Defendants are increasingly utilizing challenges to the admissibility of plaintiffs’ expert evidence under Rule 702 and Daubert to defeat class certification. The vast majority of courts considering such challenges have conducted a full Daubert analysis to assess the reliability and relevance of plaintiffs’ proffered expert opinions. While a minority of courts have held that a full Daubert inquiry is not always appropriate at the class certification stage, many of these courts nonetheless have held that some form of Daubert analysis is required.

Judge Katherine B. Forrest’s well-publicized decision denying class certification in IBEW Local Pension Fund v. Deutsche Bank AG is only the latest in a string of decisions by the federal courts requiring rigorous proof of the reliability of expert testimony before litigation may proceed as a class. Given the strong trend toward a rigorous analysis of expert opinion testimony of the class certification stage, more such decisions are likely in the future.

A Natural Application of Rule 702, ‘Daubert’

The U.S. Supreme Court has articulated the standard for class certification in
have observed, “[r]ulings on admissibility under Daubert inherently require the trial court to conduct an exacting analysis of the proffered expert’s methodology.”12 Only “sound science” and “objective, independent validation of the expert’s methodology” are sufficient to demonstrate that expert evidence is admissible.13

Accordingly, faced with motions to exclude expert testimony under Daubert and Rule 702 at the class certification stage, courts have repeatedly held that the normal rules governing the admissibility of expert evidence apply. Thus, courts in a variety of contexts—including product liability,14 environmental,15 antitrust,16 employment,17 and securities cases18—have applied Daubert to assess the relevance and reliability of expert testimony in determining whether a class should be certified.

In ‘Deutsche Bank’, the court excluded the opinions of plaintiffs’ expert and denied certification of a class alleging that the defendants engaged in fraud in connection with certain residential mortgage-backed securities and collateralized debt obligations.

Nonetheless, a minority of courts have suggested that in some circumstances a full Daubert analysis may not be necessary at the class certification stage. Even then, these courts typically recognize that some form of Daubert analysis is required, applying what some courts have labeled a more “focused” or “tailored” Daubert inquiry at the class certification stage.19

It appeared that the Supreme Court would specifically address the appropriate standard for determining the admissibility of expert evidence at the class certification stage in Comcast. However, the court reformulated the question presented in a manner that avoided the issue. Nonetheless, in deciding the case, the court again stressed the general principle that federal courts must conduct a “rigorous analysis” when deciding whether to certify a class under Rule 23. And it again recognized that such an analysis may include an assessment of issues that also relate to the merits of the underlying claims to be certified.20

These statements in Comcast are in line with the court’s prior commentary on the subject. In Wal-Mart Stores v. Dukes, for example, the majority criticized the suggestion that Daubert was somehow inapplicable at the class certification stage:

The district court concluded that Daubert did not apply to expert testimony at the class certification stage of class-action proceedings. We doubt that is so ....21

Following this guidance, federal courts increasingly subject expert opinion submitted in support of class certification to rigorous scrutiny under Rule 702 and Daubert. In doing so, they frequently invoke the Supreme Court’s statements in Comcast and Wal-Mart as an implicit endorsement of a “rigorous analysis” that includes a robust Daubert inquiry at the class certification stage.22

‘Deutsche Bank AG’

One recent example of such a decision is the Southern District of New York’s ruling in IBEW Local 90 Pension Fund v. Deutsche Bank AG. In Deutsche Bank, the court excluded the opinions of plaintiffs’ expert and denied certification of a class alleging that the defendants engaged in fraud in connection with certain residential mortgage-backed securities and collateralized debt obligations. Plaintiffs submitted expert testimony to demonstrate that the market for defendants’ securities was efficient, laying the foundation for a fraud-on-the-market theory, in order to dispense with the need to prove individualized issues regarding reliance by each member of the class. After conducting an evidentiary hearing at which it heard
As a threshold matter, the court found that plaintiffs’ expert lacked the requisite qualifications to offer opinions regarding whether the market for defendants’ securities was efficient. The court concluded that his main expertise was “being an expert in plaintiffs’ securities cases.” As the court observed, plaintiffs’ expert had provided testimony on behalf of plaintiffs in securities class action litigations for over 20 years, including specifically on behalf of counsel representing plaintiffs in Deutsche Bank. Approximately 100 percent of his income came from the securities’ plaintiffs bar, and he had never offered an opinion in federal court that a market was inefficient. However, plaintiffs’ expert had never done any writing on market efficiency outside of the litigation context, and accordingly the court found that he lacked the basic experience that would allow him to offer opinions in the area.

The court further concluded that there were a number of problems in the expert’s analysis that rendered it “unreliable and flawed.” First, the court concluded that the expert’s opinions were not reliable because they ignored that Germany, not the United States, was the dominant market for trading of defendant’s securities. The vast majority of the securities at issue (over 90 percent) were sold in Germany. Nonetheless, plaintiff’s expert had not studied the German market and had no opinion regarding whether the German market was efficient.

In addition, the expert ignored that defendants’ securities were sold during a period of financial crisis and that during this period there were several restrictions on short sales of the securities both in the United States and Germany. This is significant because, as plaintiffs’ expert recognized, short sellers are important to the efficiency of a market. As a result, as the expert acknowledged, short sale bans could delay the amount of time it takes for information to be fully reflected in the price of a security.

Finally, the expert’s analysis of market efficiency was based on data from only 12 trading days out of 515 during a time in which an “enormity” of information regarding defendant’s business was released into the market. While the expert selected these days because they were earnings disclosure dates, he acknowledged that the market would have anticipated information regarding earnings before the dates on which these formal disclosures were made. Moreover, he conceded that liquidity—not earnings—was of more interest to the market at this point during the financial crisis. Accordingly, the court concluded that the expert’s selection of these data points was not representative.

Having concluded that plaintiffs’ expert opinions were unreliable and that plaintiff’s expert lacked the necessary qualifications to testify as an expert in this area, the court excluded the expert’s opinions in their entirety. Without admissible evidence of an efficient market, plaintiffs could not rely on a fraud-on-the-market theory to avoid individual issues regarding class member reliance, and accordingly, the court denied plaintiffs’ motion for class certification. As the court observed, plaintiffs bore the burden to demonstrate that their expert evidence was both relevant and reliable. The fact that defendants’ experts did not submit any analysis to “disprove market efficiency” was irrelevant. Without reliable expert evidence to support this element of their claims, plaintiffs’ request for class certification failed.

The court’s analysis in Deutsche Bank is merely one of the latest examples of the type of searching inquiry courts increasingly are making into both the qualifications of experts and the reliability of their opinions at the class certification stage. As the Supreme Court suggested in Comcast and Walmart, this sort of rigorous analysis is dictated by the Federal Rules. The lower federal courts appear to have taken this guidance to heart. Given the recent trend within the federal courts to apply rigorous scrutiny to proffered expert opinions in support of class certification, one can expect more decisions like Deutsche Bank in the future.

2. Id. at 1432-33 (2013).
3. Id. at *13.
4. Id. at *15.
5. Id. at *16.
6. Id. at *17.
7. Id. at *18.
8. Id. at *19.
9. Id. at *20.
10. Id. at *21.
11. Id. at *22.
12. Id. at *23.
13. Id. at *24.
14. Id. at *25.
15. Id. at *26.
16. Id. at *27.
17. Id. at *28.
18. Id. at *29.
19. Id. at *30.
20. Id. at *31.
21. Id. at *32.
22. Id. at *33.
23. Id. at *34.
24. Id. at *35.
25. Id. at *36.
26. Id. at *37.
27. Id. at *38.
28. Id. at *39.
29. Id. at *40.
30. Id. at *41.
31. Id. at *42.
32. Id. at *43.
33. Id. at *44.
34. Id. at *45.
35. Id. at *46.
36. Id. at *47.