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USE OF EXPERTS

CERTIFICATION

Prior to the Seventh Circuit's landmark 2010 decision in *American Honda Motor Co. v. Allen*, federal courts applied varying standards to the admissibility of expert reports at the class certification stage, say attorneys Joel S. Feldman, Christopher M. Assise, and Laura Bayard in this BNA Insight. In addition to examining the disparate ways courts assessed expert testimony in certification proceedings before *American Honda*, the authors analyze the seminal ruling, and place it in the context of ''a growing movement among federal courts to apply more exacting evidentiary and burden of proof standards to plaintiffs' requests for class certification.''

Evolving Use of Experts in Class Certification Proceedings

BY JOEL S. FELDMAN, CHRISTOPHER M. ASSISE, AND LAURA BAYARD

The decision whether to grant or deny class certification is critical to the outcome of a class action. That decision often depends on whether and to what extent a court considers expert submissions, as it is commonplace for counsel to submit expert reports in support of their class certification arguments. Yet, until recently, federal courts applied widely divergent standards to the admissibility of an expert report at the class certification stage. Some courts applied a full *Daubert* analysis while other courts concluded that application of *Daubert* was unnecessary at such an early juncture. Still others avoided the question altogether, and decided expert admissibility questions raised at the class certification phase without weighing in on the *Daubert* debate.

This landscape changed dramatically in 2010, with the Seventh Circuit's landmark decision in *American Honda Motor Co. v. Allen.*[1] According to the Seventh Circuit, where expert evidence or testimony is critical to a class certification decision, the court must ''conclusively rule on any challenge to the expert's qualifications or submissions prior to ruling on a class certification motion.''[2] *American Honda* thus mandates that the

[1] 600 F.3d 813 (7th Cir. 2010).
[2] *Id.* at 815-16.

court perform a full *Daubert* analysis at the class certification phase.

This article examines the disparate ways district courts assessed expert testimony for admissibility in class certification proceedings before *American Honda*. Next, this article analyzes the impact of *American Honda* on the evidentiary standard employed by courts in deciding whether to admit expert testimony at the class certification phase. Finally, we contextualize *American Honda* as part of a growing movement among federal courts to apply more exacting evidentiary and burden of proof standards to plaintiffs' requests for class certification.

Inconsistent Applications of *Daubert* Prior to *American Honda*

Admissibility of expert testimony is governed by Rule 702 of the Federal Rules of Evidence, which states that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." In *Daubert v. Merrell Dow Pharmaceuticals Inc.*, the United States Supreme Court applied Rule 702 to determinations on the admissibility of expert testimony.[3] The *Daubert* court established factors for a court to consider when evaluating an expert's evidence and established the court's role as that of "gatekeeper."[4]

Despite the articulation of solid factors to determine the admissibility of expert testimony, the Supreme Court was unclear as to when a court must undertake a *Daubert* analysis. As discussed below, federal courts adopted decidedly disparate approaches for the evidentiary standard applicable to expert reports at the class certification stage.

A. Courts Not Applying Full *Daubert* Analysis

Prior to the Seventh Circuit's ruling in *American Honda*, the majority of courts outside the Seventh Circuit refused to apply a full *Daubert* analysis to expert testimony at the class certification stage. The Second Circuit was among the first to weigh in on the issue and developed an early standard to address the evolving use of expert testimony in class certification proceedings. In 2001, finding that the class certification phase is not the time to fully examine the merits of a case, the Second Circuit in *In re Visa Check* determined that a district court need only "ensure that the basis of the expert opinion is not so flawed that it would be inadmissible as a matter of law."[5]

In re Visa Check's "fatally flawed" standard has informed case law in other jurisdictions with regard to the timing of a *Daubert* analysis.[6] In *Duchardt v. Midland National Life Insurance*, for example, the district court in the Southern District of Iowa cited the *In re Visa Check* standard in upholding the admissibility of an expert report.[7] The district court found that expert testimony need not meet trial admissibility standards at the class certification stage, but instead the testimony must support class certification.[8] Similarly, in *Turner v. Murphy Oil USA Inc*. the district court judge, citing *Visa Check*, concluded that only a limited *Daubert* review is appropriate at the class phase of proceedings.[9] The court further wrote that "[t]he question for the district court at the class certification stage is whether the plaintiffs' expert evidence is sufficient to demonstrate common questions of fact warranting certification of the proposed class, not whether the evidence will ultimately be persuasive."[10]

Prior to *American Honda*, other courts, while not relying on *Visa Check*, nonetheless employed a similar, relaxed standard. For example, district courts in California have consistently held that the "robust gate keeping" required under the *Daubert* standard is not necessary at the class certification stage, and courts need not rule on admissibility at that time.[11] The Northern District of California held in *In re Static Random Access Memory (SRAM) Antitrust Litigation* that courts may apply a more lenient standard as long as they "ensure that the basis of the expert opinion is not so flawed that it would be inadmissible as a matter of law."[12]

Other courts have agreed with the California district courts[13] that application of the *Daubert* standard is limited at the class certification phase.[14] In *Midwestern Machinery Co. v. Northwestern Airlines Inc.*, the District Court of Minnesota expressed concern that applying a full *Daubert* analysis could result in excluding proper expert testimony too early in the proceedings. The court held that at the class certification stage, a court applying a full *Daubert* analysis would be prematurely critiquing the experts "prospective results" before the expert has a chance to fully develop his opinion.[15] Holding that a full *Daubert* analysis at the class certification stage is premature, the court opined that "[a] party and its experts should not be expected to

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[3] 509 U.S. 579 (1993).

[4] The Supreme Court's decision in *Kumho Tire Co. v. Carmichael* expanded the holding in *Daubert* to apply to non-scientific experts. 526 U.S. 137 (1999).

[5] *In re Visa Check/MasterMoney Antitrust Litig.,* 280 F.3d 124, 135 (2d Cir. 2001).

[6] *See e.g., Duchardt v. Midland Nat'l Life Ins. Co*., 265 F.R.D. 436, 441 (S.D. Iowa 2009) (following the "fatally flawed" standard).

[7] *Id.*

[8] *Id.*

[9] No. 05-4206, 2006 U.S. Dist. LEXIS 985, at *13 (E.D. La. Jan. 12, 2006) .

[10] *Id.* at *14, *citing Visa Check*, 280 F.3d at 135.

[11] *Ellis v. Costco Wholesale Corp*., 240 F.R.D. 627, 635 (N.D. Cal. 2007); *Allied Orthopedic Appliances Inc. v. Tyco Healthcare Group LP*, 247 F.R.D. 156, 158 (C.D. Cal. 2007).

[12] *In re SRAM,* 264 F.R.D. at 616 (*citing Sepulveda v. Wal-Mart Stores Inc.,* 237 F.R.D. 229, 235 (C.D. Cal. 2006)).

[13] Many California district courts, however, require a higher standard than the "fatally flawed" analysis laid out in *In re Visa Check*. Instead, the court must assess whether the expert evidence is "useful" or "sufficiently probative" in deciding whether the class certification requirements under Rule 23 have been met. *In re SRAM Antitrust Litig.,* 264 F.R.D. at 616; *In re Katrina Canal Breaches Consol. Litig*., No. 05-4182, 2007 U.S. Dist. LEXIS 82887, at *273 (E.D. La. Nov. 1, 2007) ("The court's inquiry here is to determine if the expert testimony has sufficient reliability to be presented at the class certification hearing.").

[14] *See e.g., Midwestern Mach. Co. v. Northwest Airlines Inc*., 211 F.R.D. 562, 565-66 (D. Minn. 2001); *In re Monosodium Glutamate Antitrust Litig.,* 205 F.R.D. 229, 234-35 (D. Minn. 2001).

[15] *Midwestern Mach.*, 211 F.R.D. at 566.

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have fully evaluated all data at the preliminary stage of class certification.''[16]

B. District Courts Applying Full *Daubert* Analysis

Although the majority of courts across the country prior to *American Honda* found that the class certification phase is not the appropriate time to assess an expert's testimony for admissibility, a few courts disagreed.[17] In *Bell v. Ascendant Solutions Inc*., for example, the Northern District of Texas found that class certification is the appropriate time to fully assess admissibility of evidence bearing on Rule 23 requirements for class certification.[18] Where an expert's testimony establishes a Rule 23 element, the *Bell* Court held that a *Daubert*-style motion to strike is not premature.[19] This type of inquiry, the court explained, is not a full inquiry into the merits, but is instead necessary to consider class certification ''with the appropriate amount of scrutiny.''[20] Unlike courts that apply a limited *Daubert* analysis, the *Bell* court advocated looking beyond the pleadings to understand the ''claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues.''[21]

Some courts took the analysis a step further and argued that a court cannot ''abandon its gatekeeping function'' at all, even at the class certification phase.[22] In the Northern District of Illinois, one court worried that courts applying a limited *Daubert* analysis will admit too much expert evidence, and that plaintiffs could too easily obtain class certification by simply hiring any expert to testify at a class certification hearing.[23] That court reasoned a full *Daubert* analysis is appropriate at the class certification stage, as it is ''insufficient for a court to merely point out 'that each side has the support of a reputable [expert]' as if 'the clash . . . by itself . . . support[ed] class certification and a trial on the merits.''[24] Otherwise stated, the court wanted to hold plaintiffs more accountable at the class certification stage. In another case, the Southern District of West Virginia articulated similar concerns.[25] The district judge reasoned that adequate review of expert testimony was especially important where class certification could limit the claims of absent class members. The court wrote that due to the ''high percentage of class actions which settle as a result of class certification, failure to conduct a *Daubert* analysis might invite plaintiffs to seek class status for settlement purposes. . . .''[26]

C. District Courts Declining to Decide Whether to Apply *Daubert* Analysis

Still other courts sidestep the issue of whether to apply a full *Daubert* analysis at the class certification stage, and skirt the issue altogether. One district judge, instead of choosing which standard to apply, simply found that under any standard, even the most relaxed *In re Visa Check* standard, the proffered witness did not qualify as an expert.[27] Another district court doubted that *Daubert* applied at the class certification stage, but found that even under the most stringent *Daubert* test, the plaintiff's expert witness would still be admitted.[28]

In one Northern District of Indiana case, the court applied a ''substantially relaxed Rule 702 analysis'' after finding that a *Daubert* analysis applied because the expert would be testifying solely for the purpose of class certification, and not at a later trial.[29] The court distinguished its case from others that debate the merits of a *Daubert* analysis, as other courts are evaluating expert evidence to be used both at class certification and at trial. Where experts deal solely with class certification questions, ''there is no later inquiry to which a Rule 702 analysis might be deferred.''[30] The court then applied a relaxed *Daubert* standard, reasoning that the gate keeping doctrine expounded in *Daubert* is ''largely irrelevant in the context of a bench trial.''[31]

II. *American Honda*

In *American Honda*, the Northern District of Illinois granted class certification to a class of plaintiffs who alleged breaches of express and implied warranties stemming from the allegation that Honda's Gold Wing Motorcycles contain a design defect which causes the motorcycle to exhibit a greater-than-normal amount of oscillation at low speeds.[32] In granting class certification, the court rested its predominance evaluation squarely on the contents of the plaintiffs' expert report. The Defendant moved to strike the report of plaintiffs' expert, claiming the expert report was inadmissible under the standard set forth in *Daubert*.[33] Despite expressing serious doubts about the qualifications and conclusions of plaintiffs' expert, the District Court declined to conduct a full *Daubert* analysis or to exclude the report for the purposes of class certification.[34] On interlocutory appeal, the Seventh Circuit reversed, holding 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 quali-

[16] *Id.*

[17] *See e.g., In re NYSE Specialists Sec. Litig.*, 260 F.R.D. 55, 65-66 (S.D.N.Y. 2009).

[18] No. 3:01-CV-0166-N, 2004 U.S. Dist. LEXIS 12321, at *6-7 (N.D. Tex. July 1, 2004).

[19] *Bell*, 2004 U.S. Dist. LEXIS 12321, at *8.

[20] *Id.*

[21] *Id.* at *7-8 (*citing Castano v. Am. Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996)).

[22] *See e.g., Duling v. Gristede's Operating Corp*., 267 F.R.D. 86, 95 (S.D.N.Y. 2010).

[23] *Srail v. Vill. of Lisle*, 249 F.R.D. 544, 557 (N.D. Ill. 2008).

[24] *Id.* (*citing West v. Prudential Sec. Inc*., 282 F.3d 935, 938 (7th Cir. 2002)).

[25] *See, e.g., Rhodes v. E.I. du Pont de Nemours & Co.,* No. 6:06-cv-00530, 2008 U.S. Dist. LEXIS 46159, at *35 (S.D.W. Va. June 11, 2008) (''Failure to make this [*Daubert*] inquiry . . . would result in this court's failure to conduct the 'rigorous analysis' required by the Supreme Court.'')

[26] *Id.* at *36.

[27] *Carlson v. C.H. Robinson Worldwide Inc*., No. 02-3780, 2005 U.S. Dist. LEXIS 5674, at *14 (D. Minn. Mar. 31, 2005).

[28] *In re Foundry Resinsurance Antitrust Litig*., 242 F.R.D. 393, 399-400 (S.D. Ohio 2007).

[29] *In re FedEx Ground Package Sys. Inc., Employment Practices Litig*., No. 3:02-MD-527, 2007 U.S. Dist. LEXIS 76798, at *10-11 (N.D. Ind. Oct. 15, 2007).

[30] *Id.* at *10.

[31] *Id.* (citing *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 853 (6th Cir. 2004); *see also Randall v. Rolls-Royce Corp*., No. 1:06-cv-860, 2010 U.S. Dist. LEXIS 23421, at *17-18 (S.D. Ind. Mar. 12, 2010) (finding that *Daubert*'s ''gatekeeper function'' is no longer essential where the district judge sits as the trier of fact).

[32] *Allen v. Am. Honda Motor Co.*, 264 F.R.D. 412, 415-16 (N.D. Ill. 2009).

[33] *Id.* at 423.

[34] *Id.* at 426-27.

fications or submissions prior to ruling on a class certification motion.''[35] The appellate court went on to hold that ''the district court must perform a full *Daubert* analysis before certifying the class if the situation warrants,'' and further instructed that district courts must ''resolve any challenge to the reliability of information provided by an expert if that information is relevant to establishing any of the Rule 23 requirements.''[36]

III. Impact of *American Honda*

In the year since it was decided, courts both inside and outside of the Seventh Circuit have cited to *American Honda*. As expected, courts have relied on *American Honda* as authority for requiring a full *Daubert* analysis at the class certification phase of the case. Interestingly, courts have also cited to *American Honda* as authority for the necessity of applying more stringent evidentiary and burden of proof standards to the class certification decisionmaking process.

A. Courts Citing *American Honda* as Authority for *Daubert* Analysis Before Relying on Expert

As the first Circuit Court opinion to deal directly with the issue, courts faced with the question of how to review an expert report at the class certification stage have frequently looked toward *American Honda* for guidance.[37] It has impacted both federal appellate court and district court rulings on the appropriate standard to apply to expert witness testimony proffered in class certification proceedings.

Most notably, earlier this year the Eleventh Circuit expressly adopted *American Honda*'s rigorous analysis of expert methodology.[38] In *Sher*, plaintiffs brought a toxic tort suit alleging Raytheon's improper storage and disposal of hazardous waste at a Florida plant polluted the ground water.[39] To establish Rule 23(b)(3) predominance, the plaintiffs relied on the testimony of a ground water expert who purported to identify the areas impacted by the toxic chemicals.[40] The plaintiffs also relied on the affidavit of their damages expert who allegedly used multiple regression to determine damages for the plaintiffs' diminution-in-property-value without the need for an individualized consideration of each property.[41]

Raytheon countered with its own ground water and damages experts who challenged the methodology of the plaintiffs' experts as ''inconsistent with applicable professional standards'' and unacceptable for the purposes the methods were used for.[42] The district court refused to engage in a ''*Daubert* style critique of the proffered experts' qualifications, which would be inappropriate . . . [a]t this stage of the litigation'' and granted class certification.[43] On appeal, the Eleventh Circuit reversed.[44] After a cursory review of the case law, the Eleventh Circuit opted to follow *American Honda*, holding ''the district court erred as a matter of law by not sufficiently evaluating and weighing conflicting expert testimony on class certification.''[45] The court went on to state that the law requires district courts to ''declare a proverbial, yet tentative winner'' in a case where experts present conflicting testimony.[46]

Another good example stems from a December 2010 opinion from the Northern District of California.[47] The district judge first noted a conflict in the case law, citing *American Honda* and *Ellis*,[48] before observing that the *Dukes*[49] opinion did not conclusively decide the issue of how much scrutiny to apply to expert opinions. After considering the Ninth Circuit's *Dukes* opinion and noting that under the majority's dictum, the court refused to ''blindly accept'' the plaintiffs' expert.[50] Relying on *American Honda*, the court held that ''because an adequate *Daubert* analysis of every challenged expert opinion seems prudent in fulfilling the court's obligation to ensure actual conformance with FRCP 23, the court applies . . . *Daubert* and *Kumho Tire*.''[51] As expected, the one district court in the Seventh Circuit to address the issue of whether to perform a *Daubert* analysis prior to class certification acknowledged that *American Honda* is the guiding precedent. *McReynolds v. Merrill Lynch II*, No. 05-c-6583, 2010 U.S. Dist. LEXIS 80002, at *18 (N.D. Ill. Aug. 9, 2010) (acknowledging the rule that a full *Daubert* analysis is needed before deciding the case on other grounds).

Courts, however, have not universally followed *American Honda*. One court has rejected it,[52] while two courts in the Ninth Circuit have applied a more relaxed evidentiary standard without citation to *American Honda* but instead relied on the Ninth Circuit's *Dukes* opinion.[53]

The much heralded Ninth Circuit *en banc* ruling in *Dukes v. Wal-Mart Stores Inc.*,[54] provides an excellent example of the nationwide impact of the Seventh Circuit's *American Honda* holding. While the Ninth Circuit ruled that a court considering class certification should look behind the pleadings and, if necessary, decide issues related to the merits,[55] the majority declined to address directly the issue of whether a court must perform a full *Daubert* analysis before considering an expert report. The dissent, however, did consider the question,

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[35] *Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 815-16 (7th Cir. 2010).

[36] *Id.* at 816.

[37] *E.g. Sher v. Raytheon Co.*, No. 09-15798, 2011 U.S. App. LEXIS 4902, at *7 (11th Cir. Mar. 9, 2011); *Pecover v. Elec. Arts Inc.*, No. 08-2820 VRW, 2010 U.S. Dist. LEXIS 140632, at *5 (N.D. Cal. Dec. 21, 2010).

[38] *Sher*, 2011 U.S. App. LEXIS 4902, at *8.

[39] *Id.* at *2.

[40] *Id.* at *3.

[41] *Id.*

[42] *Id.* at *3-4.

[43] *Id.* at *4-5.

[44] *Id.*at *9.

[45] *Id.* at *8.

[46] *Id.* at *8

[47] *Pecover*, 2010 U.S. Dist. LEXIS 140632, at *4-5.

[48] *Ellis v. Costco Wholesale Corp.*, 240 F.R.D. 627, 635 (N.D. Cal. 2007).

[49] *Dukes v. Wal-Mart Stores Inc.*, 603 F.3d 571 (9th Cir. 2010) (discussed in greater depth in part III).

[50] *Precover*, 2010 U.S. Dist. LEXIS 140632, at *8.

[51] *Id.*

[52] *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 267 F.R.D. 549, 555-56 (D. Minn. 2010).

[53] *Hovenkotter v. Safeco Ins. Co. of Ill.*, No. C09-0218JLR, 2010 U.S. Dist. LEXIS 112645, at *10-11 (W.D. Wash. Oct. 11, 2010); *Kennedy v. Jackson Nat'l Life Ins. Co.*, No. C07-0371 CW, 2010 U.S. Dist. LEXIS 63604 (N.D. Cal. June 23, 2010).

[54] As of this writing, *Dukes* is pending before the Supreme Court.

[55] *Id.* at 594.

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and, citing *American Honda*, suggested an approach that closely parallels the *American Honda* holding.[56] The adoption of the *American Honda* standard by the Eleventh Circuit in *Sher*, and the reliance on it by the Ninth Circuit dissent in *Dukes*, starkly illustrate the impact this ruling has and will continue to have on the standard for the admissibility of expert testimony in class certification proceedings.[57]

B. Courts Citing *American Honda* as Authority for Greater Scrutiny

Over the last decade, circuit courts, starting with the Seventh Circuit in *Szabo*,[58] have steadily increased the evidentiary and burden of proof standards that a plaintiff must satisfy to justify certification of a proposed class.[59] These opinions reject the ''minimal showing'' burden of proof/evidentiary standard for class certification. They instead hold that: 1) if a party submits merits evidence material to a class certification element, then a court must examine that evidence; and 2) class certification can only be granted if plaintiff wins any clash of evidence by a preponderance of evidence.[60]

A growing number of district courts have cited to *American Honda* as support for either examining merits evidence at the class certification phase or for finding that a plaintiff must establish all Rule 23 elements by a preponderance of the evidence.[61] This point is spelled out most clearly by a Maine District Court which began by noting that circuit courts have ''tightened the requirements'' for class certification. Citing to *American Honda*, the court then noted that many ''[c]ircuits clearly require the trial judge to make factual findings by a preponderance of the evidence on all the Rule 23 criteria before certifying a Rule 23 class.''[62]

Other courts have cited to *American Honda* when reciting the legal standard to apply to the class certification determination. For example, one court in the Northern District of Illinois, in reciting the legal standard, quoted the following from *American Honda*: ''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.''[63] Other courts have cited *American Honda* for invoking a similar standard concerning the ability to examine merits evidence when the evidentiary submission overlaps with any of the requisite Rule 23 elements.[64]

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[56] *Dukes*, 603 F.3d at 640.

[57] One court has applied *Daubert* without any discussion of *American Honda*. *E.g. Weiner v. Snapple Beverage Corp.*, 07-cv-8742 (DLC), 2010 U.S. Dist. LEXIS 79647 (S.D.N.Y. Aug. 5, 2010).

[58] *Szabo v. Bridgeport Mach. Inc.*, 249 F.3d 672, 676 (7th Cir. 2001) (stating ''a judge should make whatever factual and legal inquires are necessary under Rule 23'' even if it involves making a ''preliminary inquiry into the merits'').

[59] *E.g., Id.*; *In re Initial Public Offering Sec. Litig. (IPO)*, 471 F.3d 24 (2d Cir. 2006); *Brown v. Am. Honda (In re New Motor Vehicles Canadian Export Antitrust Litig.*) 522 F.3d 6, 24 (1st Cir. 2008); *Gariety v. Grant Thornton LLP*, 368 F.3d 356, 366 (4th Cir. 2004) (Rule 23 requirements require judicial findings, even if they overlap with the merits); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008); *Dukes v. Wal-Mart Stores Inc.*, 603 F.3d 571 (9th Cir. 2010). For more on this evolution, *see, Evidentiary and Burden of Proof Standards for Class Certification Rulings*, BNA Class Action Litigation Report, Vol. 11, No. 11 at 536 (June 11, 2010).

[60] *See, e.g., In re Hydrogen Peroxide*, 552 F.3d at 320; *Teamsters v. Bombadier*, 546 F.3d 196, 202 (2d Cir. 2008) (''[T]he preponderance of the evidence standard applies to evidence proffered to establish Rule 23's requirements.'')

[61] *E.g., Prescott v. Prudential Ins. Co.*, 729 F. Supp. 2d 357, 365 (D. Maine 2010); *In re Fedex Ground Package Sys. Inc. Employment Practices Lit.*, No. 3:05-MD-527, 2010 U.S. Dist. LEXIS 50211, at *54 (N.D. Ind. May 19, 2010); *Erlandson v. ConocoPhillips Co.*, No. 09-99-DRH, 2010 U.S. Dist. LEXIS 112112, at *8 (S.D. Ill. Oct. 21, 2010).

[62] *Prescott*, 729 F. Supp. 2d at 365.

[63] *Wooley v. Jackson Hewitt Inc.*, No. 07-c-2201 2011 U.S. Dist. LEXIS 44315, at *10 (N.D. Ill. Apr. 25, 2011) (quoting *American Honda*'s citation of *Szabo*).

[64] *See, e.g., Erlandson v. ConocoPhillips Co.*, 2010 U.S. Dist. LEXIS 112112, at *8 (citing only *American Honda* for the proposition that a court is not prohibiting from considering issues that overlap with the merits in determining whether class certification is appropriate); *In re Fedex Ground Package Sys., Inc. Employment Practices Litig.*, 2010 U.S. Dist. LEXIS 50211, at *54 (starting with *Szabo* then discussing *American Honda* in a discussion of the proper scope of a District Court's inquiry at the class certification stage).