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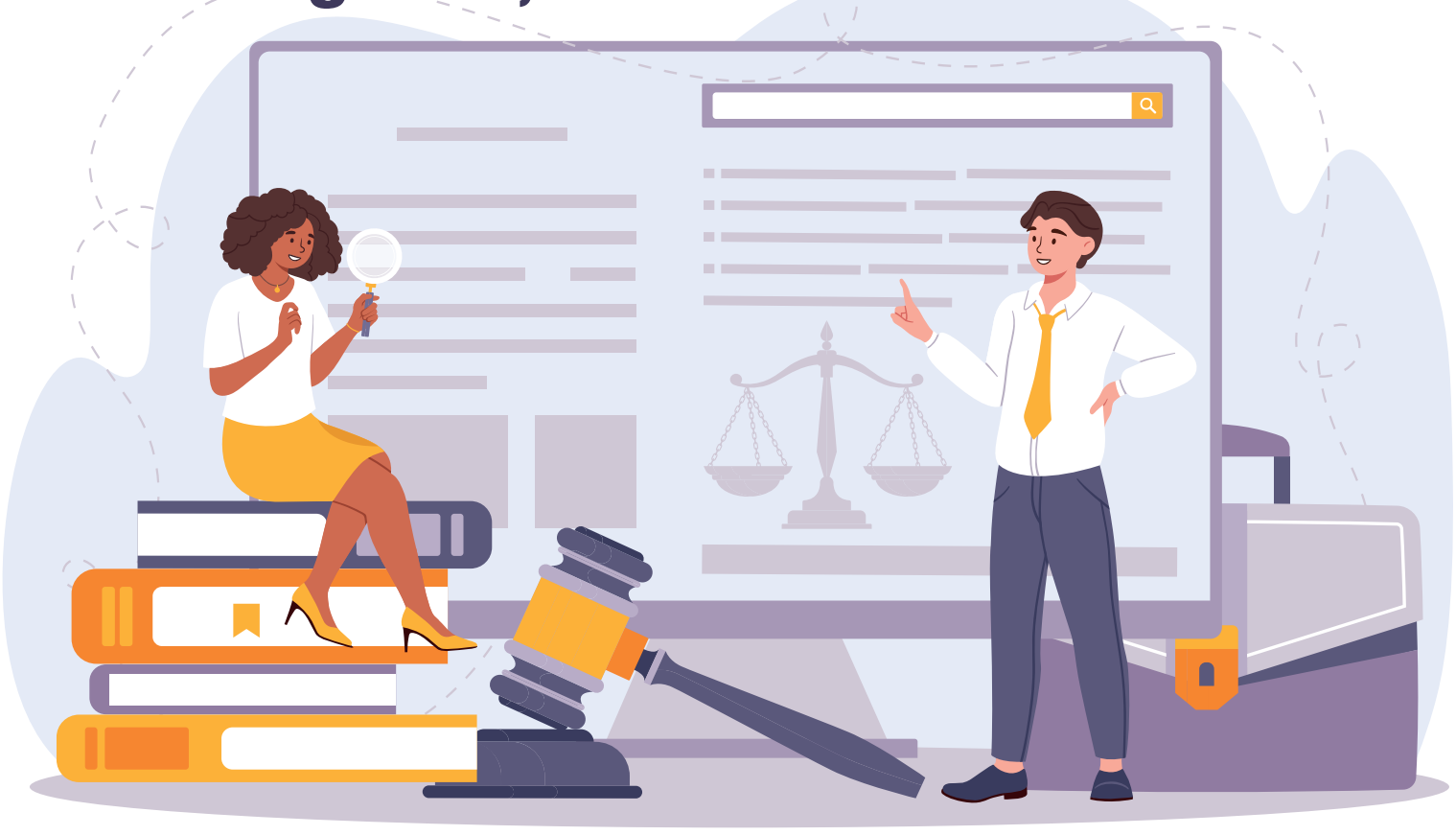

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An Illustrative Tale

Rule 702 Trumps Predominance in Class Action

By Jeff Warren

Defense attorneys should continue to monitor emerging trends concerning the admissibility of expert testimony at the class certification stage.

Sometimes class certification hinges on an opinion reached by a single expert. A recent decision by the United States District Court for the Northern District of Illinois in *Series 17-03-615 v. Express Scripts, Inc.*, No. 3:20-CV-50056, 2024 WL 1834311 (N.D. Ill. Apr. 26, 2024), provides a cautionary tale for plaintiffs, and further authority for defendants, underscoring the importance of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), in the context of class action litigation.

In recent years, a circuit split has emerged on whether a full *Daubert* analysis is required at the class certification stage. In 2010, the Seventh Circuit became the first to expressly hold that *Daubert* applies at class certification. *Honda Motor Co. v. Allen*, 600 F.3d 813, 816 (7th Cir. 2010). The following year, the Eleventh Circuit followed suit, holding that a district court's "refus[al] to conduct a *Daubert*-like critique of the proffered experts's [sic] qualifications" was erroneous and warranted vacatur. *Sher v. Raytheon Co.*, 419 F. App'x 887, 890–91 (11th Cir. 2011) (unpublished). Meanwhile, that same year, the Eighth Circuit "explicitly rejected a request for a full *Daubert* inquiry at the class certification stage" for the second time. *In re Zurn Pex Plumbing Prod. Liab. Litig.*, 644 F.3d 604, 612 (8th Cir. 2011). In 2015, the Third Circuit joined the Eleventh and Seventh, endorsing a full *Daubert* analysis at class certification. *In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 187 (3d Cir. 2015). Siding with the Eighth Circuit, however, the Ninth Circuit rejected a strict *Daubert* application at class certification. *Sali v. Corona Reg'l Med. Ctr.*, 909 F.3d 996, 1005 (9th Cir. 2018). More recently, the Fifth Circuit joined the Third, Seventh, and Eleventh, directing a district court to apply a full *Daubert* analysis at class certification. *Prantil v. Arkema Inc.*, 986 F.3d 570 (5th Cir. 2021).

In the midst of this emerging circuit split, in 2017, MSP Recovery Claims, Series LLC (MSP) commenced a putative class action that, over the following six years, became "infamous" in the United States District Court for the Northern District of Illinois. Amending its complaint four times and generating 709 discrete docket entries in the court's electronic filing system before moving for class certification—including *sua sponte* orders from the court criticizing the "tone and tactics in [the] action" and instructing the parties to "stop [their unprofessional conduct] immediately"—MSP's efforts to obtain class certification ultimately rested on the opinions of a single expert who had been excluded at least eight times in similar cases.

While most class action practitioners are familiar with Rules 23(a) and (b) of the Federal Rules of Civil Procedure, it is less common (though certainly not unheard of) for class certification to hinge on an analysis under *Daubert*. Under *Daubert*, an expert's opinion must be the product of reliable principles and methods, which, in turn, must be reliably applied to the facts of the case. Generally, a party offering expert testimony at trial bears the burden of establishing its admissibility by a preponderance of the evidence.

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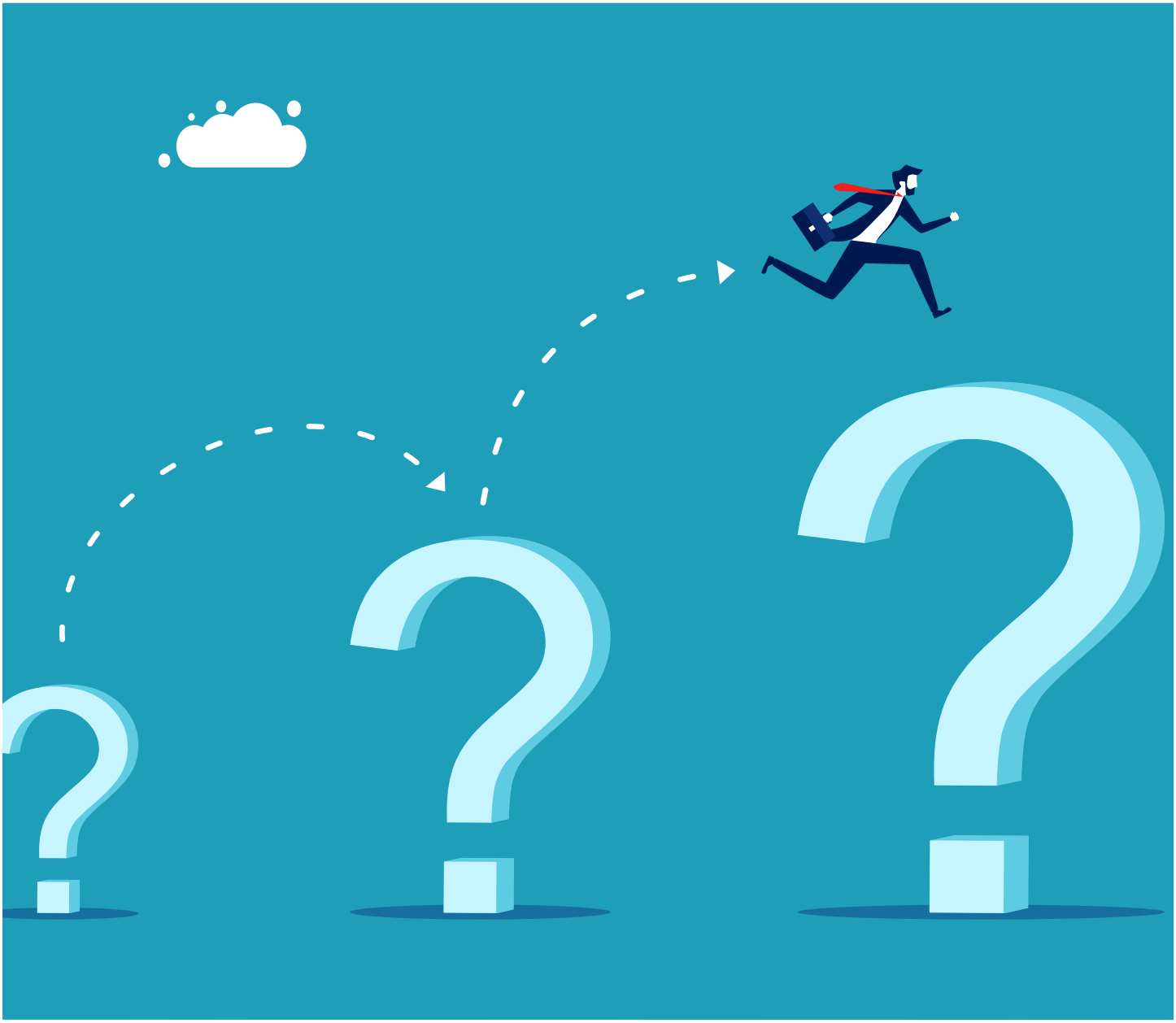

For factual context, MSP is the assignee of recovery rights originally held by various Medicare Advantage Organizations (MAOs), which are private health insurers that entered into contracts with the Centers for Medicare and Medicaid Services (CMS) to provide certain Medicare benefits to Medicare beneficiaries. In 2017, MSP filed an action asserting that several MAOs were overcharged for Acthar, an adrenocorticotropic hormone (ACTH) drug used to treat certain autoimmune conditions.

Acthar was the only ACTH drug sold in the United States for decades. MSP claimed that Questcor Pharmaceuticals purchased Acthar and its only viable alternative, Synacthen, and chose not to bring the latter to market, thereby artificially inflating the price of Acthar. The Federal Trade Commission brought an action against Questcor for this conduct, which Questcor settled for $100 million. MSP alleged that Questcor's conduct caused the price of Acthar to remain over $34,000 per vial, thereby harming its MAOs. MSP further claimed that Express Scripts Inc. conspired with Questcor to artificially inflate the price of Acthar by entering into exclusive distribution contracts and anticompetitive pricing agreements.

After five years of remarkably contentious litigation, MSP moved for certification of two classes:

1. Direct Purchaser Class: All third-party payers (TPP) who, at any time from August 27, 2007, to the present, on behalf of the TPPs' Medicare Advantage Plan beneficiaries and Medicare Part D Prescription Drug Plan beneficiaries, through Express Scripts as Pharmacy Benefit Manager (PBM), paid some or all of the purchase price of Acthar (or later provided reimbursement for the same under a legal obligation to do so).

2. Indirect Purchaser Class: All third-party payers (TPP) who, at any time from August 27, 2007, to the present, on behalf of the TPPs' medical and/or pharmacy benefit plan beneficiaries, and through a Pharmacy Benefit Manager (PBM) other than Express Scripts, paid some or all of the purchase price of Acthar (or later provided reimbursement for the same under a legal obligation to do so).

Series 17-03-615, 2024 WL 1834311, at *1.

Both proposed classes sought damages and thus certification under Rule 23(b)(3). This required a showing that (1) the questions of law or fact common to the members of the proposed class predominate over questions affecting only individual class members, and (2) a class action is superior to other available methods of resolving the controversy. Because the ability to prove damages on a class-wide basis is important to the predominance inquiry, *see Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013), MSP offered two damages models prepared by Dr. Russell W. Mangum III, an economist, in support of its motion for class certification.

The first model, known as the "legacy approach," calculated the "but-for prices" (i.e., "those that would have obtained in the absence of illegal conduct by Express Scripts") using a procedure where the "first step is the inflation of the wholesale acquisition cost (WAC) of Acthar at the beginning of the alleged conspiracy by 8% per year through 2022." *Series 17-03-615*, 2024 WL 1834311, at *1. The second model, known as the "benchmark approach," calculated the "but-for prices" by inflating the "pre-conspiracy WAC by the growth in the pharmaceutical producer price index (PPI)," which Dr. Mangum argued served as a counterfactual proxy for the Acthar market. *Id.*

With its opposition to class certification, Express Scripts brought a Rule 702 motion to exclude Dr. Mangum's opinions, arguing they were insufficiently reliable. In a short order, the court agreed with Express Scripts, and accordingly denied MSP's motion for class certification.

First, the court explained, Dr. Mangum's "legacy approach" did not identify—and therefore did not "empirically validate"—any of the conditional assumptions underlying his decision to select an 8% inflation rate. *Id.* at *3. Without so much as "identify[ing] any of the conditional assumptions underlying the 8% plan," any assessment of the reliability of the 8% inflation rate was precluded. *Id.*

The "legacy approach" was deficient for another reason. Although Dr. Mangum calculated an 8% price increase from the beginning of the conspiracy—starting in 2006—until 2022, Dr. Mangum offered no explanation for why this steady price increase would persist uninterrupted for sixteen years. *Id.* at *4. Questcor's internal documentation only forecasted price increases until 2011, and there was no competent evidence connecting the logic of this five-year forecast to a period three times as long except the "*ipse dixit* of the expert." Id.

The "benchmark approach" was similarly deficient. While Dr. Mangum asserted that the "demand and the availability and cost of therapeutic substitutes" are the prime determinants of pharmaceutical prices, he failed to establish that the characteristics of the drugs composing the PPI bear "a rough similarity to Acthar with respect to those characteristics for the PPI to be a reliable proxy for Acthar's but-for prices throughout the alleged conspiracy." *Id.*

The "benchmark approach" was further deficient because Dr. Mangum failed to establish that other likely, "nonconspiratorial determinants of price—like market power, for instance—were irrelevant or, if not, that they were somehow accounted for, by a regression or otherwise." Id. Instead, Dr. Mangum "neither employed any analytically rigorous methods nor explained why he hadn't." *Id.*

Without Dr. Mangum's models, MSP could not demonstrate that its damages were measurable on a class-wide basis. Individual damages calculations would therefore "overwhelm questions common to the class," rendering certification of MSP's classes under Rule 23(b)(3) inappropriate. *Id.*

MSP's efforts in the Northern District of Illinois highlight the relevance and importance of *Daubert* in the class action context, and underscore the importance of *reliable* opinions at class certification. The outcome of MSP's motion for class certification provides a cautionary tale for similarly situated plaintiffs and bolsters the arguments of defendants looking to Evidence Rule 702 to defeat class certification.

In recent years, a circuit split has emerged on whether a full Daubert analysis is required at the class certification stage.

Defense attorneys should continue to monitor emerging trends concerning the admissibility of expert testimony at the class certification stage. A consensus has not yet emerged. In December 2021, however, the U.S. District Court for the Northern District of Ohio applied a full *Daubert* analysis at class certification and found that the plaintiffs failed to satisfy Rule 23's requirements. *Desai v. Geico Cas. Co.*, 574 F. Supp. 3d 507 (N.D. Ohio 2021). Whether other circuits will join the Third, Fifth, Seventh, and Eleventh Circuit remains to be seen.