



Irma ALLEN, et al.

v.

OLLIE'S BARGAIN OUTLET, INC., Appellant

No. 21-2121, Decided June 24, 2022

*U.S. Court of Appeals for the Third Circuit*

## Opinion Topic:

Whether the Federal Rules of Evidence apply to fact evidence introduced in support of class certification.

## Opinion Summary:

Two disabled bargain-store shoppers allege that numerous obstacles in an Ollie's Bargain Outlet store significantly impeded their shopping experience. They sought to represent a class of similarly situated individuals to advance a claim of discrimination under the Americans with Disabilities Act. A federal district court certified the class. On appeal, the Third Circuit, per Judge Porter, vacated the lower court's decision and remanded. The court first held that the plaintiffs failed to establish that the proposed class was so numerous that joinder was impracticable. While declining to decide whether Federal Rule 702 applies in the class-certification context, the court still found the record evidence of numerosity lacking. Second, the panel held that the lower court misapplied Rule 23 and prevailing circuit precedent when finding that common issues predominated over individual issues.

In a concurrence to his own majority opinion, Judge Porter criticizes the panel for sidestepping courts' application of Rule 702 when assessing fact evidence presented in support of class certification. Judge Porter conducts a thorough analysis of the Federal Rules of Evidence and other circuit's decisions on class-certification evidence, while also acknowledging the severe consequences defendants face when a court certifies a class. He concludes that the Third Circuit should follow the lead of the First and Fifth Circuits and embrace the application of Rule 702.

## Opinion Digest:

PORTER, Circuit Judge, concurring.

Today, we sidestep one of the principal legal issues raised by this appeal: whether the Federal Rules of Evidence apply to fact evidence introduced in support of class certification. Respectfully, I see no reason to duck the question ... I would prefer to end any lingering uncertainty now, by holding that statutory text and precedent require applying the Federal Rules of Evidence before certifying a class under Rule 23.

I

As the Supreme Court has emphasized, "Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared

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The **Honorable David J. Porter** serves on the U.S. Court of Appeals for the Third Circuit. *Judge Porter had no role in WLF's selecting or editing this opinion for our CIRCULATING OPINION feature.*

to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). “This calls for a rigorous analysis that usually requires courts to make factual findings and legal conclusions that overlap the underlying merits of the suit.” *Mielo v. Steak ‘n Shake Operations, Inc.*, 897 F.3d 467, 482 (3d Cir. 2018).

In *Blood Reagents*, we held rigorous analysis means “that a plaintiff cannot rely on challenged expert testimony ... 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*.” *In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 187 (3d Cir. 2015). We rejected the trial court’s acceptance of evidence that “could evolve” into admissible form later. *Id.* at 186. *Daubert*, of course, is based on Federal Rule of Evidence 702. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589–92 (1993). So, under *Blood Reagents*, expert evidence used to certify a class action must be admissible under Federal Rule of Evidence 702.

The Federal Rules of Evidence are an exercise of legislative authority, so we read the rules “as we would any statute.” *Daubert*, 509 U.S. at 587. “The specific courts and proceedings to which the rules apply, along with exceptions, are set out in Rule 1101.” Fed. R. Evid. 101(a). Rule 1101 says that the rules apply to “United States district courts” and in “civil cases and proceedings.” Fed. R. Evid. 1101(a), (b). That means all civil cases and proceedings unless an exception applies.

Rule 1101 makes three exceptions, but as the Seventh Circuit has noted, Rule 23 proceedings are “not among the proceedings excepted.” *Mars Steel Corp. v. Cont’l Bank N.A.*, 880 F.2d 928, 938 (7th Cir. 1989) (en banc) ... No civil proceedings are listed in the miscellaneous-proceedings exception.

While the list is not exclusive, in context, the miscellaneous-proceedings exception is best read as limited to closely analogous collateral proceedings, like hearings to transfer a juvenile delinquent for prosecution as an adult. *See Gov’t of Virgin Islands in Interest of A.M.*, 34 F.3d 153, 161–62 (3d Cir. 1994) ... Otherwise, the exception would swallow the rule. Even if the exception may be extended to some ordinary civil proceedings, class certification proceedings are not closely analogous to any of the listed “miscellaneous proceedings,” so context suggests they do not fall under this exception, much like Rule 23(e) hearings. The conclusion is clear: Class certification proceedings are not exempt from the rules of evidence. *See Anderson Living Tr. v. WPX Energy Prod., LLC*, 306 F.R.D. 312, 378 n.39 (D.N.M. 2015) (quotation omitted).

Our decision in *Blood Reagents*, moreover, prevents us from dispensing with the Federal Rules of Evidence ... [T]here is no principled basis for distinguishing between fact and expert evidence. Nothing in the rules of evidence allows us to selectively apply them. On the contrary, Federal Rule of Evidence 1101 says that “[t]hese rules”—meaning *all* rules, including hearsay rules—apply to civil proceedings generally. Fed. R. Evid. 1101(a), (b).

No hearsay exception applies to Rule 23 proceedings either. Hearsay is generally inadmissible unless allowed by rules adopted by the Supreme Court or statute. Fed. R. Evid. 802. Several rules of civil procedure permit proof by affidavit instead of live testimony, allowing modest exceptions to the hearsay rule. *See, e.g.*, Fed. R. Civ. P. 4(l), 32(a)(1)(B), 65(b). One general exception is Federal Rule of Civil Procedure 43(c). That rule allows affidavits “[w]hen a motion relies on facts outside the record.” Fed. R. Civ. P. 43(c); *see also* 28 U.S.C. § 1746 (permitting the use of declarations instead). But while Federal Rule of Civil Procedure 43(c) allows considerable flexibility in avoiding the live testimony required by the hearsay rule, it does not allow simply attaching hearsay—like the customer complaints—to a motion. That is what happened here.

In short, “simple logic indicates,” and statutory text confirms, that Rule 23 is not satisfied when the “evidence proffered would not be admissible as proof of anything.” *Behrend v. Comcast Corp.*, 655 F.3d 182, 215 n.18 (3d Cir. 2011) (Jordan, J., concurring in the judgment and dissenting in part), *rev’d*, 569 U.S. 27 (2013). Rigorous analysis and statutory text demand nothing less than admissible evidence at the time of certification.

## II

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I agree with the First and Fifth Circuits: Evidence used to certify a class must be admissible. The Sixth, Eighth, and Ninth Circuits overlook Federal Rule of Evidence 1101 and the rigorous analysis required by precedent. The various arguments they marshal in support of dispensing with the rules of evidence are unpersuasive. I will address each argument in turn.

### A

First, these circuits point to Rule 23(c)'s requirement that class actions be certified at "an early practicable time after a person sues or is sued as a class representative." *Sali*, 909 F.3d at 1004 (quoting Fed. R. Civ. P. 23(c)(1)(A)). The need for speed, these courts reason, weighs against applying the Federal Rules of Evidence. That is unpersuasive. This rule was amended in 2003 to abrogate the certify-first-ask-questions-later practice followed in some circuits. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 318–19 (3d Cir. 2008). Before 2003, Rule 23 said the class must be certified "as soon as practicable after commencement of an action." *Id.* at 318. The change to "an early practicable time" was meant to encourage rigorous compliance with the requirements of Rule 23 before certifying a class. *Id.* Under the current rule, "class certifications are no longer conditional," so a trial court "should delay certifying a class until it is satisfied that all Rule 23 requirements have been met." *Zurn*, 644 F.3d at 629 (Gruender, J., dissenting). Requiring that evidence be admissible does not conflict with this open-ended rule. If anything, the 2003 amendment suggests trial courts should not defer admissibility rulings relevant to certification until trial. *See, e.g., Sali*, 909 F.3d at 1006 (deferring admissibility in tension with 2003 amendment).

### B

Second, these circuits assert that an order certifying a class is merely "tentative" and "preliminary," as "[a]n order that grants or denies class certification may be altered or amended before final judgment." *Id.* at 1004 (quoting Fed. R. Civ. P. 23(c)(1)(C)). Because class certification orders are not technically final, "common sense," they say, suggests "the formal strictures of trial" should not apply at the certification stage, including the Federal Rules of Evidence. *Id.* Otherwise, they argue, class certification proceedings would turn into evidentiary shooting matches. *Id.* For legal support, these circuits lean on the Supreme Court's statement that in class proceedings, "a preliminary determination of the merits may result in substantial prejudice to a defendant, since of necessity [a class proceeding] is not accompanied by the traditional rules and procedures applicable to civil trials." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178, (1974), *quoted in Zurn*, 644 F.3d at 613–14. There are many problems with this line of argument.

For one, that snippet of *Eisen* preceded the 2003 amendments to Rule 23 and has since been repudiated as dictum ... *Eisen*, 417 U.S. at 177–78. In *Dukes*, the Supreme Court said that *Eisen*'s general warning against preliminary determinations of the merits is "the purest dictum and is contradicted by our other cases." 564 U.S. at 351 n.6. *Eisen*'s related statement about "traditional rules and procedures" is dictum too. . .

For another, Rule 23 certification orders are not "tentative" in any practical sense. Trial courts cannot make "tentative" Rule 23 findings. "When courts harbor doubt as to whether a plaintiff has carried her burden under Rule 23, the class should not be certified." *Steak 'n Shake*, 897 F.3d at 483. Under our precedent, "it is no longer accurate—however true it might have been in the past—that class certification hearings are preliminary or conditional in the sense that a judge is going to go back and reconsider his or her class certification order." Linda S. Mullenix, *Putting Proponents to Their Proof: Evidentiary Rules at Class Certification*, 82 Geo. Wash. L. Rev. 606, 636 (2014). "Although a judge subsequently may revise a class certification order, this practice has become extremely rare." *Id.* at 637. In all but exceptional cases, an order certifying a class will be the trial court's final word on the matter.

For similar reasons, the rhetoric about evidentiary shooting matches is also behind the times. Class certification proceedings are *already* evidentiary shooting matches, sometimes requiring extensive evidentiary hearings. *Id.* at 639–41. The question is whether the shooting match will be played according to the uniform rules enacted by Congress, no rules at all, or only the rules judges really like. The correct answer is the rules enacted by Congress.

Characterizing Rule 23 orders certifying a class action as “tentative” and “preliminary,” moreover, trivializes the consequences of certifying a class. “As a practical matter, the certification decision is typically a game-changer, often the whole ballgame, for plaintiffs and plaintiffs’ counsel.” *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 591 n.2. Rule 23(b)(2) class certifications compel unnamed persons to join a lawsuit they do not control, litigated by lawyers they did not choose, where a judgment binds them, win or lose. *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984); *Dukes*, 564 U.S. at 362. Defendants also face significant practical consequences. Once a class is certified, the risk of “devastating loss” often leads to “in terrorem” class settlements even for “questionable claims.” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (string citation omitted). And plaintiffs, too, may be denied meaningful redress if defendants are allowed to defeat class actions by larding the record with inadmissible hearsay, unauthenticated records, or unreliable opinion evidence. The search for truth encouraged by the Federal Rules of Evidence cuts both ways.

### C

The Eighth Circuit has also suggested that because class certification findings are made by a judge, not a jury, there is less reason to apply *Daubert* rigorously, and presumably other rules of evidence too. *Zurn*, 644 F.3d at 613. But this distinction finds no support in the Federal Rules of Evidence or our caselaw. The Federal Rules of Evidence require applying *Daubert* faithfully in bench trials too. *UGI Sunbury LLC v. A Permanent Easement for 1.7575 Acres*, 949 F.3d 825, 832–33 (3d Cir. 2020). Some rules of evidence, to be sure, expressly reference jury trials and do not apply to bench trials. Rule 403, for example, allows a trial court to “exclude relevant evidence if its probative value is substantially outweighed by a danger of ... misleading the jury.” Fed. R. Evid. 403. That rule is irrelevant in a bench trial. But hearsay is generally inadmissible no matter who the trier of fact happens to be. Fed. R. Evid. 802. So, as with *Daubert*, there is no “bench trial” exception to hearsay.

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Reasonable minds may disagree over the wisdom or practicality of applying the Federal Rules of Evidence, or hearsay rules specifically, in Rule 23 certification proceedings. But those policy judgments are for the Supreme Court and Congress to make. See 28 U.S.C. § 2072(a). We must apply the rules of evidence faithfully within their proper scope. That scope includes Rule 23 proceedings.