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Ninth Circuit deepens Circuit split by holding inadmissible evidence can be considered in resolving class certification

by Jay Bogan

Takeaway: The Ninth Circuit recently ruled that inadmissible evidence may be considered in ruling on a motion for class certification. But does inadmissible evidence really qualify as evidence? Notwithstanding the evidentiary pass granted to the class plaintiffs in the Ninth Circuit case, class plaintiffs and class defendants usually have been expected to develop in class certification discovery *admissible* evidence in support of Rule 23's requirements. In the view of other appellate courts, the critical (and, as a practical matter, often determinative) ruling of a district court on class certification should never be left to the vagaries presented by the submission of dubious evidence. Not so in the Ninth Circuit.

In *Sali v. Corona Regional Medical Center*, -- F.3d. --, No. 15-56460, 2018 WL 2049680 (9th Cir. May 3, 2018), the Ninth Circuit reversed a Central District of California decision denying class certification on typicality, adequacy, and predominance grounds. There, two registered nurses (RNs) alleged that an acute care hospital and healthcare management company committed wage and hour violations of various provisions of the California Labor Code. The RNs sought to represent a number of classes.

The district court found that Rule 23(a)'s typicality requirement had not been satisfied, because the RNs did not submit admissible evidence showing that their injuries were typical of the injuries suffered by the putative class members. *Sali v. Universal Health Services of Rancho Springs, Inc.*, No. CV 14-985 PSG (JPRx), 2015 WL 12656937, at *10-*11 (C.D. Cal. June 3, 2015).

The evidence at issue was a declaration prepared by a paralegal, who reviewed time and payroll records to determine whether the RNs were adequately compensated. The paralegal created Excel spreadsheets to aid his analysis, concluding that the hospital's policies, on average, undercounted one RN's clock-in and clock-out times by eight minutes per shift and the other's by six minutes per shift. *Sali*, 2018 WL 2049680, at *4.

The defendants objected to this evidence. The district court sustained the objection and struck the declaration. Additionally, the district court ruled that curative evidence submitted by the RNs along with their reply brief would not be considered, applying the general rule that evidence supporting a motion may not be submitted for the first time in reply. *Id.*

Regarding the paralegal's declaration, the district court made a number of evidentiary rulings, including that the paralegal could not authenticate the evidence, because he did not have the personal knowledge required to

represent that the attached spreadsheets accurately represented the raw data; the declaration was improper opinion testimony; and that the paralegal's analysis should have been done by an expert witness, and the paralegal was not properly qualified. *Sali*, 2015 WL 12656937, at *10-*11.

While the panel acknowledged that a district court must conduct a "rigorous analysis" to determine whether Rule 23's requirements are satisfied, it focused on the "preliminary" and "tentative" nature of a class certification ruling, and the general prohibition of resolving merits issues at the class certification stage. *Sali*, 2018 WL 2049680, at *4. "Applying the formal strictures of trial to such an early stage of litigation makes little common sense," the panel explained. *Id*. at *5. "[T]he evidence needed to prove a class's case often lies in a defendant's possession and may be obtained only through discovery. Limiting class-certification-stage proof to admissible evidence risks terminating actions before a putative class may gather crucial admissible evidence. And transforming a preliminary stage into an evidentiary shooting match inhibits an early determination of the best manner to conduct the action." *Id*.

Addressing an issue of apparent first impression in the Ninth Circuit, the panel held that proof in support of a motion for class certification "need not be admissible evidence." *Id*.

In so ruling, the panel agreed with an Eighth Circuit decision, *In re Zurn Pex Plumbing Products Liability Litigation*, 644 F.3d 604, 611 (8th Cir. 2011), which likewise focused on the "tentative," "preliminary," and "limited" nature of the class certification determination, and which observed: "We have never required a district court to decide conclusively at the class certification stage what evidence will ultimately be admissible at trial."

The panel declined to follow rulings from the Third, Fifth, and Seventh Circuits holding that admissibility determinations must be made at the class certification stage. *See In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 187 (3d Cir. 2015) ("We join certain of our sister courts to hold that a plaintiff cannot rely on challenged expert testimony, when critical to class certification, to demonstrate conformity with Rule 23 unless the plaintiff also demonstrates, and the trial court finds, that the expert testimony satisfies the standard set out in *Daubert*."); *Unger v. Amedisys Inc.*, 401 F.3d 316, 325 (5th Cir. 2005) ("When a court considers class certification based on the fraud on the market theory, it must engage in thorough analysis, weigh the relevant factors, require both parties to justify their allegations, and base its ruling on admissible evidence."); *Messner v. Northshore Univ. Health Sys.*, 669 F.3d 802, 812 (7th Cir. 2012) (when expert testimony is "critical" to the class certification determination, "a district court must make a conclusive ruling on any challenge to that expert's qualifications or submissions before it may rule on a motion for class certification.").

According to the *Sali* panel, "by relying on admissibility alone as a basis to strike the Ruiz declaration, the district court rejected evidence that likely could have been presented in an admissible form at trial." 2018 WL 2049680, at *7. While the court acknowledged that expert testimony submitted in support of class certification should be evaluated under *Daubert*, "admissibility must not be dispositive." *Id*. Because the district court applied the wrong legal standard, the panel reversed and remanded for consideration of the adequacy issue under the proper legal

standard. *Id*.

Would the United States Supreme Court agree with this Ninth Circuit ruling? Dictum from the Supreme Court's decision in *Wal–Mart Stores, Inc. v. Dukes* indicates otherwise. *See* 564 U.S. 338, 354 (2011) ("The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that is so ...") (citation omitted). The Third and Seventh Circuit cases cited by the Ninth Circuit panel (and cited above) followed the Seventh Circuit's seminal decision in *American Honda Motor Co. v. Allen*, 600 F.3d 813, 815-816 (7th Cir. 2010), where it held that "when an expert's report or testimony is critical to class certification, ... 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." And the Eleventh Circuit "agreed with" and followed *American Honda* in *Sher v. Raytheon Co.*, 419 Fed. Appx. 887, 2011 WL 814379 (11th Cir. Mar. 9, 2011); *see also Local 703, I.B. of T. Grocery & Food Employees Welfare Fund v. Regions Fin'l Corp.* , 762 F.3d 1248, 1258 n.7 (11th Cir. 2014).

In important respects, the Ninth Circuit's assumptions and holding cannot be squared with the realities of modern class action practice. Class plaintiffs generally will be given the opportunity to conduct whatever class certification discovery they need. In the absence of a specific showing the district court unduly limited discovery, the RNs in *Sali* should have submitted admissible evidence showing their injuries. The effect of this pro-class action decision will be to lower the bar for certification of the wage and hour class actions filed so frequently today, especially in California. The *Sali* case ultimate may constitute yet another Ninth Circuit class certification ruling the Supreme Court elects to review, given the circuit split deepened by the Court of Appeals' ruling.