help support a conclusion of common impact), *with* John H. Johnson & Gregory K. Leonard, *Economics and the Rigorous Analysis of Class Certification in Antitrust Cases*, 3 COMPETITION L. & ECON. 341, 345 (2007) (arguing against "prototypical plaintiffs' arguments" to establish common impact).

[88] *See, e.g.*, *In re* Zurn Pex Plumbing Prods. Liab. Litig., 644 F.3d 604, 615 (8th Cir. 2011); *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 314 (3d Cir. 2008); *In re* Live Concert Antitrust Litig., 247 F.R.D. 98, 126 (C.D. Cal. 2007); *In re* S. Dakota Microsoft Antitrust Litig., 657 N.W.2d 668, 677 (S.D. 2003).

of pricing that when considered allegedly precludes predominance.[89] Thus, economic testimony, while helpful, is not as essential to the defendants' case.[90]

Generally the plaintiffs' expert responds that his model is still reliable. His reasons often fall within four categories: (1) there is something special about the market; (2) there is something special about the model; (3) the particular aspect of pricing was actually considered; and/or (4) data for that variable do not exist.[91] While these arguments usually come as part of Rule 23, adding early *Daubert* challenges provides a new forum for these disputes. But, as described below, this new forum is ill-suited for evaluating competing economists. The next part details how early *Daubert* review allows some courts to distort their gatekeeping power, in turn hindering antitrust enforcement.

II. THE PARTICULAR DANGERS OF APPLYING *DAUBERT* AT CLASS CERTIFICATION

Given the key role economist testimony plays in antitrust class actions, screening such testimony is warranted. Judicial resources are far from absolute, and judicial gatekeeping is a necessary tool to balance access and efficiency.[92] As a point of clarification, this Article does not take issue with applying *Daubert* pre-trial or once an expert's final report is complete, such as at the close of merits discovery. The arguments for and against those gates are already well fleshed out.[93] The analysis here focuses on how an additional *Daubert* hurdle improperly hinders private antitrust enforcement. Should the Supreme Court or Congress act to clarify and spell out a test that does not disproportionately harm one side's experts, perhaps earlier *Daubert* assessments could be considered. Until such time, though, this

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[89] *In re* Ready-Mixed Concrete Antitrust Litig., 261 F.R.D. 154, 165 (S.D. Ind. 2009); *see also* Solow & Fletcher, *supra* note 81 at 496 ("[D]efendants' experts are entirely capable of ignoring inconvenient facts, producing economic models that do not fit the case at hand, and manipulating statistical results.").

[90] Langenfeld & Alexander, *supra* note 15 at 21.

[91] *In re* Aftermarket Auto. Lighting Prods. Antitrust Litig., 276 F.R.D. 364, 372 (C.D. Cal. 2011); *In re Visa Check/MasterMoney*, 280 F.3d at 134; *In re* TFT-LCD (Flat Panel) Antitrust Litig., No. 07-1827, 2012 WL 555090, at *5 (N.D. Cal. 2012).

[92] Lonny S. Hoffman, *Burn Up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power over Pleadings*, 88 B.U. L. REV. 1217, 1218 (2008).

[93] *Compare* Andrew I. Gavil, *Defining Reliable Forensic Economics in the Post-Daubert/Kumho Tire Era: Case Studies from Antitrust*, 57 WASH. & LEE L. REV. 831, 877 (2000), *with* Roger D. Blair & Jill Boylston Herndon, *The Implications of Daubert for Economic Evidence in Antitrust Cases*, 57 WASH. & LEE L. REV. 801, 830 (2000) (discussing the benefits of *Daubert* at summary judgment).

new obstacle should not be added given the harm it poses to antitrust enforcement.

This part explores why requiring *Daubert* before class certification invites courts to overreach and exclude potentially reliable expert testimony at the expense of private antitrust enforcement. First, confusion over how to apply *Daubert* to economists allows some courts to misconstrue Rule 702, consequently misapplying their gatekeeper power. Second, starting with Rule 702 makes it more difficult to certify an antitrust class action—a result never intended by *Daubert*.

A. Misconstruction of Rule 702 Hinders Enforcement

Adding *Daubert* as a prerequisite to class certification invites improper judicial gatekeeping. Because it permits judges to limit which claims receive judicial access, gatekeeping power should be narrowly prescribed.[94] Even without *Daubert*, judicial gatekeeping remains alive and well in private antitrust cases, as Rule 23 serves as a strong filter for weak expert testimony. Thus, it is necessary to consider whether an additional layer of gatekeeping is warranted, particularly when it disproportionately impacts one party.

Rather than helping to screen out unreliable expert testimony, applying *Daubert* as a prerequisite to class certification creates a myriad of problems not fully analyzed by the courts or pro-*Daubert* advocates. Overly permissive judicial discretion has allowed some courts to misapply Rule 702's sufficiency, reliability, and analytical fit requirements. While Rule 702 is poorly suited for antitrust expert testimony,[95] this misfit is amplified in three ways when applied pre-class certification. First, courts inflate Rule 702's sufficiency requirement, converting an admissibility test into an invitation to weigh competing expert testimony. Using *Daubert* to pick a victor in a battle of economists is an improper expansion of judicial gatekeeping. Second, some courts focus on particular *Daubert* factors which are ill-suited for economic testimony. This makes *Daubert* a faulty screen for assessing reliability. Third, in analyzing the application of the expert's methodology to the facts, courts adopt overly rigorous interpretations of analytical fit. This misconstruction encourages judges to

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[94] *See* Erin B. Kaheny, *The Nature of Circuit Court Gatekeeping Decisions*, 44 LAW & SOC'Y REV. 129, 130 (2010).

[95] 5 MOD. SCI. EVIDENCE § 46:5 (2012-2013 Edition). This misfit was part of the reason some judges assumed *Daubert* did not apply to such testimony before *Kumho*. *See, e.g.*, Carmichael v. Samyang Tire Inc., 131 F.3d 1433 (11th Cir. 1997); Compton v. Subaru of Am., Inc., 82 F.3d 1513, 1518 (10th Cir. 1996); Iacobelli Const., Inc. v. County of Monroe, 32 F.3d 19 (2d Cir. 1994).

move from gatekeepers to fact-finders, essentially denying the parties their right to a jury trial.

1. Sufficiency Does Not Require a Battle of the Experts

Rather than focusing on whether an economist's testimony is based on sufficient facts, some courts are using their gatekeeping power to justify weighing competing expert testimony.[96] This turns *Daubert* into a battle of the experts.[97] These courts rewrite Rule 702's sufficiency requirement to decide which expert is more convincing.[98] This approach is a notable departure from Rule 702: sufficiency is about whether the testimony is based on sufficient facts, not about crowning one expert at the expense of another. As one scholar artfully describes, the modern *Daubert* challenge has become "a case of 'my expert is better than your expert; therefore, your expert should be excluded.'"[99]

At class certification, it is particularly problematic to use *Daubert* for expert selection. When *Daubert* is applied at this stage, Rule 702's reliability prong is often commingled with Rule 23's predominance determination.[100] This infuses the *Daubert* analysis with judicial confusion surrounding Rule 23.[101] In the last few years, some Supreme Court

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[96] In fact, this is essentially the argument advanced by defendants in *Comcast*. Rather than focusing on whether the plaintiffs' expert's methodology was appropriate for an economist, they instead sought to have the trial court decide whether plaintiff or defendant's geographic market definition is "right". Pet'rs' Reply, Comcast Corp. v. Behrend, 2012 WL 5280782 (U.S.), 5-8 (U.S. 2012).

[97] *In re* MSG Antitrust Litig., CIV.00-MDL-1328(PAM), 2003 WL 244729, at *1 (D. Minn. Jan. 29, 2003) (discussing how *Daubert* was not intended to be a battle of the experts). *But see* Elizabeth Chamblee, *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 (2004) (questioning *In re MSG*).

[98] Stephen Mahle, Ch. 13, *Daubert and Commercial Litigation Expert Testimony*, in BUSINESS LITIGATION IN FLORIDA (Florida Bar 2007).

[99] Sofia Adrogué & Hon. Caroline Baker, *Symposium: Commercial Law Developments and Doctrine: Part I. Development in the Field: Litigation in the 21st Century: the Jury Trial, the Training & the Experts Musings & Teachings from David J. Beck, Lisa Blue, Melanie Gray, and Stephen D. Susman*, 56 ADVOC. 8, 9.

[100] The dissent in *Comcast* only added fuel to this debate. Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1436 (2013) (Ginsburg and Breyer, JJ., dissenting) ("[T]he decision should not be read to require, as a prerequisite to certification, that damages attributable to a class-wide injury be measurable on a class-wide basis.") (citation and quotation marks omitted).

[101] The courts are already adrift in their attempts to reconcile the Supreme Court's mandate to inquire into the merits of the case as part of a class certification. *Compare In re* Urethane Antitrust Litig., MDL No. 1616, 2013 WL 2097346, at *3 (D. Kan. May 15, 2013) (limiting *Comcast*); Harris v. comScore, Inc., No. 11 C 5807, 2013 WL 1339262, at n.9 (N.D. Ill. Apr. 2, 2013) (labeling *Comcast*'s discussion of Rule 23(b)(3) unbinding

language implicitly blessed using class certification as a procedural mechanism to pick one expert over another.[102] Thus, courts split on weighing competing expert testimony under Rule 23.[103]

Early expert challenges just invite confusion between the trial court's two distinct gatekeeping roles at Rule 23 and under *Daubert*.[104] While gatekeeping under Rule 23 may limit which legal issues reach a jury, *Daubert* is purely an admissibility standard. It is not a judge's role to engage in picking a victor among dueling experts.[105]

When the battle of the experts occurs before class certification, it results in less private enforcement because plaintiffs' experts are disproportionately excluded.[106] The only hope for certification is if the plaintiffs' economist wins the battle. Using *Daubert* to pick one expert over another would actually encourage reducing expert testimony by half, since only one side's expert survives. This result is at odds with any notion of *Daubert* as a liberalizing standard.[107] It also invites courts to engage in improper credibility assessments of competing experts.[108] Given the adversarial

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dicta); Levya v. Medline Indus., Inc., No. 11-56849 (9th Cir. 2013), *with* Forrand v. Fed. Exp. Corp., CV 08-1360, 2013 WL 1793951, at *3 (C.D. Cal. Apr. 25, 2013) (citing *Comcast*, 133 S.Ct. at 1432), *and* Roach v. T.L. Cannon Corp., 3:10-CV-0591, 2013 WL 1316452, at *3 (N.D.N.Y. Mar. 29, 2013) (denying certification and rejecting plaintiffs' argument that individualized damages to do not preclude certification).

[102] *See, e.g.*, Behrend v. Comcast Corp., 133 S. Ct. 1426 (2013); Wal-Mart v. Dukes, 131 S. Ct. 2541 (2011).

[103] *See, e.g.*, Sher v. Raytheon Co., 419 Fed App. 887, 888 (11th Cir. 2011); *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 323 (3d Cir. 2008); *In re* Wellbutrin XL Antitrust Litig., 282 F.R.D. 126, 137 (E.D. Penn. 2011). *But see* Munoz v. PHH Corp., 1:08-CV-0759, 2013 WL 2146925, at *24 (E.D. Cal. May 15, 2013); *In re* High-Tech Emp. Antitrust Litig., 11-CV-02509, 2013 WL 1352016, at *11 (N.D. Cal. Apr. 5, 2013); Natchitoches Parish Hosp. Serv. Dist. v. Tyco Intern., Ltd., 247 F.R.D. 253, 270 (D. Mass. 2008).

[104] Not surprisingly, parties are increasingly using the class certification stage to advance arguments beyond the scope of a traditional *Daubert* determination, thus merging the two separate inquires. *See, e.g.*, Sher v. Raytheon, 419 Fed. App. 887, 888 (11th Cir. 2011) (reversing for failure to weigh expert testimony but not clarifying whether that weighing should occur as part of the Rule 23 or the Daubert assessment).

[105] FED. R. EVID. 702, advisory committee's notes (2000) ("When facts are in dispute, experts sometimes reach different conclusions based on competing versions of the facts. The emphasis in the amendment on 'sufficient facts or data' is not intended to authorize a trial court to exclude an expert's testimony on the ground that the court believes one version of the facts and not the other.").

[106] *See* Langenfeld & Alexander, *supra* note 15 at 22.

[107] Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 588-89 (1993).

[108] Ice Portal, Inc. v. VFM Leonardo, Inc., No. 09-60230-CIV, 2010 WL 2351463, at *4 (S.D. Fla. June 11, 2010) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge ..."; change of control provision susceptible to more than one construction could not

process, it is rare that the judge is independently identifying variables. Instead, the judge picks one experts' list of controlling variables over the opposing expert's list.[109] Such credibility determinations are solely for the jury.[110] A judge may not play fact-finder under Rule 702.[111]

Rather than correcting it, circuit decisions have sometimes encouraged this judicial overreaching. For example, in *Sher v. Raytheon Co.*, a class action alleging environmental contamination, the trial court granted certification without first engaging in a full *Daubert* analysis.[112] Recognizing its limited gatekeeping role, the court refused *"*to declare a proverbial winner in the parties' war of the battling experts" and recognized that a *Daubert* analysis at this premature stage "delves too far into the merits of Plaintiffs' case."[113] In reversing this decision,[114] the Eleventh Circuit explicitly instructed the trial court to use *Daubert* prior to certification to weigh competing expert testimony and pick a winner: "We hold that the district court erred as matter of law by not sufficiently evaluating and weighing conflicting expert testimony presented by the parties at the class certification stage."[115] With appellate courts issuing such directives, it is no surprise that courts are routinely seeing parties make Rule 702 arguments that require judges to play arbiters between dueling experts.

This improper construction of *Daubert* fails to acknowledge valid disagreement amongst economists.[116] It wrongly presumes both experts

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be resolved on summary judgment); Castleberry v. Collierville Med. Assocs. Inc., 92 F.R.D. 492, 493-94 (W.D. Tenn. 1981) ("a motion for summary judgment must be denied where affidavits present a credibility contest between the parties' expert witnesses on a relevant issue").

[109] *See, e.g.*, *In re* Live Concert Antitrust Litig., 863 F. Supp. 2d 966, 1000 (C.D. Cal. 2012).

[110] *See, e.g.*, *In re* Polyester Staple Antitrust Litig., No. 3:03CV1516, 2007 WL 2111380, at *25 (W.D.N.C. 2007) (applying Rule 702 because merit discovery was already completed but recognizing it would be improper to weigh the opposing expert's testimony at class certification); *In re* Playmobile Antitrust Litig., 35 F. Supp. 2d 231, 247 (E.D.N.Y. 1998) (recognizing the dueling expert battle is one for jurors to resolve); *see also* Department of Justice Manual Comment 4-5.0000, S (4-5.000) MANUAL FOR COMPLEX LITIGATION (2013).

[111] *See, e.g.*, *In re* High-Tech Employee Antitrust Litig., 11-CV-02509-LHK, 2013 WL 1352016 (N.D. Cal. Apr. 5, 2013) (internal citations omitted).

[112] 261 F.R.D. 651, 670 (M.D. Fla. 2009).

[113] *Id.*

[114] Sher v. Raytheon Co., 419 Fed. App. 887, 890-91 (11th Cir. 2011)

[115] *Id.* at 888.

[116] Gregory G. Wrobel & Ellen Meriwether, *Economic Experts: The Challenges of Gatekeeping and Complexity*, 25 ANTITRUST 8, 10 (2011) ("Industrial organization and economists engage in lively and ongoing debate among themselves on the viability of these economic theories and models. The theoretical literature for these debates and the real-

cannot be right. Economists themselves debate the "what's reliable enough" question. As Solow and Fletcher describe, conflicting economic testimony does not make one expert's testimony unreliable. Rather, conflict is just an inherent component in economic modeling:

> [E]conomists testifying on opposite sides in court will typically disagree. It does not follow that one of them is engaging in academic misconduct. Different experts will find different pieces of evidence persuasive. Different sources of data can point to alternative conclusions, and applying different statistical techniques to the same body of data can give rise to different inferences.[117]

It is quite possible for economists to rely on the same evidence and reach contrary but fully supportable conclusions.[118] Experts' conclusions primarily differ on the variables and assumptions underlying their models. Any theory of competition depends on its assumptions, the validity of which varies across industries and time.[119] Case law evidences an assortment of discordant but equally viable analytical methods to quantify these issues.[120] By requiring a *Daubert* standard that not only decides whether the economist's testimony is sufficiently reliable but whose economist is "right," a court is asked to dive into the exceptionally murky waters of economic theory.[121]

Weighing competing testimony also invites courts to improperly use *Daubert* to analyze an expert's conclusions rather than his methodology. By excluding it at class certification, the court is essentially saying the

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world applications in antitrust cases and government enforcement actions are often technical, mathematical, and laden with assumptions that are difficult to follow even for experienced antitrust practitioners, and even more so for courts and juries who encounter such material infrequently, if at all.").

[117] Solow & Fletcher, *supra* note 81 at 497.

[118] *Id.* at 490.

[119] Maurice E. Stucke, *Better Competition Advocacy*, 82 ST. JOHN'S L. REV. 951, 1011 (2008).

[120] *See generally* Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. REV. 551 (2012) (discussing courts various differing ways of measuring competition). Part of the trouble is the goals of antitrust enforcement are not always consistently defined. *See, e.g.*, Joshua D. Wright & Douglas H. Ginsberg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 FORDHAM L. REV. 2405, 2416 (2013).

[121] The Supreme Court has already recognized that antitrust examinations are challenging: "antitrust plaintiffs may bring lawsuits throughout the Nation in dozens of different courts with different nonexpert judges and different nonexpert juries . . . . "in light of the nuanced nature of the evidentiary evaluations necessary to separate the permissible from the impermissible, it will be difficult for those many different courts to reach consistent results." Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264, 281 (2007).

expert's conclusion that common issues predominate is unreliable. While a trial court can review how an economist applies a proposed model, his conclusions are off limits.[122] Otherwise, *Daubert* would essentially decide the subsequent certification question. If the court buys a lack of fit argument and accordingly rejects plaintiffs' expert, failure to certify is sure to follow for lack of predominance.[123]

In re Live Nation Concert Antitrust Litigation[124] provides a stark example of how ill-equipped judges are to weigh competing testimony and how such efforts can result in judicial fact-finding, which is inappropriate under Rule 702.[125] There, the trial court excluded the testimony of Dr. Owen Phillips, a well-regarded Economics Professor at the University of Wyoming.[126] The case involved allegations of monopoly and attempted monopoly against promoters of live rock concerts.[127] Originally, the court granted class certification but later reversed its decision upon evaluating the admissibility of Dr. Phillips' testimony.

The court went far beyond determining admissibility and instead used *Daubert* to evaluate which expert's method was more persuasive. For example, the court held Dr. Phillips failed to consider all the potential market variables, including how an artist's popularity impacted promotion.[128] Yet, Dr. Phillips specifically and repeatedly stated his three separate models all incorporated various market factors, including artist popularity.[129]

Notably, there was no contrary modeling by Defendants proving popularity was statistically significant. Instead, Defendants took issue with

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[122] MANUAL FOR COMPLEX LITIGATION (FOURTH) § 23.34 (2004).

[123] Amy Dudash, *Hydrogen Peroxide: The Third Circuit Comes Clean About the Rule 23 Class Action Certification Standard*, 55 VILL. L. REV. 985, 1003 (2010) (discussing how essential expert testimony is to certify an antitrust class action); Heather P. Scribner, *Rigorous Analysis of the Class Certification Expert: The Roles of Daubert and the Defendant's Proof*, 28 REV. LITIG. 71, 72 (2008).

[124] *In re* Live Concert Antitrust Litig., 863 F. Supp. 2d 966 (C.D. Cal. 2012).

[125] *Id.* at 970.

[126] *In re* Live Concert Antitrust Litig., 247 F.R.D. 98, 125 n. 20 (C.D. Cal. 2007).

[127] *In re Live Concert*, 863 F. Supp. at 969.

[128] *Id.* at 974-75. The court's own opinion somewhat contradicts its own ruling, saying popularity was not considered, but then going on to dispute the method Phillips used to evaluate this factor. *Id.*

[129] Pls.' Mem. In Opp. to Defs.' Mot. to Exclude Testim. of Dr. Owen Phillips, 7-8 *In re* Live Concert Antitrust Litig., Case No. 06-ML-1745-SVW, Nov. 14, 2011 (providing details regarding Phillips' analysis on artist popularity). It seems the court either ignored or misconstrued some of the expert testimony, choosing Defendants' version of Phillips' research rather than Phillips' and Plaintiffs' explanation of his conclusions. But much of the record is under seal, including the expert reports, despite repeated efforts by plaintiffs to unseal. *See* Telephone Interview with Jennifer Connolly, Partner, Hagens Berman Sobol Shapiro LLP (June 27, 2013).

how well the models considered popularity. According to Defendants' expert, Phillips should have considered the top 25 artists rather than the top 100.[130] The court sided with Defendants' expert, though only Plaintiffs' expert actually analyzed the evidence. The court used analytical fit to justify ignoring the evidence and improperly evaluated the sufficiency of Dr. Phillips' conclusions. It substituted evidence and sound methodology with what it called "common sense" to find popularity would impact pricing. It then wrongly concluded Dr. Phillips' models must not have considered the factor.[131]

The judge's erroneous conclusions were not limited to fact-finding about variable selection. The court also rejected Dr. Phillips' market definition, again by rejecting his factually-supported conclusions.[132] This ruling is particularly questionable since Dr. Phillips successfully relied on this exact market definition in a previous antitrust class action involving notably similar allegations.[133] By treading too far into expert selection, the court excluded Phillips—essentially killing yet another private enforcement case.[134] This result demonstrates just how dangerous misapplication of *Daubert* is for antitrust enforcement.

As *Live Nation* suggests, courts are not well-equipped to evaluate economic testimony. By their own admission, judges find evaluating economic experts thorny.[135] Jurisprudence is replete with judicial missteps when economic theory failed to match factual realities.[136] Given this

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[130] Pls.' Mem. In Opp. to Defs.' Mot. to Exclude Testim. of Dr. Owen Phillips, at 12.

[131] *In re Live Concert*, 863 F. Supp. 2d at 975.

[132] The judge stated he focused "exclusively on Dr. Phillips' methodology, not his results." *Id.* at 988. However, in actuality, the judge rejected the conclusion that live rock concerts were the appropriate relevant market because he felt Dr. Phillips did not do enough to start with a smaller product market before testing for substitution. *Id.* at 988-89.

[133] *See* Nobody in Particular Presents, Inc. v. Clear Channel Commc'ns, Inc., 311 F. Supp. 2d 1048, 1082 (D. Colo. 2004).

[134] Summary judgment was entered for Defendants without first decertifying the class. *In re Live Concert*, 863 F. Supp. at 1001.

[135] *Interview with Judge Kathyrn Vratil*, ANTITRUST 19, 20 (Spring 2003). There is an argument that jurors should evaluate this testimony rather than have judges limit the testimony. In fact, some scholarship suggests that the judicial challenges are so extreme as to outweigh the potential problems with jurors evaluating such testimony. *See, e.g.*, Brief Amici Curiae of Neil Vidmar et al., Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999). However, such an argument is beyond the scope of this paper, which is more narrowly focused on the application of *Daubert* at the class certification stage.

[136] *In re Potash* provides a particularly troubling example of problematic overreliance on economic theory to the hindrance of antitrust enforcement. Blomkest Fertilizer, Inc. v. Potash Corp. of Sask., Inc., 203 F.3d 1028, 1031-32 (8th Cir. 2000). The case involved class action allegations by Potash buyers alleging violation for price-fixing. *Id.* at 1031-32. Though some economists and antitrust scholars recognize the existence of the alleged cartel, the trial court granted summary judgment. *Id.* Notably soon thereafter, the price for

potential for error, it is a mistake to make the judge's job even harder by using *Daubert* to select between conflicting experts at class certification.

2. Applying Particular *Daubert* Factors Skews the Reliability Analysis

In addition to improperly evaluating the sufficiency of competing expert testimony, Rule 702's reliability requirement also causes problems for antitrust enforcement. Admittedly, *Daubert* encourages judicial flexibility in identifying factors relevant to determine an expert's reliability. This makes sense when the type of expert testimony varies. For example, evaluating a police procedure expert requires a different set of Rule 702 factors than, say, an epidemiologist. But economists in antitrust class actions are a fairly homogenous group, justifying more consensus about the factors relevant to analyzing their testimony. Instead, courts divide on these factors. As a result, parties are left uncertain how to bolster their economists against attack, as the bases for attack change from court to court.[137]

In evaluating reliability, courts that apply *Daubert* factors to economic testimony are often trying to fit a square peg into a round hole. At least one court explicitly acknowledged that none of the *Daubert* factors are particularly relevant.[138] More specifically, though, some of the factors commonly used are especially difficult for a plaintiffs' economist to satisfy. When courts use their gatekeeping discretion to screen out economists based on these factors, private antitrust enforcement pays the price.

First, a requirement of peer review is problematic for plaintiffs' economic experts. Much of the modeling used in antitrust cases is made for

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Potash increased 3000%, confirming for many that the alleged price-fixing was more than hypothetical. *See, e.g.*, Christopher Leslie, *Antitrust Law as Public Interest Law*, 2 U.C. IRVINE L. REV. 885, 894 (2012) (discussing impact to food prices stemming from the alleged Potash conspiracy). These types of questionable determinations by judges playing arm-chair economists undermine giving such deferential treatment to *Daubert* evaluations. *See* Craig Lee Montz, *Trial Judges As Scientific Gatekeepers After Daubert, Joiner, Kumho Tire, and Amended Rule 702: Is Anyone Still Seriously Buying This?*, 33 UWLA L. REV. 87, 110 (2001) (discussing theories why judges find expert evaluation so challenging); Haw, *supra* note 74 at 1271 (discussing how judges have a difficult time distinguishing between admissible factual expert testimony and inadmissible legal conclusions).

[137] Rudolph F. Pierce, Esq. & Jennifer M. DeTeso, Esq., *A Lawyer's Lament: Unpredictability and Inconsistency in the Wake of the Daubert Trilogy*, 2 SEDONA CONF. J. 163, 170 (2001).

[138] Bailey v. Allgas, Inc., 148 F. Supp. 2d 1222, 1235 (N.D. Ala. 2000) *aff'd*, 284 F.3d 1237 (11th Cir. 2002) ("The court concludes that, because of the nature of the issues presented, the *Daubert* factors are not reasonable measures of reliability in this case.").

litigation and thus not subject to peer review.[139] While an econometric model is essential for a plaintiffs' case, it is optional for a defendant.[140] Thus, using this factor to reject an economist disproportionately excludes plaintiffs' experts.

Second, acceptance in prior cases[141] and academic consensus[142] are frequently used bases for evaluating *Daubert* testimony. Given the quickly changing contours of economic thought, prior use should not be given much weight.[143] Yet, to the extent that it is, it harms attempts to expand antitrust enforcement. Much of the prior accepted economic testimony relies heavily on neo-classical economic modeling that narrowly defines harm.[144] However, other schools of economic thought, particularly post-Chicago scholarship, reach broader anticompetitive conduct.[145] Looking to prior acceptance and academic consensus leaves little room for expert testimony reflecting these newer schools of thought and their accompanying expansion of antitrust enforcement.[146] Hence, these factors should not be part of the *Daubert* evaluation.

Third, using "testability" to measure reliability is problematic for antitrust economic modeling.[147] Testing in this context is often defined in

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[139] Even if defendants offered models, peer review remains a defendant-friendly concept because they more frequently have the financial resources to fund research that has litigation value. *See* Leslie Borden & David Ozonoff, *Litigation-Generated Science: Why Should We Care?*, 116 ENVTL. HEALTH PERSPECTIVES 1, 119 (2008).

[140] *In re* Ready-Mixed Concrete Antitrust Litig., 261 F.R.D. 154, 165 (S.D. Ind. 2009); *see also* Solow & Fletcher, *supra* note 81 at 496 ("[D]efendants' experts are entirely capable of ignoring inconvenient facts, producing economic models that do not fit the case at hand, and manipulating statistical results.").

[141] *See, e.g.*, *In re* Chocolate Confectionary Antitrust Litig., 289 F.R.D. 200, 209 (M.D. Pa. 2012) (discussing how economist had been qualified as an expert in numerous legal actions); Christou v. Beatport, LLC, No. 10-CV-02912, 2013 WL 248058, at *4 (D. Colo. Jan. 23, 2013) (same).

[142] *See* Thomas G. Hungar & Ryan G. Koopmans, *Appellate Advocacy in Antitrust Cases: Lessons from the Supreme Court*, 23 ANTITRUST, 53, 54 (Spring 2009) ("[T]he court in recent years has frequently looked to the majority views of economists to help resolve antitrust issues...."); *see, e.g.*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 889 (2007); State Oil Co. v. Khan, 522 U.S. 3, 15-18 (1997).

[143] Daniel E. Lazdroff, *Antitrust Symposium—Introduction: So What Else is New?*, 45 LOY. L.A. L. REV. 1023, 1043 (2011).

[144] John E. Lopatka & William H. Page, *Economic Authority and the Limits of Expertise in Antitrust Cases*, 90 CORNELL L. REV. 617, 638 (2005).

[145] Spencer Weber Waller, *The Law and Economics Virus*, 31 CARDOZO L. REV. 367, 403 (2009); Joshua D. Wright, *The Roberts Court and the Chicago School of Antitrust: The 2006 Term and Beyond*, 3 COMPETITION POL'Y INT'L 25 (2007); Reza Dibadj, *Saving Antitrust*, 75 U. COLO. REV. 745, 847 (2004).

[146] Further, just being grounded in prior precedent does not necessarily make the testimony more reliable. *See Commentary*, *supra* note 210 at 86-87.

[147] City of Tuscaloosa v. Harcos, 158 F.3d 548 n.25 (11th Cir. 1998). *But see In re*

terms of replication, meaning did experts looking at similar facts reach similar conclusions.[148] Unlike scientific testimony, economic models are not tested through experiments where other variables that might affect the outcome are controlled.[149] Instead, a hypothesis is developed and historical data are collected on the potentially relevant variables. Then, regression analysis is used to measure the influence of each variable in the model. To truly falsify an economic model's hypothesis in the way "testing" is used in hard sciences requires creating a real-world functioning market. However, it is virtually impossible to replicate a market to help differentiate between more important and less important variables.[150] As one antitrust expert explains, "It is doubtful that much economic testimony would survive a strict and literal application of the *Daubert* factors … few economic techniques of the ilk utilized in antitrust litigation could be 'tested' in the sense contemplated by *Daubert*…."[151]

Continued reliance on these four factors underscores the problem with judicial discretion in applying *Daubert*. These factors do not answer the basic question of whether the testimony is reliable in the field of economics. Instead, the factors invite courts to improperly exclude potentially reliable testimony outright. In turn, what should be a liberal admissibility standard has become an exclusionary one for antitrust class actions, allowing fewer economists to testify. But reliance on factors not well suited to economic testimony is only part of the problem with requiring additional, earlier *Daubert* challenges. The larger problems stem from courts' confusion over how to evaluate whether the expert properly applies his method to the facts of the case at class certification, which is discussed next.

3. Misinterpretation of "Analytical Fit" Improperly Excludes Economists

In addition to relying on faulty factors, courts misapply Rule 702's application prong. This prong requires courts to consider whether the

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Prop. Carpet Antitrust Litig., 966 F. Supp. 18, 26 (N.D. Ga. 1997).

[148] Herbert Hovenkamp, *The Antitrust Enterprise: Principle and Execution: An Introduction*, 31 J. CORP. L. 287, 290 (2006); *cf.* Shubha Ghosh, *Federal and State Resolutions of the Problem of Daubert and "Technical or Other Specialized Knowledge"*, 22 AM. J. TRIAL ADVOC. 237, 241 (1998) (discussing pre-*Kumho* how the concept of falsifiability does not strictly fit with economic modeling).

[149] YVES SMITH, ECONNED: HOW UNENLIGHTENED SELF INTEREST UNDERMINED DEMOCRACY AND CORRUPTED CAPITALISM 56 (2010) (discussing how economics does not use traditional scientific method).

[150] Andrew Gavil, *After Daubert: Discerning the Increasingly Fine Line Between the Admissibility and Sufficiency of Expert Testimony in Antitrust Litigation*, 65 ANTITRUST L.J. 663, 673-64 (1997).

[151] *Id.*

economist reliably applied his methodology to the facts of the case.[152] The application requirement, often referenced as analytical fit, generally focuses on two types of potential gaps: (1) a gap between the data the expert relies on and the facts of the case; and (2) a gap between the methodology and the opinions, namely how the methodology supports the proffered conclusion when applied to the given facts.[153] Courts disagree over how large a gap expert testimony can have and still be admissible, with some courts wrongly equating lack of "analytical fit" with lack of complete precision.[154] An over-exacting analytical fit requirement hinders private enforcement efforts as it further invites courts to move from judicial gatekeepers to fact-finders.

When analytical fit is too narrowly defined, it becomes an alternative basis for attacking testimony establishing predominance.[155] This is where

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[152] FED. R. EVID. 702.

[153] *See* Kimberly Keller, *Bridging the Analytical Gap: the Gammill Alternative to Overcoming Robinson and Havner Challenges to Expert Testimony*, 33 ST. MARY'S L. J. 277, 312 (2002); Gavil, *supra* note 93 at 876 (discussing alternative meanings of the "fit" requirement).

[154] *See, e.g.*, *In re* Live Concert Antitrust Litig., 863 F. Supp. 2d 966, 977 (C.D. Cal. 2012); *cf. In re* REMEC Inc. Sec. Litig., 702 F. Supp. 2d 1202, 1273 (S.D. Cal. 2010). Originally, the Supreme Court stated an expert's conclusions were not subject to *Daubert*. Subsequently, rather than *Daubert*'s bright-line protection for experts' findings, the Supreme Court in *Joiner* noted that in assessing analytical fit, "conclusions and methodology are not entirely distinct from one another." Gen. Elec. v. Joiner, 522 U.S. 136, 146 (1997). Thus, the decision provided some leeway to poke at experts' conclusions, even when based on legitimate methodology. Lucinda M. Finley, *Guarding the Gate to the Courthouse: How Trial Judges Are Using Their Evidentiary Screening Role to Remake Tort Causation Rules*, 49 DEPAUL L. REV. 335, 344 (1999). Technically, the decision did not directly render moot the conclusion vs. methodology distinction. But at the same time, it essentially invited trial courts to blur the line between conclusions and methodology, thus adding a new smudge to the less-than-clear *Daubert* lens. *Compare* Brown v. Wal-Mart Stores, Inc., 402 F. Supp. 2d 303, 308 (D. Me. 2005) (limiting Rule 702 to an expert's methodology and reasoning, not his conclusions), *with* Monell v. Scooter Store, Ltd., 895 F. Supp. 2d 398, 407 (N.D.N.Y. 2012) (holding expert testimony should be excluded when conclusions are inadequately supported).

[155] *See, e.g.*, *In re* Polypropylene Carpet Antitrust Litig., 93 F. Supp. 2d 1348, 1357 (N.D. Ga. 2000); *see also* Craftsman Limousine, Inc. v. Ford Motor Co., 2004 US App. LEXIS 7096 (8th Cir. 2004) (holding the expert's testimony on damages should have been excluded because it "failed to 'incorporate all aspects of the economic reality.'"); *In re* Titanium Dioxide Antitrust Litig., No. 10-0318, 2013 WL 1855980 at *9 (D. Md. May 1, 2013); *In re* Urethane Antitrust Litig., MDL 1616, 2012 WL 6681783, at *7-8 (D. Kan. Dec. 21, 2012); Lopatka & Page, *supra* note 144 at 692-93; *Reliable Forensic*, *supra* note 153 at 869-72 (citing *Blomkest* and *Concord Boats* as cases where missing variables lead to exclusion of expert testimony). This argument is usually raised by defendants and used with a tag-along argument. The defendant often goes on to claim once those variables are included, and plaintiffs can no longer establish common impact or use a common damage methodology. *See, e.g.*, *In re* Linerboard Antitrust Litig., 497 F. Supp. 2d 666, 674-75 (E.D. Penn. 2007).

much of the conflict between experts arises: the defendant's expert will often claim the plaintiffs' economist either made too generous an assumption or left out a variable which allegedly would change the conclusion.[156] Thus, the defendants argue, the plaintiffs' model does not "fit" squarely with all the potential facts of the case, making it too unreliable to admit.

Construing analytical fit to evaluate whether an economist included the "right" variables makes little sense. Not only does it ignore how economic modeling works, it blurs the concepts of admissibility and sufficiency. In economics, which factors should or should not be included in a proposed regression model is not always crystal clear. Antitrust economists, particularly those for plaintiffs, often encounter pricing information that is inconsistent, incomplete, or unobtainable.[157] This can impact what variables and assumptions an economist makes. However, these models can still be reliable enough for economic scholarship, and thus for use in court, even if they lack a certain precision.[158] Failing to merely identify a particular variable does not necessarily make the model unreliable outright.[159] As Judge Walls explains, "It is only the rare case where the 'regressions are so incomplete as to be irrelevant' and the expert's decisions regarding control variables are the basis to exclude the analysis."[160]

Analytical fit does require a court to consider whether the expert testimony matches the facts of the case, but only in a general sense.[161] Analytical fit is really just the stricter cousin of relevancy. The fit test simply requires "good intuitive sense"[162] rather than a nuanced, detailed

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[156] *See, e.g.*, *In re Titanium Dioxide*, 2013 WL 1855980 at *9 (discussing defendant's argument that plaintiff's expert "cherry-picked" facts); *In re Urethane*, MDL 1616, 2012 WL 6681783 at *7-8 (D. Kan. Dec. 21 2012).

[157] *See* Solow & Fletcher, *supra* note 81 at 494 (discussing marginal cost data as an example of unobtainable information).

[158] For example, some courts admit models with heteroscedasticity, though such models would likely face difficulty standing up to an overly rigid analytical fit analysis. *See, e.g.*, Denny v. Westfield State Coll., 669 F. Supp. 1146, 1149 (D. Mass. 1987); Estate of Hill v. ConAgra Poultry Co., No. 4:94CV0198, 1997 WL 538887, at *6 (N.D. Ga. 1997).

[159] Rubenfeld, *supra* note 85 at 188 (discussing how failure to include a variable goes more to the probative value of the model than its admission).

[160] Gutierrez v. Johnson & Johnson, No. 01-5302, 2006 WL 3246605, at *5 (D.N.J. Nov. 6, 2006) (internal citation omitted).

[161] For example, in one case, a plaintiff sued defendant Phillip Morris claiming its cigarette was defective because it had an unreasonable propensity to ignite upholstered furniture. Kearney v. Phillip Morris, Inc., 916 F. Supp. 61 (D. Mass. 1996). Plaintiff offered expert testimony regarding the flammability of a particular type of fabric. However, the fabric was not used on the couch at issue. Consequently, the court rejected the expert testimony under *Daubert*'s "fit" requirement. *Id.* at 67.

[162] Bobak Razavi, *Admissible Expert Testimony and Summary Judgment*, 29 J. LEGAL

understanding of the particularities of the case.[163] Viewed more accurately as a heightened relevancy requirement, analytical fit focuses on whether the expert testimony matches the facts, not necessarily how well.[164] The court can consider whether the facts of the case allow for a certain type of modeling; for example, whether a yardstick model for computing class-wide damages applies to the particular antitrust violation at issue. What is not permissible under Rule 702 is second-guessing which facts must be included in impact or damages models. Often, the latter question forces courts to make merit determinations, thus directly drawing judges further away from their proper position behind the bench and toward the jury box to serve as fact-finders.[165]

Viewing analytical fit as just a relevancy standard makes sense because whether enough variables are included impacts the testimony's sufficiency, not its admissibility.[166] The admissibility determination is more generous than evaluating whether the expert testimony proves the case.[167]

MED. 307, 315 (2008).

[163] In fact, *Daubert*, itself provides a clear example of how the standard for fit is loose and intended to exclude junk science like astrology. Daubert v. Merrell Dow Pharms., Inc. 509 U.S. 579, 591-95 (1993); *see also supra* § I(A).

[164] *Daubert*, 509 U.S. at 591-92; *see also* DuMiller v. Farmers Ins. Grp., CIV-10-466-F, 2012 WL 8017244 at *5 (W.D. Okla. Mar. 22, 2012); S.E.C. v. Johnson, 525 F. Supp. 2d 70, 74 (D.D.C. 2007); M. Michelle Jones, *Using Daubert Principles to Determine If Other Incidents Are Substantially Similar in Design Defect Cases*, 6 CHARLESTON L. REV. 685, 722 (2012).

[165] Adrogué & Baker, *supra* note 99 at 14 ("The judge, as a neutral decision-maker, wears a robe, which represents a separating veil between him and the litigants. This veil is torn and neutrality compromised when a judge is asked to step in and interpret the facts.").

[166] City of Tuscaloosa v. Harcos, 158 F.3d 548, 563 (11th Cir. 1998). The trial court's *Daubert* analysis in *City of Tuscaloosa* demonstrates how the admissibility/sufficiency distinction can blur. There, plaintiffs' economic expert offered testimony on collusion. City of Tuscaloosa v. Harcros Chems., Inc., 877 F. Supp. 1504, 1513 (N.D. Ala. 1995). The economist's testimony focused on plus-factors, such as a smaller number of firms, low demand elasticity, and acting against the firms' interests. *Id.* at 1526-27. The trial judge excluded the report under Rule 702, finding the expert's methodologies failed to distinguish between unlawful and lawful parallel pricing. *Id.* at 1532. After excluding the report, summary judgment was granted since plaintiffs now lacked evidence of collusion. *Id.* at 1538. The Eleventh Circuit reversed, finding the trial court's interpretation of the rule erroneous as a matter of law. *City of Tuscaloosa*, 158 F.3d at 563. The court admonished the trial court for confusing the sufficiency of the testimony and its admissibility. The appellate court pointed out that expert testimony alone does not need to make plaintiffs' case but rather is just a part of the case. *Id.* at 564-65. Part of the confusion between admissibility and sufficiency likely stems from the increased summary judgment requirement for antitrust cases post-*Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *see also After Daubert*, *supra* note 150 at 689.

[167] Some courts already recognize this and view the standard for fit as "not that high." *See In re* Paoli R.R. Yard PCB Litig., 35 F.3d 717, 745 (3d Cir. 1994); *see also* Kordek v. Becton, Dickinson and Co., No. 10-7040, 2013 WL 420332, at *6 (E.D. Pa. Feb. 4, 2013);

Sufficiency, in contrast, evaluates whether the collective weight of the evidence is adequate to present a jury question.[168] Sufficiency looks at the overall persuasiveness of the party's entire case, not just the expert testimony.

A helpful analogy for considering the sufficiency/admissibility distinction is assembling a jigsaw puzzle. The plaintiffs' economist is asked to piece together a puzzle. If fully assembled, the complete puzzle would provide a precise picture of the underlying market. But often, not all the pieces of the puzzle are available. The economist may only be able to assemble a percentage of the overall picture. Although the entire picture is not visible, the picture the expert presents can still aid the finder of fact.

Sufficiency considers whether there is enough of the picture to justify the expert's conclusion. The plaintiffs' expert may say that even without all the pieces, he can still draw a conclusion as to the puzzle's image. In contrast, admissibility is a much looser threshold: it considers whether the expert's methodology in piecing together the puzzle makes sense given the shape or image of the puzzle itself—regardless of how much of the puzzle it reveals.

Despite this distinction, courts still confuse sufficiency and admissibility, as occurred in *El Aguila Foods Products v. Gruma Corp.*[169] In that antitrust case, one of Plaintiffs' experts offered testimony about whether Defendant's action demonstrated market power. The expert relied on industry information generated by others, including a FTC study on the specific anticompetitive conduct at issue.[170] Based on his research, he then offered his opinion.[171]

The trial court rejected the expert testimony, applying a narrow definition of the analytical fit requirement.[172] The problems that the court relied on to exclude the testimony highlight a fundamental misinterpretation of analytical fit. For example, the court noted several potential areas where the marketing expert could have further researched the industry, including conducting retailer interviews to determine how the agreements at issue affected retailers' space allocation for the relevant product.[173]

Safeco Ins. Co. of Am. v. S & T Bank, No.07-01086, 2010 WL 786257, at *5 (W.D. Pa. Mar. 3, 2010).

[168] *See In re* Joint E. & S. Dists. Asbestos Litig., 52 F.3d 1124, 1132 (2d Cir. 1995) (distinguishing between inquiry into admissibility of expert evidence and "a sufficiency inquiry, which asks whether the collective weight of a litigant's evidence is adequate to present a jury question.").

[169] 301 F. Supp. 2d 612 (S.D. Tex. 2003)

[170] *Id*. at 624.

[171] *Id*.

[172] *Id*. at 623-24.

[173] *Id*.

However, just because the plaintiffs' expert could have gone further in analyzing the market does not render his testimony inadmissible. The testimony still relied on sound economic modeling and applied that model to relevant facts. That the expert could have considered additional facts goes to the testimony's sufficiency, not necessarily its admissibility under *Daubert*.[174]

The court's blurring of admissibility and sufficiency killed the case. Plaintiffs' damages expert in part relied on the market power testimony, so his testimony was also stricken.[175] Without any supporting economic testimony, the court found there were no longer any triable issues of fact, and thus granted summary judgment for Defendant.[176] Then, given the deference afforded to a trial court's Rule 702 decision, the Fifth Circuit affirmed the ruling.[177]

Since courts have accepted misconstrued analytical fit arguments to exclude experts at later procedural stages,[178] it is only a matter of time before this same flawed interpretation of *Daubert* seeps into the class certification setting.[179] The number of analytical fit challenges to economic experts will likely increase in relation to the number of courts requiring a full *Daubert* assessment before class certification. Given the great latitude trial courts have in these cases and the incredible pressure to resolve cases earlier than ever using their gatekeeping power, it seems quite possible testimony that is appropriate at Rule 23 may not necessarily be sufficient for an early application of a strict *Daubert* test.

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[174] Daubert v. Merrell Dow Pharms., Inc. 509 U.S. 579, 596 (1993) (noting even shaky testimony is admissible).

[175] *El Aguila Foods Prods.*, 301 F. Supp. 2d at 626.

[176] *Id*. at 633.

[177] El Aguila Food Prods, Inc. v. Gruma Corp., 131 Fed. Appx. 450 (5th Cir. 2005).

[178] *See, e.g.*, Concord Boat Corp. v. Brunswick, 207 F.3d 1039, 1047, 1056-57 (8th Cir. 2000); Blue Dane Simmental Corp. v. Am. Simmental Ass'n., 178 F.3d 1035, 1040-41 (8th Cir. 1999); *In re* Aluminum Phosphide Antitrust Litig., 893 F. Supp. 1497, 1503-05 (D. Kan. 1995); *see also* Sandra F. Gavin, *Managerial Justice in a Post-Daubert World: A Reliability Paradigm*, 234 F.R.D. 196, 212 (May 2006) (discussing harm of *Daubert* at summary judgment). Not all courts have fallen for these arguments, though. *See, e.g.*, *In re* Indus. Silicon Antitrust Litig., No. 95-2104, 1998 WL 1031507, at *3 (W.D. Pa. Oct. 13, 1995) (noting defendants cannot just point to excluded variables but must instead demonstrate such variables matter).

[179] The success of these arguments has been limited to date. *See, e.g.*, Christou v. Beatport Inc., No. 10–cv–02912, 2013 WL 248058, at * 4 (D. Colo. 2013). Some courts have even gone so are as to acknowledge that a missing variable does not make testimony unreliable. *See, e.g.*, *In re* Linerboard, 497 F. Supp. 2d at 677-78, *In re* Polypropylene Carpet Antitrust Litig., 93 F. Supp. 2d 1348, 1365 (N.D. Ga. 2000); *In re Indus. Silicon*, 1998 WL 1031507 at *3. But this limited success is more attributable to the limited number of cases explicitly running through *Daubert* prior to class certification.

Since sufficiency hurdles already exist at summary judgment,[180] analytical fit does not need to serve this purpose. There is little reason to think the adversarial process will not sufficiently weed out testimony that lacks adequate factual foundation.[181] As the Supreme Court stated, even "shaky" expert testimony should clear *Daubert*.[182] Any contrary interpretation of "analytical fit" invites courts to improperly extend their gatekeeping power by determining whether the testimony fits the facts of the case well enough to allow the case to proceed, rather than focusing on admissibility.

Given how economic models are designed, applying analytical fit to economists at class certification is particularly illogical. Plaintiffs need not prove their case at class certification.[183] Even with the recent increased Rule 23 rigor, plaintiffs' obligation at class certification is only to explain how they propose to prove their case once class and merit discovery are complete.[184] Thus, the plaintiffs are not required to provide full reports on impact and damages but rather proposals of how to design methodologies to generate the reports.[185] All the facts the expert may consider are not yet

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[180] *Scientific Evidence, Non-Scientific Experts, and Reliability*, 29 FED. PRAC. & PROC. EVID. § 6266 (1st ed. 2013) ("Accordingly, where expert testimony is based on well-established science, the courts generally have concluded that reliability problems go to weight, not admissibility.").

[181] Even the Supreme Court in *Daubert* stated: "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." Daubert v. Merrell Dow Pharms., Inc. 509 U.S. 579, 596 (1993); s*ee also* FED. R. EVID. 702 advisory comments 2000 (internal citation omitted) ("*Daubert* did not work a 'sea change [sic] over federal evidence law,' and 'the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system.'").

[182] *Daubert*, 509 U.S. at 596.

[183] *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311 (3d Cir. 2008); *In re* Rail Freight Fuel Surcharge Antitrust Litig., 287 F.R.D. 1, 21 (D.D.C. 2012); *see also Walsh v. Ford Motor Co., 807 F.2d 1000, 1017-18 (D.C. Cir. 1986)* ("Class action proponents may not be called upon to prove their case in order to obtain certification.").

[184] *In re Hydrogen Peroxide*, 552 F.3d at 311; *see Walsh*, 807 F.2d at 1017–18 ("Class action proponents may not be called upon to prove their case in order to obtain certification.").

[185] *See, e.g.*, *In re* Polypropylene Carpet Antitrust Litig., 178 F.R.D. 603, 618 (N.D. Ga. 1997); *In re* Disposable Contact Lens Antitrust Litig., 170 F.R.D. 524, 531 (M.D. Fla. 1996) (noting plaintiffs need only proffer a colorable method of proving common impact); *Class Actions in Which Common Questions Predominate Over Individual Questions—Antitrust Actions*, 7AA FED. PRAC. & PROC. CIV. § 1781 (3d ed. 2013); J. Douglas Richards & Benjamin D. Brown, *Predominance of Common Questions-Common Mistakes in Applying the Class Action Standard*, 41 RUTGERS L.J. 163, 170 (2009) ("[T]he requirement of predominance does not ask a court to determine whether proposed common methods of proof are correct or incorrect, persuasive or unpersuasive. Instead, all it asks the court to determine is whether common questions predominate and whether the plaintiff

settled, nor will they be until trial. Consequently, the best course is to postpone *Daubert* until later in the case.

B. Starting with Rule 702 Negatively Impacts the Rule 23 Inquiry

In addition to inviting misconstruction of Rule 702, a *Daubert* analysis before class certification gives judicial gatekeepers too much power to shut out antitrust claims. Starting class certification with Rule 702 makes certification less likely, regardless of the merits of the case. This outcome was neither intended by *Daubert* nor has been properly considered by the courts adopting this requirement.

As a preliminary matter, the rationale behind *Daubert* makes little sense in the class certification setting. The underlying goal of *Daubert*—protecting jurors from questionable expert testimony—is not triggered at class certification, where there are no jurors involved.[186] Rule 23 is a notably different assessment than summary judgment under Federal Rule of Civil Procedure 56, where *Daubert* motions are more common. Rule 56 is essentially a jury-orientated standard, which evaluates whether a reasonable juror could potentially find for the opposing party.[187] Given this standard, a judge has a logical basis to evaluate what admissible evidence a jury would hear. In contrast, class certification is purely a judicial determination without consideration for potential jurors.[188] No jury will ever need to determine whether common issues predominate. While *Daubert* makes some logical sense at summary judgment, that logic does not apply at class certification.

Though *Daubert* does not belong at class certification at all, it is particularly problematic when it precedes, rather than follows, the Rule 23 evaluation.[189] As discussed below, this sequencing makes reviewing the trial court's procedural roadblock more difficult because of the great

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genuinely has viable common methods of proof.").

[186] *In re* Zurn Pex Plumbing Prods. Liab. Litig., 644 F.3d 604, 613 (8th Cir. 2011).

[187] FED. R. CIV. PROC. 56; *see also, e.g.*, Samuels v. Air Transp. Local 504, 992 F.2d 12, 14 (2d Cir. 1993) ("we must determine whether, drawing all reasonable inferences regarding the weight of the evidence and the credibility of witnesses in favor of plaintiff, a reasonable jury could only have found for the defendants.").

[188] MANUAL FOR COMPLEX LITIGATION (FOURTH) 21.21 (2004). The Manual's position on the *Daubert* assessment is highly confusing; it characterizes a Rule 23 determination as the judge as the trier of fact. Nonetheless, it goes on to invite judges to engage in *Daubert* assessment without any guidance on how to reconcile the bench trial nature of Rule 23 determinations. *Id.* at § 21.133.

[189] *Compare In re* FEMA Trailer Formaldehyde Prods. Liab. Litig., 72 Fed. R. Serv. 3d 622, at *2 (E.D. La. 2008) (starting class certification analysis with Rule 23 then moving to Rule 702), *with In re* Chocolate Confectionary Antitrust Litig., 289 F.R.D. 200, 207 (M.D. Pa. 2012) (starting with Rule 702 then moving to Rule 23).

discretion afforded trial courts' admissibility rulings. Further, starting certification with Rule 702 heightens the requirements for class certification because *Daubert* evaluations lack some of the carefully crafted pro-enforcement presumptions that exist for antitrust cases.

In jurisdictions that begin class certification determinations with *Daubert*, the party appealing an adverse ruling faces a more uphill battle to reverse any faulty gatekeeping.[190] Despite research establishing judges' failings in making these decisions,[191] such rulings are given great deference.[192] A *Daubert* determination is only subject to review for abuse of discretion.[193] This is notably higher than the *de novo* review given class certification decisions.[194]

Given the profound importance of expert testimony at class certification, it is difficult to justify broad deference to a trial court's decision. It deprives the parties their right to have a jury make factual and credibility determinations.[195] It also denies appellate courts a solid basis to

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[190] This deferential review is not without its critics. Concern with the abuse of discretion review has lead several state courts to refuse to adopt this portion of the Daubert jurisprudence. *See, e.g.*, State v. Dahood, 814 A.2d 159, 161-62 (N.H. 2002); Jennings v. Baxter Healthcare Corp., 14 P.2d 596, 604 (Or. 2000). Other state courts go further and reject *Daubert* outright, taking a more liberal viewpoint on expert admissibility. For example, in Idaho, a "bare analysis" of expert testimony suffices. Carnell v. Baker Mgmt., Inc., 49 P.3d 651, 656-57 (Idaho 2002). In North Dakota, expert testimony is admissible so long as the witnesses have "some degree of expertise in the field in which they are to testify." Hamilton v. Oppen, 653 N.W.2d 678, 683 (N.D. 2002).

[191] Cassandra H. Welch, *Flexible Standards, Deferential Review: Daubert's Legacy of Confusion*, 29 HARV. J.L. & PUB. POL'Y 1085, 1099 (2006); s*ee also infra* note 135 (discussing difficulty judges have in evaluating expert testimony).

[192] Gen. Elec. Co. v. Joiner, 522 U.S. 136, 142 (1997). This deferential standard suggests confidence in trial courts' abilities to evaluate expert testimony. This is somewhat ironic given the Chief Justice authored Joiner—only after authoring the concurrence in *Daubert* where he spent much of the opinion airing his concerns with federal judges' abilities to evaluate expert testimony. *See* Paul C. Giannelli, *The Supreme Court's "Criminal" Daubert Cases*, 33 SETON HALL L. REV. 1071, 1080 (2003).

[193] *Joiner*, 522 U.S. at 142.

[194] Though Rule 23 determinations are reviewed for an abuse of discretion, whether the court applied the correct standard of proof is reviewed under the more rigorous *de novo* standard. *See, e.g.*, Yokoyama v. Midland Nat. Life Ins. Co., 594 F.3d 1087, 1091 (9th Cir. 2010); Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc., 546 F.3d 196, 201 (2d Cir. 2008); *see also Andrews v. Chevy Chase Bank*, 545 F.3d 570, 573 (7th Cir. 2008) ("We generally review a grant of class certification for abuse of discretion, but 'purely legal' determinations made in support of that decision are reviewed de novo."); *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 312 (3d Cir. 2008) ("We review a class certification order for abuse of discretion . . . . Whether an incorrect legal standard has been used is an issue of law to be reviewed *de novo*.") (internal quotations omitted). In contrast, *Daubert* determinations are strictly subject to abuse of discretion review. *Joiner*, 522 U.S. at 142.

[195] David E. Bernstein, *Expert Witnesses, Adversarial Bias, and the (Partial) Failure*

assess the trial court's ruling.[196] A trial court's determination of an expert's reliability based on an incomplete factual record receives greater protection than a trial court's decision post-trial that the testimony does not support a jury verdict as a matter of law.[197] As Professor Cheng explains, "The application of an abuse-of-discretion standard is perfectly in line with appellate review standards for other evidentiary rulings, but critically misses the generality that distinguishes scientific from ordinary adjudicative facts."[198]

Further, this extreme deference to trial court *Daubert* decisions sacrifices the more cerebral and academic understanding of testimony that usually accompanies appellate decisions.[199] It limits appellate courts from articulating clear, consistent guidelines to evaluate an antitrust expert's proposed methodology[200]—an inquiry that should not be tied to the facts of the case so much as the legitimacy of the model. It also leaves room for potential judicial bias to creep into the decision-making.[201] There is already evidence of a correlation between a judge's political affiliation and his proclivity to use judicial gatekeeping power to foreclose plaintiffs' right of access in civil cases generally.[202] This bias is only exacerbated in antitrust cases, as much of the economic modeling in these cases support contingent claims with redistributive results.[203] Thus, particular political viewpoints can impact how reliable an expert seems.[204] As a result, the level of review

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of the Daubert Revolution, 93 IOWA L. REV. 451, 473 (2008); Anne S. Toker, *Admitting Scientific Evidence in Toxic Tort Litigation*, 15 HARV. ENVTL. REV. 165, 185 (1991).

[196] Giannelli, *supra* note 192 at 1079.

[197] Christopher B. Hockett & Frank M. Hinman, *Admissibility of Expert Testimony in Antitrust Cases: Does Daubert Raise A New Barrier to Entry for Economists?*, 10 ANTITRUST 40, 45 (Summer 1996).

[198] Edward K. Cheng, *Scientific Evidence as Foreign Law*, 75 BROOK L. REV. 1095, 1110 (2010).

[199] Faigman, *supra* note 45 at 922. Appellate courts are generally more cerebral and academic. *Id.*

[200] Amy B. Hargis & Joe R. Patranella, *Rethinking Review: The Increasing Need for A Practical Standard of Review on Daubert Issues in Place of Joiner*, 52 S. TEX. L. REV. 409, 417 (2011).

[201] Kimberly Wise, *Peering into the Judicial Magic Eight Ball: Arbitrary Decisions in the Area of Juror Removal*, 42 J. MARSHALL L. REV. 813, 832 (2009); Robert P. Mosteller, *Finding the Golden Mean with Daubert: An Elusive, Perhaps Impossible, Goal*, 52 VILL. L. REV. 723, 758 (2007).

[202] *See* Erin B. Kaheny, *Appellate Judges As Gatekeepers? An Investigation of Threshold Decisions in the Federal Courts of Appeals*, 12 J. APP. PRAC. & PROCESS 255, 257 (2011) (discussing how Republican-appointed judges exercise their gatekeeping power more frequently that Democrat-appointed judges on right of access determinations).

[203] Haw, *supra* note 74 at 1294.

[204] *Id.* The relationship between judicial gatekeeping and a judge's political affiliation is well documented. *See, e.g.*, Kaheny, *supra* note 202 at 257; C.K. Rowland &

for *Daubert* decisions makes the sequencing of Rule 702 and Rule 23 highly relevant.

The order of *Daubert* and Rule 23 also matters for a second reason. While both Rule 23 and *Daubert* are often characterized as "one size fits all" tests,[205] the last several decades of antitrust jurisprudence belies that, at least as to Rule 23. Instead of a draconian application of Rule 23, courts have developed a series of presumptions for assessing antitrust claims.

These presumptions intersect with numerous areas of economist testimony. Even in a big picture way, many courts recognize that class certification is generally appropriate in price-fixing class actions.[206] Under Rule 23, for numerosity, while the class size cannot be based on speculation, it can be in part based on common sense assumptions.[207] Presumptions also exist for satisfying Rule 23(b)(3) criteria. For example, some courts presume class-wide impact in price-fixing cases in industries with particular pricing structures.[208] Others go further to assume impact so long as there is common proof of individual damages.[209] As for

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Bridget Jeffery Todd, *Where You Stand Depends on Who Sits: Platform Promises and Judicial Gatekeeping in the Federal District Courts*, 53 J. POL. 175, 181-83 (1991).

[205] "Rule 23 provides a one-size-fits-all formula for deciding the class-action question." Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431, 1437 (2010).

[206] *See, e.g.*, *In re* Dynamic Random Access Memory (DRAM) Antitrust Litig., M 02-1486 PJH, 2006 WL 1530166, at *3 (N.D. Cal. June 5, 2006) ("Accordingly, when courts are in doubt as to whether certification is warranted, courts tend to favor class certification."); *In re* Rubber Chem. Antitrust Litig., 232 F.R.D. 346, 350 (N.D. Cal. 2005) (internal quotations and citation omitted) ("Courts have stressed that price-fixing cases are appropriate for class certification because a class-action lawsuit is the most fair and efficient means of enforcing the law where antitrust violations have been continuous, widespread, and detrimental to as yet unidentified consumers."); *see also, e.g.*, *In re* Vitamins Antitrust Litig., 209 F.R.D. 251, 258 (D.C. Cir. 2002); *In re* Playmobil Antitrust Litig., 35 F. Supp. 2d 231, 238 (E.D.N.Y. 1998).

[207] *See In re* New Motor Vehicles Canadian Export Antitrust Litig., MDL 1532, 2006 WL 623591, at *2 (D. Me. 2006) (citing McCuin v. Sec'y of Health & Human Servs., 817 F.2d 161, 167 (1st Cir. 1987)); *In re* Cardizem CD Antitrust Litig., 200 F.R.D. 297, 303 (E.D. Mich. 2001); *In re* NASDAQ Market-Makers, 169 F.R.D. 340, 342 (E.D.N.Y. 1987) ("Where, as here, it is apparent that members of the class would be very numerous, Rule 23 (a)(1) is satisfied.").

[208] While the Supreme Court rejected this presumption in *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 341 (1990), some lower courts still adopt this presumption. *See, e.g.*, *In re* Rubber Chems. Antitrust Litig., 232 F.R.D. 346, 352 (N.D. Cal. 2005). *But see In re* Rail Freight Fuel Surcharge Antitrust Litig., 287 F.R.D. 1, 41 (D.D.C. 2012) (stating this presumption is more akin to a presumption-plus, meaning some additional evidence is needed for common impact).

[209] The Third Circuit has held that "when an antitrust violation impacts upon a class of persons who do have standing, there is no reason in doctrine why proof of impact cannot be made on a common basis, so long as the common proof adequately demonstrates some

predominance, the presumptions are tailored to remedying the challenges of generating class-wide damage calculations. An expert's report can and often is based on factual assumptions.[210] This means an economist's proposed model could arguably satisfy Rule 23 without fully considering all market variables. Some courts go further and hold the need to calculate damages individually does not preclude predominance.[211]

While courts disagree over the weight and sometimes the existence of these presumptions, plaintiffs continue to successfully rely on them to seek certification. Underlying these presumptions is a general understanding that antitrust cases pose particular challenges that make narrow interpretations of Rule 23 conflict with private antitrust enforcement's goals of compensation and deterrence.[212] In essence, certain presumptions evolved over time to even the playing field between the parties in antitrust cases.

While these presumptions are essential for private antitrust suits,[213] starting certification determinations with Rule 702 means the presumptions are essentially gutted. In cases where a court completes a full *Daubert*

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damage to each individual." Bogosian v. Gulf Oil Corp. 561 F.2d 434, 454 (3d Cir. 1977); *see also* Am. Seed Co, Inc. v. Monsanto Co., No. 07–1265, 2008 WL 857532, at *2-3 (3d Cir. April 1, 2008); *In re* Linerboard Antitrust Litig., 305 F.3d 145, 151 (3d Cir. 2002).

[210] The Sedona Conference Working Group on the Role of Economics in Antitrust Law & Daniel R. Shulman, Esq., *The Sedona Conference Commentary on the Role of Economics in Antitrust Law*, 7 SEDONA CONF. J. 69, 88 (2006) ("The theoretical and empirical modeling tools of economics invariably incorporate assumptions that may not perfectly comport with any particular factual setting, and they may nevertheless appropriately form a basis for an economic opinion.").

[211] *See, e.g.*, *In re* Visa Check/MasterMoney, 280 F.3d 124, 139-140 (2d Cir. 2011), *overruled on other grounds by In re IPO, 471 F.3d 24 (2d Cir. 2006)*, and *superseded by statute on other grounds as stated in Attenborough v. Const. and Gen. Bldg. Laborers' Local 79*, 238 F.R.D. 82, 100 (S.D.N.Y. 2006); *In re* NASDAQ Market Makers Antitrust Litig., 169 F.R.D. 493, 523 (S.D.N.Y. 1996); *In re* Catfish, 826 F. Supp. 1019, 1043-44 (N.D. Miss. 1993) (explaining that individual damages issues are rarely a barrier to certification and finding predominance was satisfied because the plaintiff's proposed method of determining damages was not "so insubstantial and illusive as to amount to no method at all").

[212] Joshua P. Davis & Eric L. Cramer, *Antitrust, Class Certification, and the Politics of Procedure*, 17 GEO. MASON L. REV. 969, 1033 (2010).

[213] *See e.g.*, *In re Visa/MasterMoney*, 280 F.3d at 140 (internal citations omitted):

> [I]f defendants' argument (that the requirement of individualized proof on the question of damages is in itself sufficient to preclude class treatment) were uncritically accepted, there would be little if any place for the class action device in the adjudication of antitrust claims. Such a result should not be and has not been readily embraced by the various courts confronted with the same argument. The predominance requirement calls only for predominance, not exclusivity, of common questions.

See also In re Catfish Antitrust Litig., 826 F. Supp. 1019, 1044 (N.D. Miss. 1993); *In re* Fine Paper Antitrust Litig., 82 F.R.D. 143, 154 (E.D. Pa. 1979), *aff'd*, 685 F.2d 810 (3d Cir. 1982).

analysis prior to the Rule 23 determination, these presumptions play little to no role.[214] Thus, in those courts that decide *Daubert* before Rule 23, the barriers to certification are greater than courts that begin with Rule 23. Without these presumptions, a strict *Daubert* test is harder to win than the already demanding Rule 23 test.

Given this judicial deference and the loss of key antitrust presumptions, requiring Rule 702 evaluations before class certification improperly elevates judicial gatekeeping at the expense of antitrust enforcement. To remedy this imbalance, expert testimony offered for class certification should be treated more like evidence in a bench trial. A bench trial eliminates the concerns with hoodwinked jurors. Hence, rather than applying *Daubert* to exclude the expert testimony, the preference is to admit even borderline testimony and afford it the appropriate weight (even if that is just slight).[215] This same approach should be used in class actions: keep *Daubert* out of class certification and instead raise it later in the litigation, as the case proceeds closer to the jury *Daubert* aims to protect. Otherwise, the trend to misapply *Daubert* before class certification transforms judges from gatekeepers into bricklayers, erecting unnecessary barriers to private antitrust enforcement.

III. EARLY *DAUBERT* CHALLENGES ARE UNJUSTIFIED

Despite the litany of problems with *Daubert* motions at class certification, these earlier motions are on the rise, begging the simple question: why? This part explores the proffered rationales for adding earlier *Daubert* motions and finds them insufficient to offset the resulting harm to private antitrust enforcement.

Proponents of adding yet another *Daubert* hurdle must substantiate the need for additional expert challenges, particularly given *Daubert* motions can already be brought at multiple stages of litigation. While private antitrust often gets swept up in anti-class action rhetoric, these cases provide essential deterrence and compensation for anticompetitive conduct.[216] Adding obstacles to these claims means overall less private

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[214] *See, e.g., In re* Live Concert Antitrust Litig., 863 F. Supp. 2d 966 (C.D. Cal. 2012); *In re* Chocolate Confectionary Antitrust Litig., 289 F.R.D. 200, 218 (M.D. Pa. 2012).

[215] *See, e.g.*, N.W.B. Imports & Exports Inc. v. Eiras, 3:03CV1071J32MMH, 2005 WL 5960920, at *1 (M.D. Fla. Mar. 22, 2005); SmithKline Beecham Corp. v. Apotex Corp., 247 F. Supp. 2d 1011, 1042 (N.D. Ill. 2003), *superseded on other grounds as stated in* 403 F.3d 1331, 1363-64 (Fed. Cir. 2005).

[216] *See* ANTITRUST MODERNIZATION COMMITTEE, 110TH CONG., REPORT AND RECOMMENDATIONS 241 (Comm. Print 2007) ("The vitality of private antitrust enforcement in the United States is largely attributed to two factors: (1) the availability of

enforcement.[217] This new obstacle is particularly suspect if it distorts the class certification determination and permits judicial gatekeeping to snuff out bona fide antitrust claims.[218] As Justice Kagan recently noted, it does not matter precisely *how* one's right to bring an antitrust suit is infringed; so long as it is, the courts should not allow it.[219] A contrary conclusion essentially allows an evidentiary standard to immunize antitrust wrongdoing. Consequently, this dramatic change in the timing of *Daubert* review requires considerable justification.

What follows in this part is a thorough discussion of how the current rationalizations for early *Daubert* motions lack merit. Justifications for evaluating antitrust economists before class certification are mixed. Some proponents offer reasons that fail to address why *Daubert* is needed specifically at class certification. For example, some focus on the dangers of "junk science."[220] However, while economic modeling has its flaws, it is far from the fields of "junk science," such as palmistry and astrology, that *Daubert* fears. Others cite to concerns about potentially misleading jurors. But, as previously discussed, jurors play no part in the class certification

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treble damages plus costs and attorneys' fees, and (2) the U.S. class action mechanism, which allows plaintiffs to sue on behalf of both themselves and similarly situated, absent plaintiffs.").

[217] Baxter, *supra* note 9 at 691 ("Private litigation, particularly in cases in which the injuries resulting from the unlawful conduct are not widespread, is an effective tool both in identifying existing violations and in deterring future violations by the offender or by others similarly situated."); *see also* California v. Am. Stores Co., 495 U.S. 271, 284 (1990) (acknowledging private enforcement plays "an integral part of the congressional plan for protecting competition."); Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134, 139 (1968) (describing the private right of action as a "bulwark of antitrust enforcement").

[218] In fact, this exact co*mplaint was initially raised when Daubert was first added to summary judgment. See, e.g.*, *In re* Joint E. & S. Dist. Asbestos Litig., 52 F.3d (reversing lower court for improperly weighing expert evidence). Within a few years, the number of summary judgment motions granted almost doubled, with 90% of those rulings going against plaintiffs. 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 61 (2001), available at http://www.rand.org/publications?MR/MR1439/MR1439.pdf. For an extensive discussion of the harm to plaintiffs of adding *Daubert* to summary judgment, *see generally* Gavin, *supra* note 178.

[219] Am. Exp. Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2320 (2013) (Kagan, J., dissenting).

[220] *In re* Paoli R.R. Yard PCB Litig., 35 F.3d 717, 798 (3d Cir. 1994); Pecover v. Elec. Arts Inc., C 08-2820 VRW, 2010 WL 8742757, at *3 (N.D. Cal. Dec. 21, 2010) ("Given that class actions consume vast judicial resources and that many defendants face substantial settlement pressures as a result of class certification, . . . it hardly seems appropriate to allow flimsy expert opinions to buttress plaintiffs' [Rule] 23 arguments. . . . [A] *Daubert* analysis of every challenged expert opinion seems prudent in fulfilling the court's obligation to ensure actual conformance with [Rule] 23 . . . .").

determination.[221]

Other arguments do specifically focus on *Daubert* review at class certification. Some contend early *Daubert* motions allow for judicial gatekeeping needed to save resources and avoid forced settlements.[222] As detailed below, these arguments either miss the mark or lack empirical support. First, there are already numerous gatekeeping checks on antitrust class actions; adding *Daubert* as a new check is unnecessary. Second, requiring *Daubert* before class certification does little to preserve limited judicial and enforcement resources. Third, rather than minimizing settlement pressure, this new hurdle merely shifts the pressure from defendants to plaintiffs.

Without a strong basis to defend its danger to private enforcement, doubts about *Daubert* disappear: the best answer becomes leaving *Daubert* entirely out of antitrust class certification decisions.[223] Instead, it should remain at its more proper place: pre-trial or at summary judgment. This approach allows courts to screen experts without unnecessarily wounding antitrust enforcement.

A. Increased Private Antitrust Gatekeeping Is Unwarranted

Despite their harm to private enforcement, early *Daubert* assessments are often trumpeted as essential to gatekeeping.[224] In essence, proponents of adding this new hurdle contend that increased gatekeeping is better, without pointing to any specific need for more barriers to enforcement. While this argument borrows the term gatekeeping from *Daubert*, its focus is notably different. Under *Daubert*, judicial gatekeeping protects jurors.[225] Here, this gatekeeping protects defendants from potentially meritorious litigation—a concern conspicuously absent in *Daubert*.

Even assuming that more gatekeeping is needed in antitrust cases, proponents of early *Daubert* motions fail to establish that another round of

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[221] *See infra* § II.

[222] *See, e.g.*, Frank H. Easterbrook, *On Identifying Exclusionary Conduct*, 61 NOTRE DAME L. REV. 972, 979 (1986) ("To set the jury adrift on uncharted seas – and then to defer to whatever it does – is to introduce considerable risk into all business decisions.").

[223] The few scholars who have actually evaluated both sides of the debate acknowledge the burden disproportionately impacts plaintiffs. *See, e.g.*, *Simplified Pleading*, *supra* note 3 at 313-14 ("*Daubert*'s high threshold has been particularly burdensome – financially, logistically, and sometimes both – for plaintiffs."); Adrogué & Baker, *supra* note 165 at 13 (discussing how *Daubert* has a chilling effect on plaintiffs' attorneys). As the authors explain, "The standard set out in *Daubert* can be insurmountable and leaves many legitimate claims without a proper remedy." *Id*.

[224] *See* Biesanz & Burt, *supra* note 262 at 61-68.

[225] *See* n. 30 and accompanying text.

expert challenges is the appropriate new gate. Expert testimony will still be repeatedly screened without early *Daubert* review. First, the testimony is screened under Rule 23 to determine if it sufficiently proves or disproves predominance. Only convincing testimony will satisfy the ever-rising Rule 23 bar. Next the parties would again raise expert challenges at summary judgment, both under Rule 702 and Rule 56. Motions to strike expert testimony are already pro forma at summary judgment in antitrust class actions.[226]

The expert challenges are far from over, as parties can again raise *Daubert* pre-trial through motions *in limine*, during trial, and subsequently post-trial.[227] Since *Daubert* challenges are already repeatedly brought, it is unclear how adding another round of challenges is a necessary assertion of judicial gatekeeping.

More importantly, the underlying premise that further gatekeeping is needed in these cases lacks foundation. The bipartisan Antitrust Modernization Commission recently considered critics' claims that antitrust laws resulted in excessive payments by defendants. During their investigation, the Commission sought testimony and evidence to determine whether additional gatekeeping was needed. It concluded: "[n]o actual cases or evidence of systematic overdeterrence were presented to the Commission.…"[228]

As it stands, even without *Daubert* at class certification, plaintiffs must win five times to get to trial: (1) on a motion to dismiss; (2) at class certification; (3) on a Rule 702 challenge pre-summary judgment; (4) at summary judgment; and (5) on a renewed Rule 702 challenge pre-trial.[229] Not surprisingly, such trials are increasingly a rarity,[230] which suggests these cases require no further judicial gatekeeping.

Even assuming there were any lingering needs to filter out spurious antitrust class claims, the Supreme Court has added substantial gatekeeping to many of these five existing hurdles during the last decade alone.[231] In

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[226] Solow & Fletcher, *supra* note 81 at 497.

[227] *See, e.g.*, Lantec, Inc. v. Novell, Inc., 146 F. Supp. 2d 1140, aff'd 306 F.3d 1003 (10th Cir. 2002) (denying motion in limine to exclude expert testimony but subsequently granting motion to strike expert after hearing expert testimony during trial); Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1046 (8th Cir. 2000); Craftsman Limousine, Inc. v. Ford Motor Co., CIVA 98-3454-CV-SAEE, 2002 WL 34448786, at *1 (W.D. Mo. Aug. 28, 2002).

[228] Antitrust Modernization Commission Report, *supra* note 216 at 247.

[229] Edward D. Cavanagh, *Making Sense of Twombly*, 63 S.C. L. REV. 97, 119 (2011).

[230] *Id.* (discussing data on the vanishing trial).

[231] Daniel E. Lazaroff, *Entry Barriers and Contemporary Antitrust Litigation*, 7 U.C. DAVIS BUS. L.J. 1, 46-51 (2006). For a thorough discussion of increased gatekeeping under the Roberts Court, *see generally* Howard M. Wasserman, *The Roberts Court and the Civil Procedure Revival*, 31 REV. LITIG. 313 (Spring 2012).

federal court, where these claims are primarily brought, it is now harder to get into court; harder to plead an antitrust claim; and harder to certify a class.[232] The full consequences of these barriers remain to be seen. There is evidence, however, that these barriers already limit potentially meritorious antitrust class claims.[233] This makes the need for further obstacles even more questionable.

One of the primary new gates to antitrust claims is *Twombly*.[234] *Twombly* empowers judges to dismiss claims they deem implausible based on their "judicial experience and common sense."[235] This means antitrust plaintiffs must now prove up their case without the aid of discovery.[236] For many areas of law, this standard means little. For example, in a typical contract case, a plaintiff need only allege facts for each element of the claim, with potentially more emphasis on breach and damages allegations. So long as a party states facts "plausibly suggesting (not merely consistent with)" illegal conduct,[237] the complaint should stand.

But in antitrust, what is "plausible" is far more relative. *Twombly* permits a judge to subjectively decide whether she believes a particular restraint is plausible in a particular industry.[238] This subjectivity has

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[232] *See* Hovenkamp, *supra* note 256 at 60.

[233] As Senator Arlen Spector noted: "The effect of the Court's actions will no doubt be to deny many plaintiffs with meritorious claims access to the federal courts and, with it, any legal redress for their injuries. . . . I think that is an especially unwelcome development at a time when, with the litigating resources of our executive-branch and administrative agencies stretched thin, the enforcement of federal antitrust, consumer protection, civil rights and other laws that benefit the public will fall increasingly to private litigants." David Ingram, *Specter Proposes Return to Prior Pleading Standard*, BLOG OF LEGAL TIMES (July 23, 2009, 11:43 AM) (internal quotation marks omitted), http://legaltimes.typepad.com/blt/2009/07/specter-proposes-return-to-prior-pleading-standard.html.

[234] Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); s*ee, e.g.*, Cavanaugh, *supra* note 236 at 22 (discussing impact of *Twombly*).

[235] *Twombly*, 550 U.S. at 565. Curiously, such a determination seems to run counter to the need for a strict *Daubert* requirement, given it would result in further excluding economic testimony, which is often critical to a judge's understanding of an antitrust claim.

[236] Edward D. Cavanagh, *Twombly: The Demise of Notice Pleading, the Triumph of Milton Handler, and the Uncertain Future of Private Antitrust Enforcement*, 28 REV. LITIG. 1, 22 (2008).

[237] *Id*. at 557.

[238] Further, this requirement ignores that defendants, not plaintiffs, have access to detail needed to pass this barrier. *See also* Hovenkamp, *supra* note 256 at 58 (discussing the problematic nature of *Twombly* for plaintiffs attempting to plead implicit market division agreements). As one scholar explains, "Based on differences among judges, one judge may dismiss a complaint while another concludes that it survives, solely because of the way each judge applies his or her 'judicial experience and common sense.' This is bound to create unpredictability, lack of uniformity, and confusion." Suzette M. Malveaux, *Clearing Civil Procedural Hurdles in the Quest of Justice*, 37 OHIO N.U. L. REV. 623, 624

already ended countless antitrust class actions. Specifically, two out of every three antitrust claims filed since *Twombly* have been dismissed on Rule 12(b)(6) motions,[239] a figure nearly 25 percent higher than in torts or contracts cases.[240] Thus, even assuming antitrust class actions needed more gatekeeping—a suspect assumption—*Twombly* more than sufficed.

Nonetheless, *Twombly* is far from the only new filter in private antitrust suits. The Supreme Court just recently added yet another gate to pursuing antitrust claims. In *American Express Co. v. Italian Colors Restaurant*,[241] the Court provided potential defendants with a powerful tool to avoid antitrust class actions altogether. A potential defendant need only include an arbitration clause that precludes class actions to avoid such suits.[242] With the correct magic language in the terms and conditions fine print accompanying its products, a potential defendant can immunize itself from antitrust class actions.[243] This new gate is probably the single most important gatekeeping blow to consumer antitrust class actions, though its full impact has yet to be felt. Future antitrust class actions that trigger these arbitration provisions are dead on arrival. This, too, filters which antitrust claims pass through the courtroom doors, thus minimizing the need any further limitations on such cases.

These new barriers apply to all class actions, not just antitrust cases. But given the inherent challenges already associated with antitrust claims, the cumulative effect has been extreme. Some commentators have already described this as the end of days for private suits.[244] Consequently, the need

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(2011).

[239] Heather Lamberg Kafele & Mario M. Meeks, *Developing Trends and Patterns in Federal Antitrust Cases after* Bell Atlantic Corp. v. Twombly *and* Aschroft v. Iqbal, ANTITRUST DIGEST (Apr. 2010). A segment of scholars, practitioners, and advocacy organizations have sought to ameliorate the harm caused by this decision, though their proposed responses are far from uniform. Some advocate for limited discovery, others seek a legislative override of the decision or amendments to the Federal Rules. *See* Malveaux, *supra* note 281 at 629 (2011); *see also* American Antitrust Institute's May 27, 2010 letter to the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (endorsing "flashlight discovery" that is limited initial discovery).

[240] Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 607 (2010).

[241] Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013).

[242] *Id.* at 2309.

[243] *Id.*

[244] *See, e.g.*, James Schurz, *Consumer Class Actions Take Another Hit: Supreme Court Rules Class-Action Arbitration Waiver Covers Antitrust Claims*, 2013 WL 3488542 (WJCLA); *see also* David M. Harris, *Supreme Court Continues To Scrutinize Class-Action Practices In Federal Court*, 2013 WL 3488541 (WJCLA); Ashby Jones, *Is D-Day Approaching for Class Action Lawsuits?*, WSJ BLOG (Nov. 8, 2010 3:54 pm), http://blogs.wsj.com/law/2010/11/08/is-d-day-approaching-for-class-actions-lawsuits;

for yet another gatekeeping hurdle is suspect. If anything, adding *Daubert* to class certification is an overcorrection since it disproportionately excludes plaintiffs' experts.[245] Blanket pro-gatekeeping interests alone do not justify the harm caused by adding Rule 702 to class certification.

B. Adding Daubert *to Class Certification Wastes Resources*

Like the gatekeeping rationale, the second proffered justification for early *Daubert*—saving judicial resources[246]—suffers from similarly thin reasoning. As the argument goes, if a case is based on questionable economist testimony, early exclusion kills the case before the court or the parties expend unnecessary resources. Of course, this argument assumes the court rejects the plaintiffs' economist. Thus, this rationale actually invites judicial overstepping, as *Daubert* becomes an easy way to clear complicated antitrust class actions that take years to litigate from already burdened dockets.[247]

In actuality, when Rule 702 is properly applied, early *Daubert* assessment at class certification raises concerns about misallocating limited judicial and enforcement resources. Though mentioned before, it merits repeating that Rule 702 challenges will still be brought subsequently in the case: pre-trial, during trial, and post-trial. Early *Daubert* determinations are just one of many swipes parties take at expert testimony. This extra swipe comes at a cost: 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.[248]

The *Daubert* Court warned against taking too long and devoting too many judicial resources to the admissibility inquiry.[249] However, despite this warning, *Daubert* has evolved into a lengthy process, involving a

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Brian Fitzpatrick, *Is the end of class actions upon us*?, SCOTUSBLOG (Sept. 14, 2011 9:55 a.m.), http://www.scotusblog.com/2011/09/is-the-end-of-class-actions-upon-us.

[245] *See* Langenfeld & Alexander, *supra* note 15 at 22.

[246] *See, e.g.*, West v. Prudential Sec., 282 F.3d 935, 938 (7th Cir. 2002); *Pecover*, 2010 WL 8742757, at *3; Rhodes v. E.I. du Pont de Nemours & Co., CIV.A. 6:06-CV-00530, 2008 WL 2400944, at *11 (S.D.W. Va. June 11, 2008).

[247] *See, e.g.*, *In re* Live Concert Antitrust Litig., 863 F. Supp. 2d 966, 998, 1000 (C.D. Cal. 2012) (using *Daubert* to terminate case on the eve of trial).

[248] *See* North Dallas Diagnostic Ctr. v. Dewberry, 900 S.W.2d 90, 96 (Tex. Ct. App. 1995) (observing the *Daubert* and Robinson process "may involve more time and expense in the litigation process"); Richard Middleton, Jr., *The Case of Kumho Tire and the Future of Expert Testimony in Civil Litigation*, 9 KAN. J.L. & PUB. POL'Y 8, 10 (Fall 1999) ("*Daubert* allows those who want to delay the proceeding to come up with another whole layer of disputes that have to be resolved….").

[249] *Daubert*, 509 U.S. at 597.

"complex mini-trial."[250] Rather than the "quick" determination originally envisioned, Rule 702 challenges now require multiday hearings preceded by "the filing of voluminous memoranda in which the lawyers for both sides try their case on paper."[251] This applies to each expert, so in antitrust cases, where several economic experts offer testimony, the potential delay is exponential.[252] In fact, the situation has gotten so out of hand that in at least one case, the *Daubert* hearing took three times as long as the trial would have taken.[253] Courts are already expressing concern about the delay these motions cause. As one Delaware court described:

> The case currently before the Court is a prime example of how *Daubert* hearings could overwhelm. There are over 500 docket entries, and there are literally boxes of reports, deposition, and affidavits submitted in support of the parties' respective Motions to exclude experts. Plaintiffs' counsel has requested that the trial date be stayed so that the parties can have *Daubert* hearings in the time that is reserved for the trial (for a period of three weeks). Such a request and similar requests, if granted in every case, could cripple the trial calendar.[254]

Given this waste, the burden of expert evaluations now arguably outweighs the dangers the test originally sought to avoid.[255] Why this waste should be

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[250] Allapattah Services, Inc. v. Exxon Corp., 61 F. Supp. 2d 1335, 1342 (S.D. Fla. 1999). In the limited cases to date where expert admissibility was evaluated prior to or as part of class certification, it has already added considerable delay to the certification process. For example, even in *Comcast*, where the *Daubert* question was not squarely at issue, the parties spent countless attorney hours generating volumes of briefs on expert arguments. The oral argument alone totaled five days and commenced with the issuance of an 81 page opinion. Behrend v. Comcast Corp., 655 F.3d 182, 188 (3d Cir. 2011), *rev'd*, 133 S. Ct. 1426 (2013).

[251] Brief of Margaret A. Berger, Edward J. Imwinkelried, and Stephen A. Salzburg as *Amicus Curiae* in Support of Respondents, Kumho Tire Co., Ltd. v. Carmichael, No. 97-1709, 1998 WL 739321, at *2 (U.S. Oct. 20, 1998); *see also* Treadwell, *supra* note 255 at 40-41; Crump, *supra* note 249 at 40-41 (2003) (lengthy and confusing *Daubert* hearings "clog the trial courts today.").

[252] *Cf. Simplified Pleading*, *supra* note 3 at 313 (describing how *Daubert* applies to every challenged expert, making the overall litigation process particularly burdensome for plaintiffs).

[253] *See* U.S. v. Katz, 178 F.3d 368, 371 (5th Cir. 1999) ("we are troubled by the amount of judicial resources that were devoted to the *Daubert* hearing.").

[254] Minner v. American Mortg. & Guar. Co., 791 A.2d 826, 845 (Del. Super. Ct. 2000).

[255] Marc T. Treadwell, *Eleventh Circuit Survey-Evidence*, 56 MERCER L. REV. 1273, 1279 (2005) ("[W]hatever benefits have been realized have come at high costs. District courts spend days, sometimes weeks, on *Daubert* hearings, and appellate courts render

compounded by yet another round of *Daubert* challenges is unclear.

This exponential delay is particularly problematic in antitrust class actions since it undermines any notion of preserving resources. Even without such motions, the timetable from initial investigation to class certification often takes years.[256] Adding a new stage for expert challenges will only expand this timetable.[257] To clear *Daubert*, parties will need to engage in more expansive, more time-consuming expert discovery to prepare for the battle of the experts: expert depositions will take longer, export reports will be lengthier, and class discovery will be more protracted.[258] Since plaintiffs' attorneys' fees are only recovered if they prevail, unlike the by-the-hour defendants' bar, delay disproportionately burdens plaintiffs.[259]

Not only is this delay contrary to conserving judicial resources, it also seems contrary to legislative intent. The Class Action Fairness Act suggests seeking certification "as early as practicable"—certainly prior to merits discovery.[260] Generally, an expert report can only be generated after class discovery is complete.[261] With earlier *Daubert* challenges, a conservative

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lengthy and often conflicting decisions trying to define the proper gatekeeping role for district judges. Consequently many questions exist as to whether *Daubert* has been worth the judicial resources it has cost."); *see also* David Crump, *The Trouble with Daubert-Kumho: Reconsidering the Supreme Court's Philosophy of Science*, 68 MO. L. REV. 1, 40-41 (2003).

[256] Part of this delay is due to increased motion to dismiss practice post-*Twombly*. Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007). With the increased pleading requirements under *Twombly*, antitrust cases are increasingly investigated for months, if not years, before filing. *See* Herbert Hovenkamp, *The Pleading Problem in Antitrust Cases and Beyond*, 95 IOWA L. REV. BULL. 55, 60 (2010).

[257] *See* Robert H. Klonoff, *Antitrust Class Actions: Chaos in the Courts*, 11 STAN. J.L. BUS. & FIN. 1, 20 (2005) (discussing how *Daubert* before certification will delay the Rule 23 determination); Materials from *In Re* Visa Check/MasterMoney Antitrust Litigation, Decl. of Lloyd Constantine, Esq., No. CV-96-5238 (E.D.N.Y. 2003) (showing defendant prolonged the case by nearly seven years battling class certification).

[258] Treadwell, *supra* note 255 at 1279.

[259] *Simplified Pleading*, *supra* note 3 at 313-14 ("This, like other stop signs, plays into the hands of the billing-by-the hour regime of the law firms that usually represent corporate and other economically power interests. It has precisely the opposite effect on contingent fee and public interest lawyers who must bear the increased cost and time investment without any assurance of reimbursement, let alone compensation."); Arthur R. Miller, *McIntyre in Context: A Very Personal Perspective*, 63 S.C. L. REV. 465, 471 (2012); Judge Harvey Brown, *Procedural Issues Under Daubert*, 36 HOUS. L. REV. 1133. 1177 (1999).

[260] CAFA shifted the timeline for certification just slightly from "as soon as possible" to "as early as practicable." FED. R. CIV. P. 23(C)(1)(A) advisory committee's notes (2003 amendments). However, this expansion still assumed certification would occur prior to merits discovery. *Id*.

[261] *See* Anthony Z. Roisman, *Taming the Daubert Tiger Embrace the Tiger-Return to*

plaintiffs' lawyer might take it one step further and now wait to seek certification until after all discovery is complete instead of bifurcating class and merits discovery. That way, rather than provide a proposed econometric model, the plaintiffs' expert can run the full methodology using all the facts, thus showing the model is more than theoretically plausible.[262] This could add years to class certification.[263]

Not surprisingly, both the early *Daubert* hearing and the delay come with a hefty price tag that does little to preserve resources for the courts or the litigants. Rather than conserving resources, adding another *Daubert* motion requires courts to exhaust extensive resources reviewing dense filings, evaluating expert reports, and hearing arguments. The parties also bear a heavy cost with added *Daubert* motions, as each hearing involves preparation, transportation, and court time for the testifying expert.[264] This is in conjunction with the expense of preparing supporting, supplemental, and rebuttal documents.[265] The information on the cost for completing *Daubert* is limited, but given the high hourly rate of economists[266] and antitrust attorneys,[267] it easily adds up.

Mountain, PRAC. LITIGATOR, May 2009, at 49, 57.

[262] Waiting to seek certification means a potential merger of *Daubert*, class certification, and summary judgment—a merger which is already on the rise. This makes the consequences of overly rigorous *Daubert* assessments even more direr, since expert exclusion will invariably decide both the Rule 23 and Rule 56 motions. *See* United States v. Nacchio, 555 F.3d 1234, 1258-59 (10th Cir. 2009); Cortes-Irizarry v. Corporacion Insular De Seguros, 111 F.3d 184, 188 (1st Cir. 1997). Nonetheless, some scholars support merging the procedural steps. *See generally* Zachary W. Biesanz & Thomas H. Burt, *Everything That Requires Discovery Must Converge: A Counterintuitive Solution to A Class Action Paradox*, 47 U.S.F. L. REV. 55 (2012); Linda S. Mullenix, *Dropping the Speak: The Case for Enhanced Summary Judgment Prior to Class Certification*, 43 AKRON L. REV. 1197 (2010) (advocating for summary judgment before class certification).

[263] *See, e.g.*, Michael R. Nelson & Mark H. Rosenberg, *Behrend, Knowles and the Continuing Evolution of Class Actions*, Association of Corporate Counsel Newsletter (May 31, 2013), available at http://www.lexology.com/library/detail.aspx?g=cff4587b-19c7-413c-92a3-03fc43e3f5d3.

[264] Amicus Brief for Appellees, *In re* Zurn Pex Prods. Liab. Litig., U.S. 8th Cir. Briefs LEXIS 912 (2010) (No. 10-2267).

[265] *Id.*

[266] *See, e.g.*, Torday v. Sec'y of the Dep't of Health & Human Servs., 07-372V, 2011 WL 2680717 (Fed. Cl. May 4, 2011) (finding fees between $400-$450/hr reasonable); Appelcon, LLC v. Berry & Leftwich, 2006 WL 388532 (E.D. Mich. 2006) (explaining the testifying economist's hourly rate under agreed upon retainer was $400); *see also* David Marx, Jr. *The "Proper" - and by That I Mean Limited - Role for Economists in Price-Fixing Litigation*, 38 LOY. U. CHI. L. J. 491, 491 (2007) ("[T]he hourly rates of testifying economists – which I have consistently found to be remarkably similar across the major economic consulting firms – are even higher than those of the lawyers who retain them!").

[267] Margaret A. Berger, *What Has a Decade of Daubert Wrought?*, 95 AM. J. PUB. HEALTH S1, S64 (2005).

Consequently, these earlier *Daubert* motions harm antitrust enforcement without any true gains to judicial efficiency. When Rule 702 is accurately applied pre-certification, a case's time on the docket just increases, as does the costs for both the parties and the judicial system. Thus conserving judicial resources, the second primary justification for early *Daubert* review, lacks merit.

C. Settlement Pressure on Plaintiffs Exceeds the Pressure on Defendants

Finally, the most prevalent argument for an early *Daubert* challenge focuses on settlement pressure. Defendants claim *Daubert* is necessary to minimize pressure to settle unmeritorious class claims certified on the basis of inadmissible evidence.[268] Claims that class actions unduly cause rash settlement began in the 1970s.[269] They have been echoed by class action critics and courts alike.[270] Stated simply, a defendant would likely avoid gambling and settle even a meritless claim once it is certified as a class, particularly in the face of treble damages.[271]

However, in the forty years since these fears first surfaced, the argument remains primarily anecdotal. Focus on settlement pressure ignores that aggregate claims do offer the substantial benefit of claim preclusion in cases where defendants can establish the claim lacks merit.[272] But far more importantly, there is little informed empirical analysis supporting the fear of *in terrorem* settlements.[273] As a non-profit think tank recently explained,

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[268] *See, e.g.*, Amicus Brief of DRI-The Voice of the Defense Bar, Comcast Corporation v. Behrend, 2012 WL 3643903 (U.S.), 10 (U.S. 2012); Brief of Washington Legal Foundation et al., Comcast Corp. v. Behrend, 2012 WL 3643902 (U.S.), 20 (U.S., 2012); *see also* Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996); *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995); Jonathan Fischbach & Michael Fischbach, *Rethinking Optimality in Tort Litigation: The Promise of Reverse Cost-Shifting*, 19 BYU J. PUB. L. 317, 342 (2005).

[269] Allan Kanner & Tibor Nagy, *Exploding the Blackmail Myth: A New Perspective on Class Action Settlements*, 57 BAYLOR L. REV. 681, 704 (2005).

[270] *See, e.g.*, Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1254-55 (2002); Geoffrey C. Hazard, Jr., *Class Certification Based on Merits of the Claims*, 69 TENN. L. REV. 1, 3-6 (2001) (proposing precertification merits evaluation through examination of "verdict value"); George L. Priest, *Procedural Versus Substantive Controls of Mass Tort Class Actions*, 26 J. LEGAL STUD. 521, 545 (1997).

[271] *See* Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and Cafa*, 106 COLUM. L. REV. 1872, 1882 (2006).

[272] *See* Hillary A. Sale, *Judges Who Settle*, 89 WASH. U.L. REV. 377, 383 (2011).

[273] Brief of the AAI and the Am. Independent Business Alliance as Amici Curiae In Support of Pet'rs, Comcast v. Behrend, 2012 WL 3643903 (U.S.), 18 (U.S. 2012); Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal: *A Double Play on the Federal Rules of Civil*

"Significantly, the suggestion that businesses routinely settle 'meritless' class actions with substantial payments is a myth."[274] In fact, the settlement rate for certified class actions is very close to the settlement rate for other federal lawsuits.[275]

Assuming *arguendo* defendants rashly settle antitrust class claims, it is unclear why early *Daubert* challenges are the appropriate salve, particularly given their harm to antitrust enforcement. Early Rule 702 challenges do not necessarily screen out unmeritorious claims: when properly applied, Rule 702 assesses the admissibility of testimony, not whether that testimony proves the parties' case. A better screen to minimize settlement pressure is one that focuses on a case's merits, not merely evidentiary issues. Instead, as discussed in Part II, misapplication of *Daubert* pre-certification creates an impassable wall with little regard to the claim's merit.

Even if early *Daubert* challenges could properly assess a case's merit pre-class certification, defendants' settlement concerns have been sufficiently assuaged by the increased gatekeeping previously discussed.[276] In addition, commentators have already noted that the recently heightened rigor of Rule 23 negates defendants' alleged settlement pressures.[277] Thus, there is little need for yet another weapon against speculative fears of settlement pressures, particularly when that weapon indiscriminately maims

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Procedure, 60 DUKE L.J. 1, 103 (2010) ("claims of excessive costs, abuse, and frivolousness in litigation may have much less substance than many think, and extortionate settlements may be but another urban legend"); Charles Silver, ''*We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1395 n.164 (2003) ("[t]here is little empirical evidence supporting the theory that frivolous lawsuits are common").

[274] Brief of the Am. Antitrust Institute as Amicus Curiae in Support of Resp'ts, Am. Express Co. v. Italian Colors Restaurant, 2013 WL 417719 (U.S.), 34 (U.S. 2013); *see also* Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 159 (2006) ("Meritless filings are not met with payoff money; they are met with motion practice, and sometimes sanctions."); *see also* Silver, *supra* note 273, at 1393; Charles M. Yablon, *The Good, the Bad, and the Frivolous Case: An Essay on Probability and Rule 11*, 44 U.C.L.A. L. REV. 65, 70 n.12 (1996) ("In real litigation . . . defendants' counsel are generally quite adept at placing time-consuming and expensive motions and other obstacles in the path of plaintiffs' counsel . . . such that it seems unlikely a plaintiff can create a sufficient threat, based on disparity of litigation cost alone, to coerce a settlement.").

[275] Kanner & Nagy, *supra* note 269 at 697.

[276] *See supra* § III (A) and accompanying notes (discussing increased judicial gatekeeping in antitrust class actions).

[277] *See, e.g.*, Erwin Chemerinsky, *New Limits on Class Actions*, 47 TRIAL 54, 56 (Nov. 2011); Timothy D. Edwards, *Class Action Suits After Walmart v. Dukes*, 84 WIS. LAW. 18, 20 (Nov. 2011); Ian Simmons, Alexander P. Okuliar & Nilam A. Sanghvi, *Without Presumptions: Rigorous Analysis in Class Certification Proceedings*, 21 ANTITRUST 61, 66 (Summer 2007) ; Jessie Holland, *High Court Turns Away Class-Action Suit Against Comcast*, ASSOCIATED PRESS, Mar. 28, 2013, http://www.theledger.com/article/ 20130327/news/130329236.

the good claims along with the bad.

Even if concerns with rash settlements were substantiated, these concerns ignore the very significant pressures early *Daubert* motions place on plaintiffs and their potential economists. Plaintiffs' attorneys are pressured to curtail their enforcement efforts both by not filing putative claims and settling claims for less than full value. For potential experts, the pressure to not testify for plaintiffs in these cases is mounting. Thus, any minimal protection afforded by *Daubert* is more than outweighed by the harm these pressures cause private antitrust enforcement.

First, adding *Daubert* as a precursor to certification pressures plaintiffs' attorneys to forego filing claims.[278] Without attorneys willing to pursue antitrust cases, anticompetitive conduct will likely go unredressed.[279] Thus, rather than minimizing defendants' pressure to settle, adding additional *Daubert* motions just deters bringing cases in the first place. This in turn triggers right of access concerns, as these early expert challenges conflict with plaintiffs' right to a "just, speedy, and inexpensive determination of action and proceeding."[280] When a claim actually gets filed, plaintiffs have little ability to ward off the disproportionate exclusion of their economists. Given the great discretion courts have in completing *Daubert*,[281] plaintiffs are left attempting to read the tea leaves from prior decisions to arm their experts against attack.[282]

Attorneys are already more hesitant to accept these cases: due to the rising costs of expert testimony, small- and medium-value claims have become financially unviable.[283] Many private antitrust firms are also involved in securities and consumer class actions and have chosen to emphasize these other aspects of their litigation portfolio.[284] While these other practice areas have also been affected by stricter Rule 23 standards,

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[278] *See* Adrogué and Baker, *supra* note 165 at 13.

[279] *See infra* n. 17-25.

[280] FED. R. CIV. P. 1.

[281] *See supra* § I (A) and accompanying notes (discussing judicial discretion in applying Rule 702).

[282] Pierce & DeTeso, *supra* note 137 at 170 ("To the consternation of trial attorneys, there is no way to select a "*Daubert*-proof" expert or to fully prepare for a *Daubert* hearing because a trial judge is not required to consider any particular reliability factors.").

[283] Richard L. Cupp, Jr., *Preemption's Rise (and Bit of a Fall) As Products Liability Reform: Wyeth, Riegel, Altria, and the Restatement (Third)'s Prescription Product Design Defect Standard*, 74 BROOK. L. REV. 727, 756 (2009); Margaret A. Berger & Aaron D. Twerski, *Uncertainty and Informed Choice: Unmasking Daubert*, 104 MICH. L. REV. 257, 267 (2005).

[284] *See* David B. Wilkin, *Frank J. Kelley Institute of Ethics Lecture Series: Rethinking the Public-Private Distinction in Legal Ethics: the Case of "Substitute Attorneys General"*, 2010 MICH. ST. L. REV. 423, 446-47 (outlining how firms, such as Cohen Milstein, handle class actions in various areas, including securities fraud).

Daubert is not necessarily as high of a hurdle in these practice areas; those cases' damages models are often less complex. Rather than invest limited resources in an uncertain terrain, the safer course is to diversify the risk by filing other types of cases. Without private antitrust enforcement, the wrongdoing will likely go unpunished, as competitor and government claims are rare.[285]

For those class action attorneys willing to take a risk, the pressure still remains to file only those few antitrust cases where the *Daubert* fence seems particularly climbable. Given the importance of economic modeling to class certification, and the accompanying dangers associated with not surviving this test, antitrust plaintiffs' attorneys would be wary to rely on any model that might not be admissible.[286] A narrow definition of reliable economic testimony limits antitrust enforcement efforts to cases with easy modeling.[287] If the market definition or damages are complicated, plaintiffs' attorneys will feel great pressure to decline the case because this complexity increases the chance an expert's testimony will be excluded under an early *Daubert* motion. Thus, procedural fences like *Daubert* limit the ability of antitrust cases to push for more expansive enforcement.[288]

Requiring a *Daubert* test at class certification also pressures plaintiffs to settle early. Even if a case survives an early expert evaluation, the case continues with the specter of future *Daubert* motions still lingering.[289] If

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[285] *See supra* Introduction and accompanying notes (explaining the limited role competitor and government suits in U.S. antitrust enforcement efforts).

[286] For example, some scholars argue that some of these newer models are less likely to satisfy *Daubert*. *See, e.g.*, Malcom Coate & Jeffrey Fischer, *Can Post-Chicago Economics Survive Daubert?*, 34 AKRON L. REV. 795, 795 (2001) (arguing post-Chicago models face significant *Daubert* problems because they are less likely to be matched to the facts of the case).

[287] The risk also encourages antitrust plaintiffs to focus solely on economic goals foregoing other potential, non-economic goals. Some of these other goals include dispersion of economic power, protecting small business, and the promotion of equal opportunities. United States v. Alcoa, 148 F.2d 416, 429 (2d Cir. 1948); Robert Pitofsky, *Challenges of the New Economy: Issues at the Intersection of Antitrust and Intellectual Property*, 68 ANTITRUST L.J. 913, 914 n.2 (2001); Stephen F. Ross, *Network Effects and the Limits of GTE Sylvania's Efficiency Analysis*, 68 ANTITRUST L.J. 945, 947 (2001).

[288] Spencer Weber Waller, *The Law and Economics Virus*, 31 CARDOZO L. REV. 367, 383 (2009). For example, when Professor Areeda argued successfully that oligopolistic disciplinary pricing was an accepted theory under the Robinson-Patman Act, the testimony was later excluded for lack of analytical fit. Brooke Group v. Brown Tobacco Corp., 509 U.S. 209, 242-43 (1993). For a thorough discussion of the case, *see* Abbott B. Lipsky, Jr., *Antitrust Economics–Making Progress, Avoiding Regression*, 12 GEO. MASON L. REV. 163, 171-72 (2003).

[289] *See, e.g.*, *In re* Brand Name Prescription Drugs Antitrust Litig., 1999 U.S. Dist. LEXIS 550, 1999-1 Trade Cas. (CCH) ¶ 72,446, at *48 (N.D. Ill. Jan. 19, 1999) (denying defendants' pretrial requests to exclude the testimony of plaintiffs' economic expert, but

the case does not survive *Daubert*, plaintiffs' only option for enforcement and potential compensation is settlement.[290] Given settlements are generally still approved without *Daubert* scrutiny,[291] *Daubert* shifts the pressure to settle from defendants to plaintiffs. As risk increases, so do early settlements.[292] This is not properly attributed to attorney greed,[293] but rather to problems valuing cases with so much uncertainty of success.[294]

Early *Daubert* motions also exert pressure on economists. Generally, economists are already less likely to testify than other scientific experts because the harshness of cross-examination is more intense than it would be for academic economic research, where there is less of a tradition of research replication than in other disciplines.[295] *Daubert* just exacerbates economists' real pressure to avoid testifying for plaintiffs. Exclusion has significant impact on testifying economists. Many economists who have felt the sting of overaggressive *Daubert* determinations are highly respected law and economics scholars.[296]

Economists must weigh the significant financial and professional consequences of exclusion before testifying. On the financial side, it is far less likely that a previously excluded expert will be retained in future cases. On the professional side, exclusion undermines the expert's alleged "expertise" in his field. As one scholar notes, "One can only imagine the feeling of being among the economists who analyses, rightly or wrongly,

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subsequently excluding the testimony on defendants' motion for judgment at the close of plaintiffs' case).

[290] *McIntyre in Context*, *supra* note 259 at 471.

[291] Int'l Union, United Auto., Aerospace, & Agr. Implement Workers of Am. v. Gen. Motors Corp., 497 F.3d 615, 636 (6th Cir. 2007); Am. Int'l Grp., Inc. v. ACE INA Holdings, Inc., 07 CV 2898, 2012 WL 651727 (N.D. Ill. Feb. 28, 2012) *appeal dismissed*, 710 F.3d 754 (7th Cir. 2013) ("Federal Rules of Evidence and the requirements of *Daubert* and its progeny do not apply at a fairness hearing . . . .").

[292] John C. Coffee, Jr., *Rescuing the Private Attorney: General Why the Model of the Lawyer as Bounty Hunter is Not Working*, 42 MD. L. REV. 215, 231 (1983).

[293] Some critics quickly point to greed without sufficient consideration of other motives. *See, e.g.*, Coffee, *supra* note 21 at 241 (arguing settlements are a result of a conflict of an interest forcing attorneys' to take whatever they can get and run).

[294] Pierce & DeTeso, *supra* note 137 at 170 ("Moreover, assessing the appropriateness of settlement is more difficult for a trial attorney who cannot predict whether his or her expert will be permitted to testify.").

[295] Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1537-38 (1999).

[296] For example, George Priest, Robert Hall, Richard Gilbert, and Franklin Fisher were all excluded when testifying for plaintiffs. *See* Williamson Oil Co. v. Philip Morris USA, 346 F.3d 1287, 1323 (11th Cir. 2003); Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1047 (8th Cir. 2000); *In re* Titanium Dioxide Antitrust Litig., CIV.A. RDB-10-0318, 2013 WL 1855980 (D. Md. May 1, 2013); Hynix Semiconductor Inc. v. Rambus Inc., CV-00-20905, 2008 WL 73689 (N.D. Cal. Jan. 5, 2008).

are now staple fare for textbook chapters on 'quality control' for expert testimony."[297] This fear may have a particularly strong chilling effect on professors. As Judge Posner explains, "Professors may incur heavy nonpecuniary costs in diminished academic reputation (something they greatly value, or else they probably would not be in academia) if they are shown to be careless or dishonest witnesses."[298]

Adding earlier *Daubert* motions pressures economists to consider career paths where the risks of exclusion are not so marked, such as testifying for defendants, sticking to their day jobs, or testifying in other areas of law. Any of these alternatives leave plaintiffs' attorneys in the same place: with a smaller pool of viable economists to provide the testimony so essential to certification and, later, to proving liability and damages.

Combined, the pressures facing plaintiffs by adding *Daubert* to antitrust class certification decisions more than offset any lingering defendant settlement pressure. Thus, defendants' theoretical settlement pressure does not sufficiently justify early *Daubert* motions, leaving proponents of pre-certification expert evaluation with no justifiable basis for adding this new hurdle to private antitrust enforcement.

CONCLUSION

Daubert will undoubtedly continue to play a large role in private antitrust cases. Economic testimony is the lynchpin in these cases, so parties are highly motivated to exclude opposing expert testimony. Unfortunately, though, the standards for evaluating such testimony are in turmoil, making it questionable whether such arguments can be properly resolved by the courts. Lack of guidance on how to evaluate economist testimony invites judicial overstepping, denying *Daubert* from serving its proper, more limited function.

Even more doubtful is the need for resolving such disputes earlier in the litigation, particularly prior to class certification. Given the recent addition of more hurdles to private enforcement, the need for such evaluation as a mechanism to somehow even the playing field for defendants is questionable at best. This is particularly true given the chilling effect such a requirement could have on antitrust enforcement and the lack of true justification for this new hurdle. The best practice is to hold off on *Daubert* evaluations, reserving them for the later in the case, when the concerns about protecting jurors are no longer hypothetical. Otherwise, *Daubert* could hasten the end of antitrust class actions. Death by *Daubert* would be a tragic ending for such an essential part of antitrust enforcement.

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[297] Solow & Fletcher, *supra* note 81 at 493.

[298] Posner, *supra* note 295 at 1537.