



Published 08-11-10

## This Week's Feature

### Rigorous Gatekeeping: Requiring a Full *Daubert* Analysis

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As illustrated in the Seventh Circuit's recent holding in *American Honda Motor Co., Inc. v. Allen*, 600 F.3d 813 (7th Cir. 2010), *vacating* 264 F.R.D. 412 (N.D. Ill. 2009), the result of the intersection of the federal district courts' gatekeeping function set forth under the *Daubert* standard and the principle that the district courts must conduct a "rigorous analysis" in determining class certification is that "when an expert's report or testimony is critical to class certification . . . the district court must perform a full *Daubert* analysis before certifying the class." *Id.* at 815-16.

Although *American Honda* specifically addressed allegations of a defective motorcycle design, in the toxic tort context, the Seventh Circuit's caveat that a full *Daubert* inquiry is required "when an expert's report or testimony is critical to class certification" would seem presumptively to be the case because establishing the class action requirements in a toxic tort matter will invariably involve expert testimony to explain the essential science underlying the claim, and how and whether it can be determined on a class-wide basis. In the basic paradigm, the toxic tort class plaintiff will need to explain the science concerning the particular exposure-dose-disease relationship at issue and how that relationship can be adjudged across the class. This proof will frequently involve expert testimony (from disciplines such as epidemiology, toxicology, biostatistics, environmental fate and transport) purporting to calculate or model exposure and dose, and, in turn, that such presumed dose is somehow linked to one or more diseases. These types of proofs are ripe for challenge under the *Daubert* standards, and the *American Honda* rule will now provide an early opportunity to refute the plaintiffs' case or at least to undermine it.

Time will tell if the *American Honda* approach of a mandatory, full *Daubert* analysis is adopted by other circuits, but this represents an important precedent synthesizing the *Daubert* standard and the rigorous analysis principles.

### ***American Honda v. Allen***

The *American Honda* claims alleged that Honda's Gold Wing GL1800 motorcycle was defectively designed because the side-to-side oscillation of the front steering assembly, a physics phenomenon known as "wobble," was not adequately dampened, so that the steering assembly would shake excessively. 600 F.3d at 814. This posed a safety risk that the rider would be frightened by the wobble and, in reacting to it, would lose control of the motorcycle. The action was brought by eight named plaintiffs, who set forth that they had experienced some version of the alleged wobble, and in support of class certification, declarations of another 49 putative class members describing wobble were submitted. 264 F.R.D. at 417-418. The defendant manufacturer, Honda, argued that it had "received only isolated complaints of wobble which do not reflect a fleet-wide problem with GL1800 model," and, accordingly, class certification should be denied on grounds, among others, that the individual issues predominated over the common issues.

To show a class-wide design defect, the plaintiffs relied on the testimony of Mark Ezra, a motorcycle engineering expert. Mr. Ezra testified that while there were no government or industry-wide motorcycle

stability standards, "a motorcycle's steering assembly must be sufficiently stiff to adequately dampen wobble 'so that the rider neither reacts to nor is frightened by the oscillations,'" and that "wobble oscillation should decay to 37% of its original amplitude within one-half to three-quarters of a second." 264 F.R.D. at 416. This "standard" was Mr. Ezra's own creation. Mr. Ezra's theory regarding the GL1800 was that his wobble standard could be attained by using tapered ball bearings in the steering assembly, rather than regular ball bearings. 600 F.3d at 814.

Honda raised several objections to Mr. Ezra's testimony and moved to exclude it on *Daubert* grounds, and the district court indeed "noted that it was concerned that, among other things, Ezra's wobble decay standard may not be supported by empirical evidence, that standard has not been generally accepted by the engineering community, and Ezra's test sample of one may be inadequate to conclude that the entire fleet of GL1800s is defective." *Id.* at 814-15. Despite having "definite reservations" as to the wobble decay standard proffered by the plaintiffs' expert, the district court declined "to exclude the report in its entirety *at this early stage of the proceedings*," and denied Honda's motion to exclude and certified two sub-classes. *Id.* at 815 (emphasis added).

### **Seventh Circuit's Decision**

On appeal, the Seventh Circuit vacated the district court's decision, finding the district court's temporal reluctance to rule on the *Daubert* challenge to be erroneous. The circuit court held that "when an expert's report is critical to class certification, as it is here . . . a district court must conclusively rule on any challenge to the expert's qualifications or submissions prior to ruling on a class certification motion. That is, the district court must perform a full *Daubert* analysis before certifying the class if the situation warrants." *Id.* at 815-16. In reaching this conclusion, the Seventh Circuit built on its prior precedent in *Szabo* and *West*:

In *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 676 (7th Cir. 2001), we held that a district court must make whatever factual and legal inquiries are necessary to ensure that requirements for class certification are satisfied before deciding whether a class should be certified, even if those considerations overlap the merits of the case. And in *West v. Prudential Sec., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002), we held that a plaintiff cannot obtain class certification just by hiring a competent expert. We emphasized, "A district judge may not duck hard questions by observing that each side has some support. . . . Tough questions must be faced and squarely decided, if necessary by holding evidentiary hearings and choosing between competing perspectives." *Id.*

*Id.* at 815.

With respect to the timing of a decision on the *Daubert* challenge, the Seventh Circuit concluded that the district court erred "by failing to clearly resolve the issue of [Ezra's testimony's] admissibility before certifying the class," since the testimony was "necessary to show that Plaintiffs' claims are capable of resolution on a class-wide basis and the common defect in the motorcycle predominates over the class members' individual issues." *Id.* at 817. On the substance of the challenge, the court found that exclusion of Ezra's testimony was "inescapable." *Id.*

### **Pre-Certification Challenges in Toxic Tort Cases**

*American Honda* was not a toxic tort matter, but applying its rationale in the toxic tort context, it is difficult to imagine a circumstance where a full *Daubert* analysis would not be required, as the expert testimony typically submitted in support of class certification addresses, among other things, the contention that all of the class members somehow received a harmful dose of the substance at issue that caused disease, or, in the case of a medical monitoring claim, that the exposure experienced by the class created a significant class-wide risk. These types of opinions relate to the commonality of the class members' claims and attempt to rule out the predominance of the individual issues (*e.g.*, disparities in exposure and dose, individual medical histories, etc.). Thus, in a toxic tort matter, a full *Daubert* analysis would be required under *American Honda* because the plaintiffs' expert testimony, almost by definition, will be offered "to show that Plaintiffs' claims are capable of resolution on a class-wide basis and the common

[exposure-dose-disease relationship] predominates over the class members' individual issues."

The expert testimony typically offered in support of class certification in a toxic tort matter does, by its nature, so greatly involve the science and specific facts of the claims that it inevitably overlaps the "merits," perhaps rendering courts reluctant to reach too far via a *Daubert* inquiry. For example, in *Sher v. Raytheon Co.*, 261 F.R.D. 651 (M.D. Fla. 2009), the district court granted class certification in a soil and groundwater contamination action, explicitly finding that "[a]t this stage of the litigation . . . an inquiry into the admissibility of Plaintiffs' proposed expert testimony as set forth in *Daubert* would be inappropriate, because such an analysis delves too far into the merits of Plaintiffs' case." *Id.* at 670. See also *Turner v. Murphy Oil USA, Inc.*, No. 05-4206, 2006 U.S. Dist. LEXIS 985 (E.D. La. Jan. 12, 2006) (undertaking a "limited *Daubert* review" to address motions *in limine* for class certification hearing, "because class certification is 'not an occasion for examination of the merits of the case.'" [quoting *In re Visa Check/Master Money Antitrust Litig.*, 280 F.3d 124, 135 (2d Cir. 2001)]). The court in *Turner* further explained that in a "limited *Daubert* review," the court does not determine "whether the expert opinion would pass muster at the time of trial on issues like causation" and the role of the court is to "review the expert's opinion to ensure that it contains no flaws that would render it inadmissible as a matter of law." *Id.* These approaches do fit within the Seventh Circuit's recognition that the trial court "may not duck hard questions" and that "tough questions must be faced and squarely decided."

On the other hand, one district court has previously concluded in a toxic tort matter that, consistent with the Seventh Circuit's *American Honda* decision, "[T]he court must satisfy itself that the facts, data, principles, and methods undergirding the expert opinions offered in support of class certification are similarly reliable prior to relying on those opinions during class certification. Failure to make this inquiry prior to certification would result in this court's failure to conduct the "rigorous analysis" required by the Supreme Court. . . . In the interest of fairness and efficiency, prior to considering the expert opinions proffered by the plaintiffs to prove commonality and cohesiveness, the court concludes that the opinions offered by the plaintiffs' experts must be reliable and relevant under the principles established in *Daubert*." *Rhodes v. E.I. DuPont de Nemours and Co.*, Civ. A. No. 6:06-cv-00530, 2008 U.S. Dist. LEXIS 46159, \*35, 38 (S.D. W.Va. Jun. 11, 2008).

*American Honda* clarifies how far the trial court may reach and approves of overlap into the merits as part of the necessary "rigorous analysis."

### **A Bright-Line Rule for Rigorous Gatekeeping**

*American Honda*, when applied to a toxic tort matter, should eliminate courts' reluctance to rule on a *Daubert* challenge at class certification, notwithstanding the inevitable incursion into the merits. *American Honda* arguably supplies a bright-line rule for a full *Daubert* analysis at the class certification stage of a toxic tort matter, thus providing a key tool for defendants and for rigorous gatekeeping by the courts.

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