

# Checking Off On Class Certification

**T**he court's ruling on a class certification motion is a defining moment for the parties. A plaintiff and his attorneys see many dollar signs and large attorney's fees. Defendants see big potential liability, and will be under pressure to settle the case if a certification motion is granted. "While class actions are an important means to prevent a failure of justice in our judicial system, they also carry the potential to create injustice." *Howard*

*Gunty Profit Sharing Plan v. Superior Court*, 88 Cal.App.4th 572 (2001). To safeguard against the potential injustice arising from the "in terrorem effect on Corporate America" that class actions bring, the court must be vigilant to ensure that the required elements of a class action are met.

Under Federal Rules of Civil Procedure, Rule 23(a), plaintiff has the burden of showing numerosity, commonality, typicality and adequacy of representation. In addition, Rule 23(b)(3) requires plaintiff to establish that "the questions of law or fact predominate over any questions affecting only individual members" and that a class action "is superior to other method for the fair and efficient adjudication of the controversy."



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A court may only certify a class after "a rigorous analysis" that the prerequisites of Rule 23 have been met. It is "necessary" for a district court to go beyond the pleadings in making a Rule 23 analysis to "understand the claims, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues." *Casiano v. American Tobacco Co.*, 84 F.3d 744 (5th Cir. 1996). As one court stated: "A corollary to the 'rigorous analysis' requirement for Rule 23 determinations is that district courts must not unquestionably accept plaintiffs' evidence and argument." *Fisher v. Ciba Specialty Chem. Corp.*, 238 F.R.D. 273 (S.D. Ala. 2006). Moreover, the merits of the case are often intertwined with Rule 23 issues so that the court must delve into the merits during the class certification phase. Plaintiff, however, need not show that he or she will prevail on the merits at the class certification stage.

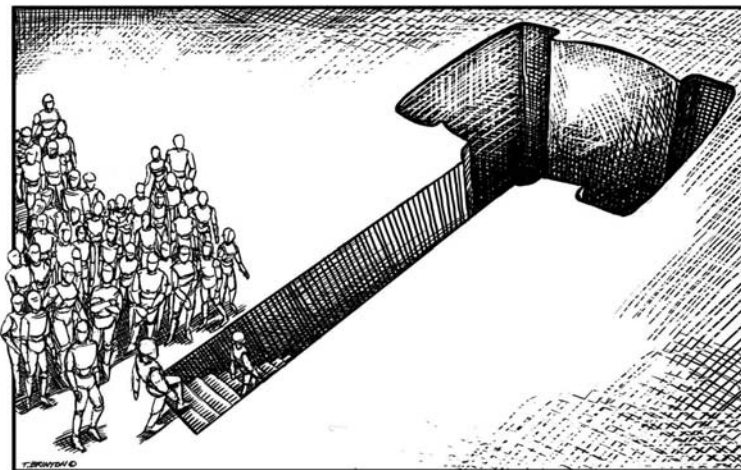
But what evidentiary standards does the court use to judge whether plaintiff has met the burden? Do federal evidence rules apply at this stage? If not, is it "anything goes?"

Although California courts have not ruled on the evidentiary standard, federal courts in deciding whether to certify a class may consider evidence that would not be admissible at trial. The rationale for this rule is that the class certification motion is a preliminary matter, not one requiring findings of fact and conclusions of law. A class certification proceeding is supposed to take place early in the case and should be relatively inexpensive. It is not a mini-trial on the merits. The district court's ruling on class certification only will be reviewed for abuse of discretion.

Some courts hold that they may not weigh competing evidence at a class certification hearing. The only question is whether plaintiffs have presented enough evidence to satisfy Rule 23 requirements. As stated in *Fisher v. Ciba Specialty Chem. Corp.*, "It is well established that a class certification hearing is not the proper platform for a district court to decide between conflicting expert testimony; therefore, the Court will not resolve this divergence at this time."

A more recent case is contrary. In *Hydrogen Peroxide Anthruss Litigation*, 552 F.3d 305 (3d Cir. 2008), the court held that the district judge erred when he stated that he could not weigh the testimony of conflicting experts. The Rule 23 "rigorous analysis" standard required the district court to consider all expert testimony and afford that testimony the weight it deserved. See also *In re Saloman Analyst Metromedia Litigation*, 544 F.3d 474 (2d Cir. 2008).

The fact that plaintiff presents enough information to the court to permit class certification does not mean plaintiff will ultimately prevail in the litigation. At trial the court will weigh evidence and will consider



only admissible evidence. Under Rule 23 the court also may revisit a class certification during the case and decertify the class if later evidence disproves the basis for the initial certification ruling. See *Wiegale v. FedEx Ground Packaging System, Inc.*, 2008 WL 410691 (S.D. Cal.).

The court, however, must not accept all proffered evidence. It cannot abandon all admissibility standards, but must determine the reliability of the evidence. The judge in *Parkinson v. Hyundai Motor American*, 2008 WL 5233200 (C.D. Cal.) observed that while a full *Daubert* hearing is not required for expert testimony in a class certification hearing, the court "should conduct a limited inquiry into the reliability of the expert opinion...."

Several courts have had to determine the reliability of evidence that would not be admissible at a trial. That determination generally depends on the specific facts before the court.

Many rulings involve hearsay. In one case, plaintiff wanted to rely on a letter from defendant's attorney that was relevant to the numerosity issue. The court held that the defense waived any objection and that besides, evidentiary rules are not strictly applied in class certification hearings. *Rocky v. Courtesy Motors, Inc.*, 199 F.R.D. 578 (W.D. Mich. 2001). See, also, *In re Hartford Sales Practices Litigation*, 192 F.R.D. 592 (D. Minn. 1999) (newspaper articles properly considered at class certification hearing). Apparently, the judges in those cases accepted reliability of the information in the documents.

This has also arisen where reliability was expressly an issue. In *Thompson v. Board of Ed. of Romeo Community Schools*, 71 F.R.D. 398 (W.D. Mich. 1976), plaintiffs' documents contained hearsay, but were not challenged on the basis of inaccuracy, only for lack of foundation. In another case, the court, following *Eisen v. Carlisle & Jaquin*, 417 U.S. 156 (1974), allowed one of plaintiffs' expert's report as evidence at a class certification hearing, while rejecting other reports. *Fisher v. Ciba Specialty Chemicals Corp.* The court ruled that report was not an "expert report" at all, but in rather more akin to a lawyer's supplemental brief. Moreover, the court would not consider plaintiffs' new environmental

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sampling data at the hearing due to the fact that this last minute submission prejudiced defendants' opportunity to challenge the reliability of the report. The court also granted defendants' motion to strike a third expert's report that contained opinions contrary to those given by the expert in his deposition. Obviously, the court concluded that the affidavit was not reliable.

The court in *In re Hartford Sales Practices Litigation* did consider exhibits to an affidavit in a class certification hearing. However, the court struck the narrative parts of the affidavit on the ground that they were argumentative and belonged in plaintiffs' legal memorandum. In other words, those statements were not reliable evidence of anything. *Dukes v. Wal-Mart* also illustrates the reliability standard. Female employees of Wal-Mart brought a class action alleging sex discrimination. At the class certification hearing, plaintiffs presented a sociologist's expert opinion that defendant's corporate culture may include gender stereotyping. The expert based his opinion on depositions, organization charts, memos, reports and other documents. Even though the expert failed to identify any specific discriminatory policy at Wal-Mart, defendant's motion to strike was denied on the ground that the focus must be on the expert's principles and methodology, not the conclusion reached. The 9th Circuit found that it was enough at the class certification stage that the expert presented "properly-analyzed, scientifically reliable evidence tending to show a common question of fact...." The validity of the opinion would be for the trier of fact at trial.

In summary, the evidentiary standards for class certification hearings are different than at trial. Although some courts will not weigh conflicting evidence, others will. Hearsay can be considered without laying a foundation. Expert opinion does not have to meet the gatekeeper requirement in *Daubert*. But the court must test all proffered evidence for reliability and reject that which does not meet the requirement.