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

Christine P. Bartholomew†

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.*

† Assistant Professor of Skills, SUNY Buffalo. The author would like to thank Charles Ewing, Ian Gallager, Chris Pashler, S. Todd Brown, Wayne Bartholomew, John Schlegel, Mark Bartholomew, Matthew Steilen, Stephen Paskey, and Michael Halberstam for their insightful feedback and support. Special thanks to my research assistants, Ryan Ganzenmuller and Anthony Faraco.

1 Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2554 (2011) (commenting on the district court's conclusion that "*Daubert* did not apply to expert testimony at the certification stage of class-action proceedings" with "[w]e doubt that is so").

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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

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2 *See, e.g.*, Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2312 (2013) (upholding bar of antitrust 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 24, 24 (2007).

3 *See infra* Part 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*

barrier: pre-class certification review of expert testimony under Federal Rule of Evidence 702, commonly called *Daubert*.[4] The Supreme Court seems determined to decide soon whether such an evaluation is mandatory.[5] For now, focusing on the cryptic phrase "[w]e doubt that is so," from the Supreme Court's 2011 *Wal-Mart Stores, Inc. v. Dukes* decision,[6] 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[7]—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 testimony is sufficiently reliable and relevant to justify admissibility.[8] In its most innocuous articulation, such a requirement prevents class certification from being based on potentially unreliable expert testimony.[9] In practice, however, premature *Daubert* review triggers real concerns for the future of antitrust. Certification is essential to consumer enforcement of antitrust laws,[10] and economist testimony plays a critical role in establishing the requirements for class certification. Individually, the stakes in antitrust suits filed on behalf of

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Importance of Securities and Antitrust, 53 EMORY L.J. 1571, 1608–10 (2004) (exploring empirically the impact of *Matsushita* on summary judgment motions).

4 *See generally* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).

5 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 Prods. 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*, 133 S. Ct. 1426. 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.

6 *Wal-Mart Stores*, 131 S. Ct. at 2554. The Court reversed class certification based on lack of commonality, but in passing commented on the Ninth Circuit's affirmation of the district court's holding that *Daubert* was not appropriate at class certification by stating, "[w]e doubt that is so . . . ." *Id.*

7 *See, e.g.*, Sher v. Raytheon Co., 419 F. App'x 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 Bos. (USA), 482 F.3d 372, 379–80 (5th Cir. 2007); *see also infra* Part I.B (discussing the timing of *Daubert* in antitrust class actions and the rise of precertification assessments).

8 *Daubert*, 509 U.S. at 589.

9 *Id.*; Harvey Brown, *Eight Gates for Expert Witnesses*, 36 HOUS. L. REV. 743, 785 n.302 (1999); 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).

10 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 . . . .").

consumers are too minimal to support multi-year litigation.[11] As a result, consumer class actions are the dominant form of private antitrust enforcement in the United States.[12] Federal private antitrust cases exceed U.S. government actions (civil and criminal) by more than twenty-five to one.[13] 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.[14] This leeway allows some courts to 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.[15] 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.[16]

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11 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." (footnote omitted)).

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

13 *See* AM. ANTITRUST INST., THE NEXT ANTITRUST AGENDA: THE AMERICAN ANTITRUST INSTITUTE'S TRANSITION REPORT ON COMPETITION POLICY TO THE 44TH PRESIDENT OF THE UNITED STATES 222 (Albert A. Foer ed., 2008).

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

15 *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?*, ANTITRUST, Summer 1996, at 40, 45.

16 *See* James Langenfeld & Christopher Alexander, Daubert *and Other Gatekeeping Challenges of Antitrust Experts*, ANTITRUST, Summer 2011, at 21, 22; D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?*, 64 ALB. L. REV. 99, 108–10 (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. Langenfeld & Alexander, *supra*, 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.

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.[17] 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.[18] Government enforcement ebbs and flows with an administration's politics[19] or ability to fund such efforts.[20] Consequently, at least ninety percent of antitrust enforcement is addressed through private actions.[21] While antitrust critics are quick to argue these private actions often just tag along with government enforcement,[22] this is more rhetoric than truth. More than half of antitrust violations are uncovered by private attorneys, not the government.[23] Further, the amount recovered in private cases is

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

18 William Kolasky, *Antitrust Litigation: What's Changed in Twenty-Five Years?*, ANTITRUST, Fall 2012, at 9.

19 Daniel R. Shulman, *A New U.S. Administration and U.S. Antitrust Enforcement*, 10 SEDONA CONF. J. 1, 5 (2009); Spencer Weber Waller, *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.).

20 Joseph P. Bauer, *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 & Rocio Salvador Roldan, *E.U. Competition and Private Actions for Damages*, 24 NW. J. INT'L L. & BUS. 585, 586 (2004) ("[P]ublic authorities lack sufficient resources to investigate and prosecute every single infringement of competition rules.").

21 *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, *available at* http://www.albany.edu/sourcebook/pdf/t5412006.pdf; *see also* Katherine Holmes, *Public Enforcement or Private Enforcement? Enforcement of Competition Law in the EC and UK*, 25 EUR. COMPETITION L. REV. 25, 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) (2012).

22 *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).

23 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, 355–56 (Claus-Dieter Ehlermann & Isabela Atanasius eds., 2007).

significantly higher than from criminal antitrust fines—thus making private action arguably a stronger deterrent.[24]

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 offset the requirement's harm to antitrust enforcement. 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 cases. To provide such a foundation, this part discusses: (1) the role of plaintiffs' expert testimony in private antitrust cases; (2) the vast discretion given to trial courts in evaluating expert testimony; and (3) the unprecedented early timing of *Daubert* review.

A. *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 can help with evaluating antitrust impact and damages.[25] But

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[24] Lande & Davis, *supra* note 23, at 893, 895 (detailing how criminal antitrust actions since 1990 resulted in $4.232 billion, while private actions generated $18.006 billion of damages).

[25] *See generally* Margaret A. Berger, *Expert Testimony Trends in Federal Practice*, SM060 ALI-ABA 551, 559 (2007); Christopher K. Kay, *Effective Rules for Effective Economic Testimony at Trial*, AHLA-PAPERS P02170011 (2000) (discussing the role of economists in antitrust cases).

in class actions, economists also opine on predominance, a requirement for class certification under Rule 23(b)(3).[26]

To prove predominance, plaintiffs rely heavily on economists to establish that the stated claims are sufficiently homogenous.[27] Questions of law and fact common to class members must predominate over any questions affecting only individual members.[28] 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.[29]

Plaintiffs' experts have a harder job at class certification than defendants' experts. To prove predominance under Rule 23(b)(3), the plaintiffs' economist must propose an econometric method to establish that anticompetitive impact and damages can be evaluated on a class-wide basis.[30]

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.[31] 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

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26 Most private antitrust class actions request monetary relief, not just injunctive relief. ABA CLASS ACTIONS HANDBOOK, *supra* note 12, at 174. 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.

27 Predominance looks at "whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *In re* Ins. Brokerage Antitrust Litig., 579 F.3d 241, 266 (3d Cir. 2009) (internal quotation marks 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.

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

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

30 *See* ABA SECTION OF ANTITRUST LAW, ECONOMETRICS: LEGAL, PRACTICAL, AND TECHNICAL ISSUES 197–201 (2005) [hereinafter ABA SECTION OF ANTITRUST ECONOMETRICS]; Hal J. Singer, *Economic Evidence of Common Impact for Class Certification in Antitrust Cases: A Two-Step Analysis*, ANTITRUST, Summer 2011, at 34; *see also, 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).

31 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).

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.[32] So at class certification, the plaintiffs' expert must develop not a perfect model, but the best model possible under the circumstances.[33]

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 be comparatively established.[34] Sometimes experts turn to price lists or statistical correlations.[35] When the market is too complex to argue for a uniform pricing structure, experts use regression analyses.[36] These regression models rely on transaction-level data to identify the relevant determinants of price.[37] 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.[38]

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.[39] Rather than coming up

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32 *See* John L. Solow & Daniel Fletcher, *Doing Good Economics in the Courtroom: Thoughts on* Daubert *and Expert Testimony in Antitrust*, 31 J. CORP. L. 489, 495–96 (2006).

33 *In re* Katrina Canal Breaches Consol. Litig., No. 05-4182, 2007 WL 3245438, at *2 (E.D. La. Nov. 1, 2007); *In re* Polypropylene Carpet Antitrust Litig., 996 F. Supp. 18, 27–29 (N.D. Ga. 1997).

34 *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*, ANTITRUST, Summer 2008, at 108, 109 (describing price structure arguments advanced to establish common impact).

35 ABA SECTION OF ANTITRUST ECONOMETRICS, *supra* note 30, at 220–24 (2005); *see also, e.g.*, *In re* Screws Antitrust Litig., 91 F.R.D. 52 (D. Mass. 1981).

36 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 (2d ed. 2000).

37 Roy J. Epstein, *An Econometrics Primer for Lawyers*, ANTITRUST, Summer 2011, at 29, 32. 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 36, at 502–03.

38 *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).

39 *See, e.g.*, *In re* Zurn Pex Plumbing Prods. Liab. Litig., 644 F.3d 604, 615 (8th Cir. 2011); *In*

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 of pricing that, when considered, allegedly precludes predominance.[40] Thus, economic testimony, while helpful, is not as essential to the defendants' case.[41]

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.[42] Arguments about the sufficiency of an expert's testimony are appropriate under Rule 23. This is in contrast to *Daubert* challenges, which focus on the more general expert admissibility questions. The standard for expert admissibility is discussed next.

B. *Evaluating Expert Testimony*

The modern approach to evaluating expert testimony began in 1993.[43] Previously, only expert testimony that was generally accepted in the field was admissible.[44] *Daubert* sought to liberalize the admissibility standard,[45] thus allowing more expert testimony than before. Under this new, more liberal standard, even "shaky" expert testimony is admissible.[46] 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."[47] To provide some limit, though, expert testimony must be

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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.D. Microsoft Antitrust Litig., 657 N.W.2d 668, 677 (S.D. 2003).

40 *In re* Ready-Mixed Concrete Antitrust Litig., 261 F.R.D. 154, 165 (S.D. Ind. 2009); *see also* Solow & Fletcher, *supra* note 32, 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.").

41 Langenfeld & Alexander, *supra* note 16, at 21.

42 *In re* Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 134 (2d Cir. 2001); *In re* TFT-LCD (Flat Panel) Antitrust Litig., No. 07-1827, 2012 WL 555090, at *5 (N.D. Cal. Feb. 21, 2012); *In re* Aftermarket Auto. Lighting Prods. Antitrust Litig., 276 F.R.D. 364, 372 (C.D. Cal. 2011).

43 Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 583 (1993).

44 *See id.* at 587–89.

45 *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.").

46 *Daubert*, 509 U.S. at 596.

47 *Id.*

relevant and reliable[48] to protect jurors from relying on junk science and to avoid trial courts admitting all expert testimony wholesale.[49]

The Supreme Court shaped the current iteration of *Daubert* through a 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.[50] This jurisprudence clarified *Daubert* applies to all expert testimony, including economists' testimony in private antitrust suits.[51]

Unlike Rule 23(b)(3)'s focus on predominance of common issues, *Daubert* considers the more basic questions of reliability and relevancy. The amendment to Federal Rule of Evidence 702 in 2000 echoes these concepts.[52] 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.[53] Under the first two prongs, courts consider several optional factors,

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48 *Id.* at 589.

49 United States v. Ozuna, 561 F.3d 728, 737 (7th Cir. 2009); Margaret Bull Kovera, Melissa B. Russano & Bradley D. McAuliff, *Assessment of the Commonsense Psychology Underlying* Daubert*: Legal Decision Makers' Abilities to Evaluate Evidence in Hostile Work Environmental Cases*, 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).

50 The four primary Supreme Court decisions are: Weisgram v. Marley, 528 U.S. 440 (2000); Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999); Gen. Elec. Co. v. Joiner, 522 U.S. 136 (1997); and *Daubert*, 409 U.S. 579. The three later 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).

51 *Kumho Tire Co.*, 526 U.S. at 149. *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.

52 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.").

53 *Id.*

including whether the expert's methodology is testable[54] and subject to peer review.[55]

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.[56] 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 darkness was a question of fact in the case.[57] 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.[58] The trial court's broad latitude is affirmed by the generous abuse of discretion standard of review given such decisions.[59] An appellate court may overturn a trial court's decision only if the trial court "acted without reference to any guiding rules and principles" or "act[ed] arbitrar[ily] or unreasonabl[y]."[60] 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, as is often true in antitrust class actions.[61]

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

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54 *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.

55 *Daubert*, 509 U.S. at 593–94.

56 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.

57 *Daubert*, 509 U.S. at 591–95.

58 Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152–53 (1999) (discussing judicial flexibility in expert evaluations); United States v. Scheffer, 523 U.S. 303, 322 (1998) (Stevens, J., dissenting).

59 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.").

60 *See, e.g.*, Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 241–42 (Tex. 1985).

61 Weisgram v. Marley Co., 528 U.S. 440, 445–46 (2000). Exclusion of an expert under *Daubert*, even when outcome-determinative, would not be subject to a more searching appellate review. *Kumho*, 526 U.S. at 152; Kilpatrick v. Breg, Inc., 613 F.3d 1329, 1334 (11th Cir. 2010); City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548, 556 (11th Cir. 1998); Daubert v. Merrell Dow Pharm., Inc., 43 F.3d 1311, 1315 (9th Cir. 1995).

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."[62] Consequently, which factors count varies from judge to judge.[63] As Professor Faigman describes, "the ultimate question is whether the expert testimony is based on good grounds. But what grounds qualify as good is something of a moving target."[64] As a result, some courts rely on factors poorly suited for economist testimony, as discussed in Part II.[65]

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.[66] Others view such weighing of expert testimony as beyond the scope of judicial gatekeeping.[67]

Third, in evaluating application, the degree of fit necessary varies widely by court. Some contend the fit standard is "not that high,"[68] while others require a degree of precision unrealistic for economic analyses.[69] 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

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62 *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 note.

63 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 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* 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).

64 Faigman, *supra* note 50, at 918.

65 *See infra* Part II.B.1.

66 Stephen Mahle, Daubert *and Commercial Litigation Expert Testimony*, *in* THE FLORIDA BAR, BUSINESS LITIGATION IN FLORIDA ch. 13 (2007).

67 *See, e.g.*, *In re* Monosodium Glutamate 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).

68 *In re* Paoli R.R. Yard PCB Litig., 35 F.3d 717, 745 (3d Cir. 1994); *see also* Kordek v. Becton, Dickinson and Co., 921 F. Supp. 2d 422, 427–29 (E.D. Pa. 2013); *In re* Flonase Antitrust Litig., 884 F. Supp. 2d 184, 189 (E.D. Pa. 2012); Safeco Ins. Co. v. S & T Bank, No. 07-01086, 2010 WL 786257, at *5 (W.D. Pa. Mar. 3, 2010).

69 *See infra* Part II.B.2 and accompanying notes.

problems, *Daubert* opened the floodgates for challenges to expert testimony. From 2000–2009 alone expert challenges rose over 340%.[70] 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.

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

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,[71] instead focusing their analysis on the testimony's role in satisfying Rule 23.[72] 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:[73] plaintiffs' expert need only propose a methodology, not actually complete the model at class certification, making it premature to evaluate the testimony for admissibility.[74] Other courts were wary of making unnecessary merit-based determinations at class certification.[75]

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

71 *See, e.g.*, *In re* Polypropylene Carpet Antitrust Litig., 996 F. Supp. 18, 26 (N.D. Ga. 1997).

72 *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* analysis 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." (citation omitted) (internal quotation marks omitted)), *aff'd in part, vacated in part*, 657 F.3d 970 (9th Cir. 2011).

73 *See, e.g.*, Drayton v. W. Auto Supply Co., No. 01-10415, 2002 WL 32508918, at *6 (11th Cir. Mar. 11, 2002); *In re* Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 132 (2d Cir. 2001), *overruled on other grounds by In re* Initial Pub. Offerings Sec. Litig., 471 F.3d 24 (2d Cir. 2006), and *superseded by statute on other grounds* as stated in Attenborough v. Constr. & 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).

74 *In re Polypropylene Carpet*, 996 F. Supp. at 26 n.6.

75 *See, e.g.*, Moore v. Hughes Helicopters, Inc., 708 F.2d 475, 480 (9th Cir. 1983); LaBauve v. Olin Corp., 231 F.R.D. 632, 644 (S.D. Ala. 2005); O'Connor v. Boeing N. Am., Inc., 184 F.R.D. 311, 321 n.7 (C.D. Cal. 1998); *see also* Caridad v. Metro-N. 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).

The Supreme Court has yet to explicitly make *Daubert* a prerequisite to certification, but it tipped its hand towards supporting such a requirement in *Wal-Mart v. Dukes*.[76] In the trial court, Wal-Mart's motion to exclude plaintiffs' expert testimony under *Daubert* was denied.[77] Wal-Mart appealed this ruling and the subsequent class certification determination.[78] 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: "[a]t 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."[79] 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*.[80]

On appeal, the specific issue was whether plaintiffs met Rule 23(a)(2)'s "commonality" requirement.[81] 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.[82] The Supreme Court's response: "[w]e doubt that is so . . . ."[83] Many scholars and practitioners have subsequently relied on these five words of dicta to justify full-blown *Daubert* evaluations at class certification.[84]

Despite legitimate concerns about earlier Rule 702 rulings, post-*Dukes* the prevailing trend is to assess the expert testimony's reliability.[85]

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76 Wal-Mart Stores, Inc. v Dukes, 131 S. Ct. 2541, 2553–54 (2011).

77 Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 602–03 (9th Cir. 2010), *judgment reversed*, 131 S. Ct. 2541.

78 *Wal-Mart Stores*, 131 S. Ct. at 2549–50.

79 *Dukes*, 603 F.3d at 603.

80 *See infra* Part II and accompanying notes.

81 *Wal-Mart Stores*, 131 S. Ct. at 2550–51.

82 *Id.* at 2554.

83 *Id.* The Supreme Court also granted certiorari to two cases involving *Daubert* evaluations before class certifications. However, both cases were resolved without clarifying the timing for Rule 702. *See supra* note 5 (discussing *Behrend* and *Zurn Pex Plumbing*).

84 *See, e.g.*, 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); John M. Husband & Bradford J. Williams, Wal-Mart v. Dukes *Redux: The Future of the Sprawling Class Action*, 40 COLO. LAW. 53, 55 (2011); Meredith M. Price, *The Proper Application of* Daubert *to Expert Testimony in Class Certification*, 16 LEWIS & CLARK L. REV. 1349, 1355 (2012); Julie Slater, *Reaping the Benefits of Class Certification: How and When Should "Significant Proof" Be Required Post-*Dukes*?*, 2011 BYU L. REV. 1259, 1274–75.

85 *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

Most courts engage in a full or nearly full *Daubert* assessment at certification.[86] The Seventh Circuit was the first circuit court to mandate this new hurdle.[87] Soon after, other circuits followed suit. The First, Second, Third, Fourth, Fifth, Eleventh, and portions of the Ninth Circuit adopt a similar requirement.[88] However, the nature of these *Daubert* assessments differs among the courts. Some reflect a broad-brush form,[89] with the court applying *Daubert* more as a guidepost than as an exclusionary assessment.[90] 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 economic testimony.[91]

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

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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 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).

86 Only the Eighth Circuit has expressly rejected requiring a full *Daubert* assessment at class certification. *See In re* Zurn Pex Plumbing Prods. Liab. Litig., 644 F.3d 604, 611 (8th Cir. 2011). 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. *Id.* at 614. This modified approach was intended to temper *Dukes* with the challenges of completing *Daubert* early in a complex litigation case. *Id.* at 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, Wal-Mart v. Dukes*: Class Actions and Legal Strategy*, 2010-11 CATO SUP. CT. REV. 319, 352–53 n.160. The parties settled the appeal before a full briefing before the Supreme Court. *Zurn Pex Plumbing*, 133 S. Ct. at 1752.

87 Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 812 (7th Cir. 2012); *Am. Honda Motor Co.*, 600 F.3d at 815–16.

88 *See, e.g.*, Sher v. Raytheon Co., 419 F. App'x 887, 890 (11th Cir. 2011); *In re Hydrogen Peroxide*, 552 F.3d. at 316–20; Regents of the Univ. of Cal. v. Credit Suisse First Bos. (USA), 482 F.3d 372, 379–80 (5th Cir. 2007); *In re* Polymedica Corp. 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 No. 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*).

89 *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).

90 *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., No. CV 09-6588, 2012 WL 769604, at *4 (C.D. Cal. Jan. 23, 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).

91 *See infra* Part III and accompanying notes.

se anticompetitive violations diminished, the need for economist testimony increased.[92] While antitrust class actions have involved economic testimony for several decades, economists are increasingly vital to class certification.[93] Hence, an additional forum for challenging economic testimony has serious implications to antitrust enforcement. This is particularly true when, 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.[94] 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.[95] 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 new obstacle should not be added given the harm it poses to antitrust enforcement.

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92 *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).

93 *See* Carol Krafka et al., *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 eighty percent of antitrust actions involve expert testimony); *accord* 2 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW 309 (2d ed. 2000) (noting that "economic testimony is both ubiquitous and essential in antitrust cases").

94 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).

95 *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).

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.[96] 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,[97] 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 move from gatekeepers to fact-finders, essentially denying the parties their right to a jury trial.

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

97 5 MODERN SCIENTIFIC EVIDENCE § 46:5 (2013–14 ed.). 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. Cnty. of Monroe, 32 F.3d 19 (2d Cir. 1994).

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.[98] This turns *Daubert* into a battle of the experts.[99] These courts rewrite Rule 702's sufficiency requirement to decide which expert is more convincing.[100] 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.'"[101]

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.[102] This infuses the *Daubert* analysis with judicial confusion surrounding Rule 23.[103] In the last few years, some Supreme Court language implicitly blessed using class certification as a

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98 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." Reply Brief for Petitioners at 5–8, Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013) (No. 11-864), 2012 WL 5280782.

99 *In re* Monosodium Glutamate Antitrust Litig., No. 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* L. Elizabeth Chamblee, Comment, *Between "Merit Inquiry" and "Rigorous Analysis": Using* Daubert *to Navigate the Gray Areas of Federal Class Action Certification*, 31 FLA. ST. U. L. REV. 1041 (2004) (questioning *In re Monosodium Glutamate*).

100 Mahle, supra note 66.

101 Sofia Adrogué & Hon. Caroline Baker, *Litigation in the 21st Century: The Jury Trial, the Training & the Experts*, LITIG. SEC. ST. BAR TEX., THE ADVOC., Fall 2011, at 8, 9.

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

103 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* Levya v. Medline Indus., Inc., 716 F. 3d 510 (9th Cir. 2013), *and In re* Urethane Antitrust Litig., No. 04-1616-JWL, 2013 WL 2097346, at *3 (D. Kan. May 15, 2013) (limiting *Comcast*), *and* Harris v. comScore, Inc., 292 F.R.D. 579, 589 n.9 (N.D. Ill. 2013) (labeling *Comcast*'s discussion of Rule 23(b)(3) unbinding dicta), *with* Forrand v. Fed. Express 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., No. 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 do not preclude certification).

procedural mechanism to pick one expert over another.[104] Thus, courts split on weighing competing expert testimony under Rule 23.[105]

Early expert challenges just invite confusion between the trial court's two distinct gatekeeping roles at Rule 23 and under *Daubert*.[106] 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.[107]

When the battle of the experts occurs before class certification, it results in less private enforcement because plaintiffs' experts are disproportionately excluded.[108] The only hope for certification is if the plaintiffs' economist wins the battle. Using *Daubert* to pick one expert over another would actually reduce 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.[109] It also invites courts to engage in improper credibility assessments of competing experts.[110] Given the adversarial process, it is rare that the judge is independently identifying variables. Instead, the judge picks one expert's list of controlling variables over the opposing expert's list.[111] Such credibility

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104 *See, e.g.*, *Comcast*, 133 S. Ct. at 1435; Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2553–54 (2011).

105 *See, e.g.*, Sher v. Raytheon Co., 419 F. App'x 887, 888 (11th Cir. 2011); *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 323–24 (3d Cir. 2008); *In re* Wellbutrin XL Antitrust Litig., 282 F.R.D. 126, 137 (E.D. Pa. 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., 289 F.R.D. 555, 563 (N.D. Cal. 2013); Natchitoches Parish Hosp. Serv. Dist. v. Tyco Int'l, Ltd., 247 F.R.D. 253, 270 (D. Mass. 2008).

106 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*, 419 F. App'x at 888 (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).

107 FED. R. EVID. 702 Advisory Committee's Notes ("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.").

108 *See* Langenfeld & Alexander, *supra* note 16, at 22.

109 Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 588–89 (1993).

110 Ice Portal, Inc. v. VFM Leonardo, Inc., No. 09-60230-CIV, 2010 WL 2351463, at *5–6 (S.D. Fla. June 11, 2010) (stating "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. . . ." (alteration in original) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986)) (internal quotations marks omitted), and holding that a change of control provision susceptible to more than one construction could not 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 . . . .").

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

determinations are solely for the jury.[112] A judge may not play fact-finder under Rule 702.[113]

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.[114] 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."[115] In reversing this decision,[116] 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 [a] matter of law by not sufficiently evaluating and weighing conflicting expert testimony presented by the parties at the class certification stage."[117] 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.[118] It wrongly presumes both experts 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

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112 *See, e.g.*, *In re* Polyester Staple Antitrust Litig., No. 3:03CV1516, 2007 WL 2111380, at *25 (W.D.N.C. July 19, 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* DEP'T OF JUSTICE, DEPARTMENT OF JUSTICE MANUAL § 4-5.000 (2013).

113 *See, e.g.*, *In re* High-Tech Employee Antitrust Litig., 289 F.R.D. 555, 586 (N.D. Cal. 2013).

114 261 F.R.D. 651, 670 (M.D. Fla. 2009), *vacated*, 419 F. App'x 887 (11th Cir. 2011).

115 *Id.*

116 *Sher*, 419 F. App'x at 890–91.

117 *Id.* at 888.

118 Gregory G. Wrobel & Ellen Meriwether, *Economic Experts: The Challenges of Gatekeepers and Complexity*, ANTITRUST, Summer 2011, at 8, 10 ("Industrial organization 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-world applications in antitrust cases and government enforcement actions often are 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.").

> conclusions, and applying different statistical techniques to the same body of data can give rise to different inferences.[119]

It is quite possible for economists to rely on the same evidence and reach contrary but fully supportable conclusions.[120] 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.[121] Case law evidences an assortment of discordant but equally viable analytical methods to quantify these issues.[122] 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.[123]

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 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.[124] 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.[125]

In re Live Concert Antitrust Litigation[126] 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

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119 Solow & Fletcher, *supra* note 32, at 497.

120 *Id.* at 490.

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

122 *See generally* Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. REV. 551 (2012) (discussing courts' 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).

123 The Supreme Court has already recognized that antitrust examinations are challenging:

> [A]ntitrust 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 prove difficult for those many different courts to reach consistent results.

Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264, 281 (2007).

124 MANUAL FOR COMPLEX LITIGATION (FOURTH) § 23.24 (2004).

125 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); Scribner, *supra* note 9, at 72.

126 863 F. Supp. 2d 966 (C.D. Cal. 2012).

under Rule 702.[127] There, the trial court excluded the testimony of Dr. Owen Phillips, a well-regarded economics professor at the University of Wyoming.[128] The case involved allegations of monopoly and attempted monopoly against promoters of live rock concerts.[129] Originally, the court granted class certification but later reversed its decision upon evaluating the admissibility of Dr. Phillips's 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.[130] Yet, Dr. Phillips specifically and repeatedly stated his three separate models all incorporated various market factors, including artist popularity.[131]

Notably, there was no contrary modeling by defendants proving popularity was statistically significant. Instead, defendants took issue with how well the models considered popularity. According to defendants' expert, Dr. Phillips should have considered the top twenty-five artists rather than the top one hundred.[132] 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's 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's models must not have considered the factor.[133]

The judge's erroneous conclusions were not limited to fact-finding about variable selection. The court also rejected Dr. Phillips's market definition, again by rejecting his factually-supported conclusions.[134]

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127 *Id.* at 970.

128 *In re* Live Concert Antitrust Litig., 247 F.R.D. 98, 124 n.20 (C.D. Cal. 2007).

129 *In re Live Concert Antitrust Litig.*, 863 F. Supp. 2d at 969.

130 *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 Dr. Phillips used to evaluate this factor. *Id.*

131 Plaintiff's Memorandum in Opposition to Defendant's Motion to Exclude Testimony of Dr. Owen Phillips at 7–8, *In re Live Concert Antitrust Litig.*, 863 F. Supp. 2d 966 (No. 06-ML-1745-SVW), 2011 WL 11067900 [hereinafter *In re Live Concert* Motion to Exclude Testimony of Phillips] (providing details regarding Phillips's analysis on artist popularity). It seems the court either ignored or misconstrued some of the expert testimony, choosing defendants' version of Phillips's research rather than Phillips's 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).

132 *In re Live Concert* Motion to Exclude Testimony of Phillips, *supra* note 131, at 9–11.

133 *In re Live Concert, Antitrust Litig.*, 863 F. Supp. 2d at 975.

134 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

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.[135] By treading too far into expert selection, the court excluded Dr. Phillips—essentially killing yet another private enforcement case.[136] 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.[137] Jurisprudence is replete with judicial missteps when economic theory failed to match factual realities.[138] Given this 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

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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.

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

136 Summary judgment was entered for defendants without first decertifying the class. *In re Live Concert, Antitrust Litig.*, 863 F. Supp. 2d at 1001.

137 *Interview with Judge Kathryn Vratil*, ANTITRUST, Spring 2003, at 19, 20. 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) (No. 97-1709), 1998 WL 734434. However, such an argument is beyond the scope of this Article, which is more narrowly focused on the application of *Daubert* at the class certification stage.

138 *Blomkest Fertilizer, Inc. v. Potash Corp. of Sask.* provides a particularly troubling example of problematic overreliance on economic theory to the hindrance of antitrust enforcement. 203 F.3d 1028, 1031–32 (8th Cir. 2000). The case involved class action allegations by Potash buyers alleging violation for price-fixing. *Id.* 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 Potash increased 3000 percent, confirming for many that the alleged price-fixing was more than hypothetical. *See, e.g.*, Christopher R. 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* Haw, *supra* note 92, at 1271 (discussing how judges have a difficult time distinguishing between admissible factual expert testimony and inadmissible legal conclusions); 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).

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.[139]

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.[140] 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 litigation and thus not subject to peer review.[141] While an econometric model is essential for a plaintiffs' case, it is optional for a defendant.[142] Thus, using this factor to reject an economist disproportionately excludes plaintiffs' experts.

Second, acceptance in prior cases[143] and academic consensus[144] are frequently-used bases for evaluating *Daubert* testimony. Given the quickly-changing contours of economic thought, prior use should not

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

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

141 Even if defendants offered models, peer review remains a defendant-friendly concept because defendants 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 PERSP. 117, 119 (2008).

142 *In re* Ready-Mixed Concrete Antitrust Litig., 261 F.R.D. 154, 165 (S.D. Ind. 2009); *see also* Solow & Fletcher, *supra* note 32, 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.").

143 *See, e.g.*, Christou v. Beatport, LLC, No. 10-cv-02912, 2013 WL 248058, at *4 (D. Colo. Jan. 23, 2013) (discussing how economists have been qualified as experts in numerous legal actions); *In re* Chocolate Confectionary Antitrust Litig., 289 F.R.D. 200, 209 (M.D. Pa. 2012) (same).

144 *See* Thomas G. Hungar & Ryan G. Koopmans, *Appellate Advocacy in Antitrust Cases: Lessons from the Supreme Court*, ANTITRUST, Spring 2009, at 53, 54 ("[T]he Court in recent years has frequently looked to the majority views of economists to help resolve antitrust issues . . . ."); *see also, 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).

be given much weight.[145] 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.[146] However, other schools of economic thought, particularly post-Chicago scholarship, reach broader anticompetitive conduct.[147] 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.[148] Hence, these factors should not be part of the *Daubert* evaluation.

Third, using "testability" to measure reliability is problematic for antitrust economic modeling.[149] Testing in this context is often defined in terms of replication, which looks at whether experts looking at similar facts reach similar conclusions.[150] Unlike scientific testimony, economic models are not tested through experiments where other variables that might affect the outcome are controlled.[151] 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.[152] As one antitrust expert explains, "[i]t is doubtful that much economic testimony would survive a strict and literal application of the *Daubert* factors. . . . [F]ew economic techniques of the

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

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

147 Reza Dibadj, *Saving Antitrust*, 75 U. COLO. L. REV. 745, 847 (2004); Spencer Weber Waller, *The Law and Economics Virus*, 31 CARDOZO L. REV. 367, 403 (2009); Wright, *supra* note 2.

148 Further, just being grounded in prior precedent does not necessarily make the testimony more reliable. *See* Daniel R. Shulman, *The Sedona Conference Commentary on the Role of Economics in Antitrust Law*, 7 SEDONA CONF. J. 69, 86–87 (2006).

149 City of Tuscaloosa v. Harcos Chems., Inc., 158 F.3d 548, 566 n.25 (11th Cir. 1998). *But see In re* Polypropylene Carpet Antitrust Litig., 996 F. Supp. 18, 26 (N.D. Ga. 1997).

150 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).

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

152 Andrew I. Gavil, *After* Daubert*: Discerning the Increasingly Fine Line Between the Admissibility and Sufficiency of Expert Testimony in Antitrust Litigation*, 65 ANTITRUST L.J. 663, 673–74 (1997).

ilk utilized in antitrust litigation could be 'tested' in the sense contemplated by *Daubert* . . . ."[153]

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 economist reliably applied his methodology to the facts of the case.[154] 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.[155] 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.[156] An over-exacting analytical fit

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153 *Id.*

154 FED. R. EVID. 702.

155 *See* Gavil, *supra* note 95, at 876 (discussing alternative meanings of the "fit" requirement); Kimberly S. Keller, *Bridging the Analytical Gap: The* Gammill *Alternative to Overcoming* Robinson *and* Havner *Challenges to Expert Testimony*, 33 ST. MARY'S L.J. 277, 310–12 (2002).

156 *See, e.g.*, *In re* Live Concert Antitrust Litig., 863 F. Supp. 2d 966, 976–78 (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

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.[157] This is where 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.[158] 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.[159] 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.[160] Failing to merely identify a particular variable does not

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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) (stating expert testimony should be excluded when conclusions are inadequately supported) (citing Amorgianos v. Nat'l R.R. Passenger Corp., 303 F.3d 256, 266 (2d. Cir. 2002).

157 *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., 363 F.3d 761, 777 (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.'" (citation omitted)); *In re* Titanium Dioxide Antitrust Litig., No. 10-0318, 2013 WL 1855980, at *9 (D. Md. May 1, 2013); *In re* Urethane Antitrust Litig., No. 04-1616-JWL, 2012 WL 6681783, at *7–8 (D. Kan. Dec. 21, 2012); Gavil, *supra* note 95, at 862–65, 869–72 (citing *Blomkest* and *Concord Boats* as cases where missing variables lead to exclusion of expert testimony); Lopatka & Page, *supra* note 146, at 692–93. 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. Pa. 2007).

158 *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*, 2012 WL 6681783, at *7–8.

159 *See* Solow & Fletcher, *supra* note 32, at 494 (discussing marginal cost data as an example of unobtainable information).

160 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.*, Estate of Hill v. ConAgra Poultry Co., No. 4:94CV0198, 1997 WL 538887, at *6 (N.D. Ga. Aug. 25, 1997); Denny v. Westfield State Coll., 669 F. Supp. 1146, 1149 (D. Mass. 1987).

necessarily make the model unreliable outright.[161] As Judge Walls explains, "[i]t 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."[162]

Analytical fit does require a court to consider whether the expert testimony matches the facts of the case, but only in a general sense.[163] Analytical fit is really just the stricter cousin of relevancy. The fit test simply screens out junk science[164] rather than mandating a nuanced, detailed understanding of the particularities of the case.[165] Viewed more accurately as a heightened relevancy requirement, analytical fit focuses on whether the expert testimony matches the facts, not necessarily how well.[166] 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.[167]

Viewing analytical fit as just a relevancy standard makes sense because whether enough variables are included impacts the testimony's sufficiency, not its admissibility.[168] The admissibility determination is

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161 Rubenfeld, *supra* note 36, at 188 (discussing how failure to include a variable goes more to the probative value of the model than its admission).

162 Gutierrez v. Johnson & Johnson, No. 01-5302, 2006 WL 3246605, at *5 (D.N.J. Nov. 6, 2006) (quoting another source).

163 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.

164 Bobak Razavi, *Admissible Expert Testimony and Summary Judgment*, 29 J. LEGAL MED. 307, 315 (2008).

165 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 Pharm., Inc., 509 U.S. 579, 591–95 (1993); *see also supra* Part I.A.

166 *Daubert*, 509 U.S. at 591–92; *see also* Miller 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).

167 Adrogué & Baker, *supra* note 101, 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.").

168 City of Tuscaloosa v. Harcros Chems., Inc., 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, the plaintiffs' economic expert offered testimony on collusion. City of Tuscaloosa v. Harcros Chems., Inc., 877 F. Supp. 1504, 1513 (N.D. Ala. 1995), *aff'd in part*,

more generous than evaluating whether the expert testimony proves the case.[169] Sufficiency, in contrast, evaluates whether the collective weight of the evidence is adequate to present a jury question.[170] 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 Food Products Inc. v. Gruma Corp.*[171] 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

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vacated in part, 158 F.3d 548. 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 1513–15. 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 1534. After excluding the report, summary judgment was granted since the 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 the 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. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *see also* Gavil, *supra* note 152, at 689–91.

169 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 & Co., 921 F. Supp. 2d 422, 429 (E.D. Pa. 2013); Safeco Ins. Co. of Am. v. S & T Bank, No. 07-01086, 2010 WL 786257, at *5 (W.D. Pa. Mar. 3, 2010).

170 *See In re* Joint E. & S. Dist. 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").

171 301 F. Supp. 2d 612 (S.D. Tex. 2003), *aff'd*, 131 F. App'x 450 (5th Cir. 2005).

Federal Trade Commission study on the specific anticompetitive conduct at issue.[172] Based on his research, he then offered his opinion.[173]

The trial court rejected the expert testimony, applying a narrow definition of the analytical fit requirement.[174] 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.[175]

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*.[176]

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.[177] Without any supporting economic testimony, the court found there were no longer any triable issues of fact, and thus granted summary judgment for defendant.[178] Then, given the deference afforded to a trial court's Rule 702 decision, the Fifth Circuit affirmed the ruling.[179]

Since courts have accepted misconstrued analytical fit arguments to exclude experts at later procedural stages,[180] it is only a matter of time before this same flawed interpretation of *Daubert* seeps into the class certification setting.[181] The number of analytical fit challenges to

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172 *Id.* at 624.

173 *Id.*

174 *Id.* at 623–24.

175 *Id.*

176 Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 596 (1993) (noting even shaky testimony is admissible).

177 *El Aguila Food Prods.*, 301 F. Supp. 2d at 626.

178 *Id.* at 633.

179 El Aguila Food Prods., Inc. v. Gruma Corp., 131 F. App'x 450 (5th Cir. 2005).

180 *See, e.g.*, Concord Boat Corp. v. Brunswick Corp., 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 FED. RULES DECISIONS 196, 212 (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, 1998) (noting defendants cannot just point to excluded variables but must instead demonstrate such variables matter).

181 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. Jan. 23, 2013). Some courts have even

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 for a Rule 23 determination may not necessarily be sufficient for an early application of a strict *Daubert* test.

Since sufficiency hurdles already exist at summary judgment,[182] 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.[183] As the Supreme Court stated, even "shaky" expert testimony should clear *Daubert*.[184] 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.[185] 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.[186] 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.[187] All the facts the

gone so far as to acknowledge that a missing variable does not make testimony unreliable. *See, e.g.*, *In re* Linerboard, 497 F. Supp. 2d 666, 677–78 (E.D. Pa. 2007); *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.

182 29 CHARLES WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 6266 (1st ed. 1982) ("Accordingly, where expert testimony is based on well-established science, the courts generally have concluded that reliability problems go to weight, not admissibility.").

183 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 Pharm., Inc., 509 U.S. 579, 596 (1993); s*ee also* FED. R. EVID. 702 advisory committee's notes ("*Daubert* did not work a seachange over federal evidence law, and the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system." (quoting another source) (internal quotation marks omitted)).

184 *Daubert*, 509 U.S. at 596.

185 *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), *vacated*, 725 F.3d 244 (D.C. Cir. 2013); *see also* Walsh v. Ford Motor Co., 807 F.2d 1000, 1017 (D.C. Cir. 1986) ("Class action proponents may not be called upon to prove their case in order to obtain certification.").

186 *In re Hydrogen Peroxide*, 552 F.3d at 311.

187 *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); 7AA WRIGHT ET

expert may consider are not yet settled, nor will they be until trial. Consequently, the best course is to postpone *Daubert* until later in the case.[188]

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 determinations 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.[189] 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.[190] 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.[191] 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.

AL., *supra* note 182, § 1781; 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 genuinely has viable common methods of proof.").

188 If new evidence impacts the class's homogeneity, the court has ways to cure this, including subclassing. *See* FED. R. CIV. P. 23(c)(5).

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

190 FED. R. CIV. PROC. 56; *see also, e.g.*, *In re* Joint E. & S. Dist. Asbestos Litig., 52 F.3d 1124, 1131 (2d Cir. 1995) ("[W]e 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.").

191 MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 124, § 21.21. The Manual's position on the *Daubert* assessment is highly confusing; it characterizes a Rule 23 determination as the judge being the trier of fact. Nonetheless, it goes on to invite judges to engage in a *Daubert* assessment without any guidance on how to reconcile the bench trial nature of Rule 23 determinations. *Id.* § 21.133.

Though *Daubert* does not belong at class certification at all, it is particularly problematic when it precedes, rather than follows, the Rule 23 evaluation.[192] As discussed below, this sequencing makes reviewing the trial court's procedural roadblock more difficult because of the great 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.[193] Despite research establishing judges' failings in making these decisions,[194] such rulings are given great deference.[195] A *Daubert* determination is only subject to review for abuse of discretion.[196] This is notably higher than the de novo review given class certification decisions.[197]

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192 *Compare In re* FEMA Trailer Formaldehyde Prods. Liab. Litig., No. MDL 071873, 2008 WL 5423488, at *2 (E.D. La. Dec. 29, 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).

193 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.3d 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., 48 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) (quoting Anderson v. A.P.I. Co. of Minn., 559 N.W.2d 204, 206 (N.D. 1997)) (internal quotation marks omitted).

194 Cassandra H. Welch, Note, *Flexible Standards, Deferential Review:* Daubert*'s Legacy of Confusion*, 29 HARV. J.L. & PUB. POL'Y 1085, 1099 (2006); *see also supra* note 137 (discussing the difficulty judges have in evaluating expert testimony).

195 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).

196 *Joiner*, 522 U.S. at 142.

197 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'l 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 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*." (quoting another source) (internal quotation marks omitted)); Andrews v. Chevy Chase Bank, 545 F.3d 570, 573 (7th Cir. 2008) ("We generally review a grant of class certification for an abuse of discretion, but 'purely legal' determinations made in support of that decision are reviewed de novo." (citing Mace v. Van Ru Credit Corp., 109 F.3d 338, 340 (7th Cir. 1997)). In contrast, *Daubert* determinations are strictly subject to abuse of discretion review. *Joiner*, 522 U.S. at 142.

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.[198] It also denies appellate courts a solid basis to assess the trial court's ruling.[199] 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.[200] As Professor Cheng explains, "[t]he 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."[201]

Further, this extreme deference to trial court *Daubert* decisions sacrifices the more cerebral and academic understanding of testimony that usually accompanies appellate decisions.[202] It limits appellate courts from articulating clear, consistent guidelines to evaluate an antitrust expert's proposed methodology[203]—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.[204] 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.[205] This bias is only exacerbated in antitrust cases, as much of the economic modeling in these cases support contingent claims with redistributive results.[206] Thus, particular political viewpoints can impact how reliable an expert

198 David E. Bernstein, *Expert Witnesses, Adversarial Bias, and the (Partial) Failure of the* Daubert *Revolution*, 93 IOWA L. REV. 451, 473 (2008); Anne S. Toker, Note, *Admitting Scientific Evidence in Toxic Tort Litigation*, 15 HARV. ENVTL. L. REV. 165, 185 (1991).

199 Giannelli, *supra* note 195, at 1078–79.

200 Christopher B. Hockett & Frank M. Hinman, *Admissibility of Expert Testimony in Antitrust Cases: Does* Daubert *Raise a New Barrier to Entry for Economists?*, ANTITRUST, Summer 1996, at 40, 45.

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

202 Faigman, *supra* note 50, at 922. Appellate courts are generally more cerebral and academic. *Id.*

203 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).

204 Robert P. Mosteller, *Finding the Golden Mean with* Daubert*: An Elusive, Perhaps Impossible, Goal*, 52 VILL. L. REV. 723, 758 (2007); 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).

205 *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 than Democrat-appointed judges on right of access determinations).

206 Haw, *supra* note 92, at 1294.

seems.[207] As a result, the level of review 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,[208] 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.[209] Under Rule 23, for numerosity, while the class size cannot be based on speculation, it can be in part based on common sense assumptions.[210] 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.[211] Others go further to assume impact so long as there is common proof of individual damages.[212] As for predominance, the presumptions are tailored to

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207 *Id.* The relationship between judicial gatekeeping and a judge's political affiliation is well documented. *See, e.g.*, Kaheny, *supra* note 205, at 257; C.K. Rowland & 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).

208 "Rule 23 provides a one-size-fits-all formula for deciding the class-action question." Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 399 (2010).

209 *See, e.g.*, *In re* Dynamic Random Access Memory (DRAM) Antitrust Litig., No. 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) ("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." (quoting another source) (internal quotation marks omitted)); *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).

210 *See In re* New Motor Vehicles Canadian Exp. Antitrust Litig., No. MDL 1532, 2006 WL 623591, at *2 (D. Me. Mar. 10, 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). *See generally In re* NASDAQ Market-Makers Antitrust Litig., 169 F.R.D. 493, 509 (S.D.N.Y. 1996) (discussing how numerosity can be satisfied with a "rough estimate"); Uniondale Beer Co. v. Anheuser-Busch, Inc., 117 F.R.D. 340, 342 (E.D.N.Y. 1987) ("Where, as here, it is apparent that the members of the class would be very numerous, Rule 23 (a)(1) is satisfied.").

211 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).

212 The Third Circuit has held: "when an antitrust violation impacts upon a class of persons who do have standing, there is no reason in doctrine why proof of the impact cannot be made

remedying the challenges of generating class-wide damage calculations. An expert's report can and often is based on factual assumptions.[213] 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.[214]

While courts disagree over the weight and sometimes the existence of these presumptions, plaintiffs continue to successfully rely on them to seek certification.[215] 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.[216] 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,[217] starting certification determinations with Rule 702 means the presumptions are essentially gutted. In cases where a court completes a full *Daubert* analysis prior to the Rule 23 determination, these

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on a common basis so long as the common proof adequately demonstrates some damage to each individual." Bogosian v. Gulf Oil Corp., 561 F.2d 434, 454 (3d Cir. 1977); *see also* Am. Seed Co. v. Monsanto Co., 271 F. App'x 138, 140 (3d Cir. 2008); *In re* Linerboard Antitrust Litig., 305 F.3d 145, 151 (3d Cir. 2002).

213 Shulman, *supra* note 148, at 88 ("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.").

214 *See, e.g.*, *In re* Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 139–40 (2d Cir. 2001), *overruled on other grounds by In re* Initial Pub. Offerings Sec. Litig., 471 F.3d 24 (2d Cir. 2006), *and superseded by statute on other grounds as stated in* Attenborough v. Constr. 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 Antitrust Litig., 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").

215 *See supra* note 214; *see also In re* Aftermarket Auto. Lighting Prods. Antitrust Litig., 276 F.R.D. 364, 369 (C.D. Cal. 2011) (discussing proving antitrust impact through common damage calculations).

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

217 *See, e.g.*, *In re Visa Check/MasterMoney*, 280 F.3d at 140 ("[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." (alteration in original) (quoting another source)); *see also In re Catfish Antitrust Litig.*, 826 F. Supp. at 1044; *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).

presumptions play little to no role.[218] Thus, in those courts that decide *Daubert* before Rule 23, the barriers to certification are greater than in 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).[219] 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.[220] Adding obstacles to these claims means

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218 *See, e.g.*, *In re* Live Concert Antitrust Litig., 863 F. Supp. 2d 966, 971–72 (C.D. Cal. 2012); *In re* Chocolate Confectionary Antitrust Litig., 289 F.R.D. 200, 218 (M.D. Pa. 2012).

219 *See, e.g.*, N.W.B. Imports & Exports Inc. v. Eiras, 3:03-CV-1071-J-32-MMH, 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).

220 *See* ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 241 (Apr. 2007) ("The vitality of private antitrust enforcement in the United States is largely attributed to two factors: (1) the availability of 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.").

overall less private enforcement.[221] This new obstacle is particularly suspect if it distorts the class certification determination and permits judicial gatekeeping to snuff out bona fide antitrust claims.[222] 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.[223] 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."[224] However, while economic modeling has its flaws, it is far from the fields of true "junk science," such as palmistry and astrology, that *Daubert* fears. Others cite to concerns about potentially misleading jurors.[225] But as previously discussed, jurors play no part in the class certification determination.[226]

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221 Baxter, *supra* note 10, 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").

222 In fact, this exact complaint 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 1124 (2d Cir. 1995) (reversing the lower court for improperly weighing expert evidence). Within a few years, the number of summary judgment motions granted almost doubled, with ninety percent of those rulings going against plaintiffs. LLOYD DIXON & BRIAN GILL, FEDERAL CIVIL CASES SINCE THE *DAUBERT* DECISION 62 (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 180.

223 Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2320 (2013) (Kagan, J., dissenting).

224 *In re* Paoli R.R. Yard PCB Litig., 35 F.3d 717, 798 (3d Cir. 1994); Pecover v. Elec. Arts Inc., No. 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 . . . .").

225 *See, e.g.*, David E. Bernstein, *Expert Witnesses, Adversarial Bias, and the (Partial) Failure of the* Daubert *Revolution*, 93 IOWA L. REV. 451, 489 (2008) (discussing some scholars' concerns with expert testimony misleading jurors).

226 *See supra* Part II.

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.[227] 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.[228] Instead, *Daubert* should remain at more proper stages: 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.[229] 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.[230] 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 expert challenges is the appropriate new gate. Expert testimony will still be repeatedly screened without early *Daubert* review. First, the

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227 *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.").

228 The few scholars who have actually evaluated both sides of the debate acknowledge the burden disproportionately impacts plaintiffs. *See, e.g.*, Adrogué & Baker, *supra* note 101, at 13 (discussing how *Daubert* has a chilling effect on plaintiffs' attorneys); Miller, *supra* note 3, at 313–14 ("*Daubert*'s high threshold has been particularly burdensome—financially, logistically, and sometimes both—for plaintiffs."). As Adrogué and Baker explain, "[t]he standard set out in *Daubert* can be insurmountable and leaves many legitimate claims without a proper remedy." Adrogué & Baker, *supra* note 101, at 13.

229 *See* Biesanz & Burt, *supra* note 84, at 61–68.

230 *See supra* note 49 and accompanying text.

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.[231]

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.[232] 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 . . . ."[233]

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.[234] Not surprisingly, such trials have increasingly become a rarity,[235] 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.[236] In federal court, where these claims are primarily brought, it is now harder to get into court; harder to plead an antitrust claim; and

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231 Solow & Fletcher, *supra* note 32, at 497.

232 *See, e.g.*, Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1046 (8th Cir. 2000); Craftsman Limousine, Inc. v. Ford Motor Co., No. 98-3454-CV-S-AE-ECF, 2002 WL 34448786, at *1 (W.D. Mo. Aug. 28, 2002); Lantec, Inc. v. Novell, Inc., 146 F. Supp. 2d 1140 (D. Utah 2001) (denying motion in limine to exclude expert testimony but subsequently granting motion to strike expert after hearing expert testimony during trial), *aff'd*, 306 F.3d 1003 (10th Cir. 2002).

233 ANTITRUST MODERNIZATION COMM'N, *supra* note 220, at 247.

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

235 *Id.* (discussing data on the vanishing trial).

236 Daniel E. Lazaroff, *Entry Barriers and Contemporary Antitrust Litigation*, 7 U.C. DAVIS BUS. L.J. 1, 4651 (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 (2012).

harder to certify a class.[237] The full consequences of these barriers remain to be seen. There is evidence, however, that these barriers already limit potentially meritorious antitrust class claims.[238] This makes the need for further obstacles even more questionable.

One of the primary new gates to antitrust claims is *Twombly*.[239] *Twombly* empowers judges to dismiss claims they deem implausible based on their "judicial experience and common sense."[240] This means antitrust plaintiffs must now prove up their case without the aid of discovery.[241] 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,[242] 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.[243] This subjectivity has already ended countless antitrust class actions. Specifically, two out of every three antitrust claims filed since *Twombly* have been dismissed on

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237 *See* Herbert Hovenkamp, *The Pleading Problem in Antitrust Cases and Beyond*, 95 IOWA L. REV. BULL. 55, 56–58 (2010).

238 As Senator Arlen Specter noted:

> [t]he 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.

Specter Proposes Return to Prior Pleading Standard, BLOG LEGAL TIMES (July 23, 2009, 11:43 AM), http://legaltimes.typepad.com/blt/2009/07/specter-proposes-return-to-prior-pleading-standard.html (internal quotation marks omitted).

239 Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); s*ee also, e.g.*, 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, 17–27 (2008) (discussing the impact of *Twombly*).

240 *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.

241 Cavanagh, *supra* note 239, at 22.

242 *Twombly*, 550 U.S. at 557.

243 Further, this requirement ignores that defendants, not plaintiffs, have access to details needed to pass this barrier. *See also* Hovenkamp, *supra* note 237, at 58 (discussing the problematic nature of *Twombly* for plaintiffs attempting to plead implicit market division agreements). As one scholar explains, "[b]ased 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 for Justice*, 37 OHIO N.U. L. REV. 621, 624 (2011).

Rule 12(b)(6) motions,[244] a figure nearly twenty-five percent higher than in torts or contracts cases.[245] 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*,[246] 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.[247] 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.[248] 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 for 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 are wondering whether this is the end of days for private suits.[249] Consequently, the need for yet another gatekeeping hurdle is suspect. If

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244 Heather Lamberg Kafele & Mario M. Meeks, *Developing Trends and Patterns in Federal Antitrust Cases After* Bell Atlantic Corp. v. Twombly *and* Aschroft v. Iqbal, SHEARMAN & STERLING LLP ANTITRUST DIG., 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 243, at 629; *see also* Letter from Albert A. Foer, President, The Am. Antitrust Inst., to Hon. Lee H. Rosenthal, Chair, The Standing Comm. on Rules of Practice & Procedure of the Judicial Conference of the United States (May 27, 2010) (endorsing "flashlight discovery" that is limited initial discovery).

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

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

247 *Id.* at 2309–10.

248 *Id.*

249 *See, e.g.*, James Schurz, Commentary, *Consumer Class Actions Take Another Hit: Supreme Court Rules Class-Action Arbitration Waiver Covers Antitrust Claims*, 20 WESTLAW J. CLASS ACTION 2 (2013), *available at* 2013 WL 3488542; *see also* David M. Harris, *Supreme Court Continues to Scrutinize Class-Action Practices in Federal Court*, 20 WESTLAW J. CLASS ACTION 1 (2013), *available at* 2013 WL 3488541; Brian Fitzpatrick, *Is the End of Class Actions upon Us?*, SCOTUSBLOG (Sept. 14, 2011, 9:55 AM), http://www.scotusblog.com/2011/09/is-the-end-of-class-actions-upon-us; 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.

anything, adding *Daubert* to class certification is an overcorrection since it disproportionately excludes plaintiffs' experts.[250] 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[251]—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.[252]

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.[253]

The *Daubert* Court warned against taking too long and devoting too many judicial resources to the admissibility inquiry.[254] However, despite this warning, *Daubert* has evolved into a lengthy process,

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250 *See* Langenfeld & Alexander, *supra* note 16, at 22.

251 *See, e.g.*, Pecover v. Elec. Arts Inc., No. C 08-2820 VRW, 2010 WL 8742757, at *3 (N.D. Cal. Dec. 21, 2010); Rhodes v. E.I. du Pont de Nemours & Co., No. 6:06-cv-00530, 2008 WL 2400944, at *11 (S.D. W. Va. June 11, 2008).

252 *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).

253 *See* N. Dall. 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 H. 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 (1999) ("*Daubert* allows those who want to delay the proceedings to come up with another whole layer of disputes that have to be resolved . . . .").

254 Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 597 (1993).

involving a "complex mini-trial."[255] 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."[256] This applies to each expert, so in antitrust cases, where several economic experts offer testimony, the potential delay is exponential.[257] 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.[258] Courts are already expressing concern about the delay these motions cause. As one Delaware court described:

> [t]he 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, depositions, and affidavits submitted in support of the parties' respective Motions to exclude experts. Recently, 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.[259]

Given this waste, the burden of expert evaluations now arguably outweighs the dangers the test originally sought to avoid.[260] Why this waste should be compounded by yet another round of *Daubert* challenges is unclear.

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255 Allapattah Servs., 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 eighty-one–page opinion. Behrend v. Comcast Corp., 655 F.3d 182, 188 (3d Cir. 2011), *rev'd*, 133 S. Ct. 1426 (2013).

256 Brief of Margaret A. Berger, Edward J. Imwinkelried, & Stephen A. Salzburg as Amicus Curiae in Support of Respondents at 20, Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999) (No. 97-1709), 1998 WL 739321, at *20; *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) (lengthy and confusing *Daubert* hearings "clog the trial courts today"); Marc T. Treadwell, *Eleventh Circuit Survey—Evidence*, 56 MERCER L. REV. 1273, 1279 (2005).

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

258 *See* United States v. Katz, 178 F.3d 368, 371 (5th Cir. 1999) ("[W]e are troubled by the amount of judicial resources that were devoted to the *Daubert* hearing.").

259 Minner v. Am. Mortgage & Guar. Co., 791 A.2d 826, 845 (Del. Super. Ct. 2000) (footnote omitted).

260 Treadwell, *supra* note 256, at 1279 ("[W]hatever benefits have been realized have come at high costs. District courts spend days, sometimes weeks, on *Daubert* hearings, and appellate courts render 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." (footnote omitted)); *see also* Crump, supra note 256, at 40–41.

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.[261] Adding a new stage for expert challenges will only expand this timetable.[262] 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.[263] Since plaintiffs' attorneys' fees are only recovered if they prevail, unlike the by-the-hour defendants' bar, delay disproportionately burdens plaintiffs.[264]

Not only is this delay contrary to conserving judicial resources, it also seems contrary to legislative intent. The Class Action Fairness Act (CAFA) suggests seeking certification "as early as practicable"—certainly prior to merits discovery.[265] Generally, an expert report can only be generated after class discovery is complete.[266] With earlier *Daubert* challenges, a conservative 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.[267] This could add years to class certification.[268]

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261 Part of this delay is due to increased motion to dismiss practice post-*Twombly*. *See* 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* Hovenkamp, *supra* note 237, at 60.

262 *See In re* Visa Check/MasterMoney Antitrust Litig., 297 F. Supp. 2d 503, 508 (E.D.N.Y. 2003) (showing defendant prolonged the case by nearly seven years battling class certification), *aff'd sub nom.* Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96 (2d Cir. 2005); 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).

263 Treadwell, *supra* note 260, at 1279.

264 Miller, *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 powerful 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."); *see also* Judge Harvey Brown, *Procedural Issues Under* Daubert, 36 HOUS. L. REV. 1133, 1177 (1999); Arthur R. Miller, McIntyre *in Context: A Very Personal Perspective*, 63 S.C. L. REV. 465, 471 (2012).

265 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 (noting so in discussion of the 2003 amendments). However, this expansion still assumed certification would occur prior to merits discovery. *Id.*

266 *See* Anthony Z. Roisman, *Taming the* Daubert *Tiger*, PRAC. LITIGATOR, May 2009, at 49, 57.

267 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

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.[269] This is in conjunction with the expense of preparing supporting, supplemental, and rebuttal documents.[270] The information on the cost for completing *Daubert* determinations is limited, but given the high hourly rate of economists[271] and antitrust attorneys,[272] it easily adds up.

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 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.

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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); Cortés-Irizarry v. Corporación Insular de Seguros, 111 F.3d 184, 188 (1st Cir. 1997). Nonetheless, some scholars support merging the procedural steps. *See generally* Biesanz & Burt, *supra* note 84; Linda S. Mullenix, *Dropping the Spear: The Case for Enhanced Summary Judgment Prior to Class Certification*, 43 AKRON L. REV. 1197 (2010) (advocating for summary judgment before class certification).

268 *See, e.g.*, Michael R. Nelson & Mark H. Rosenberg, Behrend, Knowles *and the Continuing Evolution of Class Actions*, NELSON LEVINE DE LUCA & HAMILTON CLASS ACTION Q., Spring 2013, *available at* http://documents.lexology.com/dd7ef57a-67b4-4221-9acb-7eee8bac1c4b.pdf#page=1.

269 Brief of American Association for Justice as Amicus Curiae in Support of Plaintiffs-Appellees Seeking Affirmance at 26, *In re* Zurn Pex Plumbing Prods. Liab. Litig., 644 F.3d 604 (8th Cir. 2011) (No. 10-2267), 2010 WL 3761168, at *26.

270 *Id.*

271 *See, e.g.*, Torday v. Sec'y of the Dep't of Health & Human Servs., No. 07-372V, 2011 WL 2680717 (Fed. Cl. Apr. 7, 2011) (finding fees between $400–$450 per hour acceptable); Amended Complaint, Applecon, LLC v. Berry & Leftwich (E.D. Mich. 2006) (No. 06-13808), 2006 WL 3885312 (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!").

272 *In re* Stock Exchs. Options Trading Antitrust Litig., No. 99 CIV. 0962(RCC), 2006 WL 3498590, at *10 n.6 (S.D.N.Y. Dec. 4, 2006) (discussing average rates ranging from $350–$595).

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.[273] Claims that class actions unduly cause rash settlement began in the 1970s.[274] They have been echoed by class action critics and courts alike.[275] Stated simply, a defendant is likely to avoid gambling and settle even a meritless claim once it is certified as a class, particularly in the face of treble damages.[276]

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.[277] But far more importantly, there is little informed empirical analysis supporting the fear of in terrorem settlements.[278] As a non-profit think tank recently explained, "[s]ignificantly, the suggestion that businesses routinely settle 'meritless' class actions with substantial payments is a myth."[279] In fact, the settlement rate for certified class actions is very close to the settlement rate for other federal lawsuits.[280]

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273 *See, e.g.*, Brief of DRI—The Voice of the Defense Bar as Amicus Curiae in Support of Petitioners at 10, Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013) (No. 11–864), 2012 WL 3643903, at *10; Brief of Washington Legal Foundation, Allied Educational Foundation, National Ass'n of Defense Counsel as Amici Curiae in Support of Petitioners at 15, *Comcast Corp.*, 133 S. Ct. 1426 (No. 11–864), 2012 WL 3643902, at *15; *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).

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

275 *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).

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

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

278 Brief of the American Antitrust Institute & the American Independent Business Alliance as Amici Curiae in Support of Petitioners, *Comcast Corp.*, 133 S.Ct. 1426 (No. 11-864); Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal: *A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 103 (2010) ("[C]laims 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 . . . .").

279 Brief of the American Antitrust Institute as Amicus Curiae in Support of Respondents at 34, Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013) (No. 12-133), 2013 WL 417719, at *34; *see also* Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency*

Assuming arguendo that 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 prior to class certification, defendants' settlement concerns have been sufficiently assuaged by the increased gatekeeping previously discussed.[281] In addition, commentators have already noted that the recently heightened rigor of Rule 23 offsets defendants' alleged settlement pressures.[282] Thus, there is little need for yet another weapon against speculative fears of settlement pressures, particularly when that weapon indiscriminately maims 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 to private antitrust enforcement.

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." (footnote omitted)); Silver, *supra* note 278, at 1393; Charles M. Yablon, *The Good, the Bad, and the Frivolous Case: An Essay on Probability and Rule 11*, 44 UCLA 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 in litigation costs alone, to coerce a settlement.").

280 Kanner & Nagy, *supra* note 274, at 697.

281 *See supra* Part III.A and accompanying notes (discussing increased judicial gatekeeping in antitrust class actions).

282 *See, e.g.*, Erwin Chemerinsky, *New Limits on Class Actions*, TRIAL, Nov. 2011, at 54, 56; Timothy D. Edwards, *Class Action Suits After* Walmart v. Dukes, WIS. LAW., Nov. 2011, at 18, 20; Ian Simmons, Alexander P. Okuliar & Nilam A. Sanghvi, *Without Presumptions: Rigorous Analysis in Class Certification Proceedings*, ANTITRUST, Summer 2007, at 61, 66; Jessie J. Holland, *Court Turns Away Class Action Against Comcast*, ASSOCIATED PRESS (Mar. 27, 2013, 2:02 PM), http://bigstory.ap.org/article/court-turns-away-class-action-against-comcast.

First, adding *Daubert* as a precursor to certification pressures plaintiffs' attorneys to forego filing claims.[283] Without attorneys willing to pursue antitrust cases, anticompetitive conduct will likely go unredressed.[284] 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 every action and proceeding."[285] 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*,[286] plaintiffs are left attempting to read the tea leaves from prior decisions to arm their experts against attack.[287]

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.[288] 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.[289] While these other practice areas have also been affected by stricter Rule 23 standards, *Daubert* is not necessarily as high of a hurdle in these practice areas where the 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.[290]

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

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283 *See* Adrogué and Baker, *supra* note 167, at 13.

284 *See supra* notes 18–24 and accompanying text.

285 FED. R. CIV. P. 1.

286 *See supra* Part I.B and accompanying notes (discussing judicial discretion in applying Rule 702).

287 Pierce & DeTeso, *supra* note 139 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.").

288 Margaret A. Berger & Aaron D. Twerski, *Uncertainty and Informed Choice: Unmasking* Daubert, 104 MICH. L. REV. 257, 267 (2005); 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).

289 *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"*, MICH. ST. L. REV. 423, 446–47 (2010) (outlining how firms, such as Cohen Milstein, handle class actions in various areas, including securities fraud).

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

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.[291] A narrow definition of reliable economic testimony limits antitrust enforcement efforts to cases with easy modeling.[292] 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.[293]

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.[294] If the case does not survive *Daubert*, plaintiffs' only option for enforcement and potential compensation is settlement.[295] Given settlements are generally still approved without *Daubert* scrutiny,[296] *Daubert* shifts the pressure to settle from defendants to plaintiffs. As risk increases, so do early settlements.[297] This

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291 For example, some scholars argue that some of these newer models are less likely to satisfy *Daubert*. *See, e.g.*, Malcom B. Coate & Jeffrey H. 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.).

292 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).

293 Spencer Weber Waller, *The Law and Economics Virus*, 31 CARDOZO L. REV. 367, 383–84 (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 Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 242–43 (1993); Abbott B. Lipsky, Jr., *Antitrust Economics–Making Progress, Avoiding Regression*, 12 GEO. MASON L. REV. 163, 171–72 (2003).

294 *See, e.g.*, *In re* Brand Name Prescription Drugs Antitrust Litig., No. 94C897, 1999 WL 33889 (N.D. Ill. Jan. 19, 1999) (denying defendants' pretrial requests to exclude the testimony of plaintiffs' economic expert, but subsequently excluding the testimony on defendants' motion for summary judgment at the close of plaintiffs' case), *aff'd in part and vacated in part*, 186 F.3d 781 (7th Cir. 1999).

295 Miller, *supra* note 264, at 471–72.

296 Int'l Union, United Auto., Aerospace, & Agric. 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., No. 07 CV 2898, 2012 WL 651727, at *20 (N.D. Ill. Feb. 28, 2012), *appeal dismissed*, 710 F.3d 754 (7th Cir. 2013) ("[T]he Federal Rules of Evidence and the requirements of *Daubert* and its progeny do not apply at a fairness hearing . . . .").

297 Coffee, *supra* note 22, at 231.

is not properly attributed to attorney greed,[298] but rather to problems of valuing cases with so much uncertainty of success.[299]

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.[300] *Daubert* just exacerbates economists' real pressure to avoid testifying for plaintiffs. Exclusion has a significant impact on testifying economists. Many economists who have felt the sting of overaggressive *Daubert* determinations are highly respected law and economics scholars.[301]

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 two scholars note, "[o]ne can only imagine the feeling of being among the economists whose analyses, rightly or wrongly, are now staple fare for textbook chapters on 'quality control' for expert testimony."[302] This fear may have a particularly strong chilling effect on professors. As Judge Posner explains, "[p]rofessors 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."[303]

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

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298 Some critics quickly point to greed without sufficient consideration of other motives. *See, e.g.*, *id.* at 256–57 (arguing settlements are a result of a conflict of interest forcing attorneys to take whatever they can get and run).

299 Pierce & DeTeso, *supra* note 139, 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.").

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

301 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) (Fisher); Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1046–47 (8th Cir. 2000) (Hall); *In re* Titanium Dioxide Antitrust Litig., No. CIV.A. RDB-10-0318, 2013 WL 1855980, at *2 (D. Md. May 1, 2013) (Priest); Hynix Semiconductor Inc. v. Rambus Inc., No. CV-00-20905 RMW, 2008 WL 73689, at *15 (N.D. Cal. Jan. 5, 2008) (Gilbert).

302 Solow & Fletcher, *supra* note 32, at 490.

303 Posner, *supra* note 300, at 1537.

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. The Supreme Court majority remains hell-bent on disfavoring class actions. To that end, the Court continues to add judicial barriers to these cases, without recognizing that not all class actions are the same and many are essential. 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.

Consequently, the best practice is to hold off on *Daubert* evaluations, reserving them for 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.