Examining Class Cert. At 9th Circ. After Sali Ruling

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The Ninth Circuit is at it again, blazing a different path than its sister circuits. In Sali v. Corona Regional Medical Center,[1], the court reversed a district court's order that denied class certification on the grounds that the sole evidence offered in support was a self-serving declaration that included unauthenticated documents and improper opinion testimony and was therefore inadmissible. In ruling that evidence offered in support of class certification need not be admissible at trial, the Ninth Circuit has arguably shown again why its reputation as one of the most plaintiff-friendly jurisdictions is well-deserved.

This article addresses (1) the Sali court's analysis and holding; (2) how Sali directly conflicts with most other circuits; and (3) the impact this ruling is likely to have on class action defendants in the Ninth Circuit.

Sali Summarized

In Sali, registered nurses brought suit against their former employers, alleging that certain employment policies resulted in their underpayment.[2] The plaintiffs moved to certify seven classes based on a variety of alleged policy deficiencies.[3] In support of their motion, plaintiffs filed a declaration by a paralegal employed at the law firm representing them.[4] The paralegal, Javier Ruiz, had reviewed the time and payroll records of the named plaintiffs to determine whether they were fully compensated under the defendants' rounded-time pay policy, among other things.[5] The analysis, the accuracy of which the defendants did not dispute, indicated that the defendants' rounded-time pay policy had in fact resulted in underpayment.[6]

The district court ruled, however, that the Ruiz declaration was inadmissible evidence and denied class certification in part on the basis that the plaintiffs had failed to demonstrate that their injuries were typical of the proposed classes.[7] The court specifically found that :(1) Ruiz could not authenticate the spreadsheets and other data that his declaration relied on because he did not have personal knowledge; (2) the declaration was improper opinion testimony; and (3) Ruiz's data analysis was the technical or specialized work of an expert witness, a task for which Ruiz was unqualified.[8]

On appeal, the Ninth Circuit held that the district court had abused its discretion in denying class certification, finding that "[i]nadmissibility alone is not a proper basis to reject evidence submitted in support of class certification."[9] The court explained that "in evaluating a motion for class certification, a district court need only consider material sufficient to form a

reasonable judgment on each [Rule 23(a)] requirement."[10]

The court acknowledged its ruling was at odds with other circuit courts but, relying on Eighth Circuit case law and analogous U.S. Supreme Court discussion of standing, leaned on a standard of evidentiary admissibility that is lax early in the life of a lawsuit and tightens through subsequent phases of litigation.[11] As the court explained, the "manner and degree of evidence required at the preliminary class certification stage is not the same as at the successive stages of the litigation — i.e., at trial."[12] Thus, the court reasoned, "[a]pplying the formal strictures of trial to such an early stage of litigation makes little common sense. Because a class certification decision is far from a conclusive judgment on the merits of the case, it is of necessity[ ] not accompanied by the traditional rules and procedure applicable to civil trials."[13]

The Sali court also made clear, however, that deeming inadmissible evidence worthy of judicial consideration on class certification was not the same as weighing all pieces of evidence equally. In fact, admissibility should factor into a court's analysis when it weighs class certification evidence:

When conducting its rigorous analysis into whether the Rule 23(a) requirements are met, the district court need not dispense with the standards of admissibility entirely. The court may consider whether the plaintiff's proof is, or will likely lead to, admissible evidence. Indeed, in evaluating challenged expert testimony in support of class certification, a district court should evaluate admissibility under the standard set forth in Daubert. But admissibility must not be dispositive. Instead, an inquiry into the evidence's ultimate admissibility should go to the weight that evidence is given at the class certification stage.[14]

Where Other Circuits Stand

Most circuit courts have deliberated on evidentiary standards at the class certification stage in some capacity. Only the Ninth Circuit has gone so far as allowing consideration of inadmissible, nonexpert testimony. Further, the Eighth Circuit is the only sister circuit that permits consideration of inadmissible expert testimony. Rather than require examination of expert evidence in a traditional Daubert analysis, the Eighth Circuit mandates only a "focused" Daubert analysis that is "tentative, preliminary and limited."[15] Because class certification does not implicate the gatekeeping function served by Daubert, the Eighth Circuit reasoned that courts may adopt a more flexible approach.[16] Since the class certification decision "is far from a conclusive judgment on the merits of the case, it is 'of necessity ... not accompanied by the traditional rules and procedure applicable to civil trials.'"[17] Despite the Ninth and Eighth Circuits' willingness to break with traditional evidentiary principles while analyzing the issue of class certification, other circuits more formally adhere to the rules of evidence, including a thorough admissibility examination of proffered evidence.

The Fifth Circuit's view is different than the Ninth Circuit's, holding that nonexpert testimony must adhere to traditional evidentiary principles.[18] Indeed, in contemplating class certification of a securities-based "fraud on the market" class action, the Fifth Circuit held that findings must be made based on adequately admissible evidence to justify class certification. There, the district court had certified a class relying on two internet printouts that calculated average weekly trade volumes. Reversing, the Fifth Circuit reasoned that

“reliance on unverifiable evidence is hardly better than relying on bare allegations”[19] at the certification phase because such evidence “can prove decisive for class certification.”[20] The court further reasoned that because of “the realities of litigation costs, certification can compel settlements without trial,” which requires courts to apply “rigorous, though preliminary, standards of proof.”[21] The Fifth Circuit therefore considered class certification to be intertwined with the underlying merits of the case, thereby compelling consistent application of evidentiary principles at the class certification stage. The court's discussion of the realities and impacts of class certification upon defendants was refreshing and all too quickly dismissed issue in many courts.

The lion’s share of other circuits have expressly held or at least suggested that expert evidence must be admissible, demonstrating a reverence for traditional evidentiary standards at the class certification stage. In In re Initial Public Offering Securities Litigation,[22] the Second Circuit laid a foundation for a rigorous assessment of expert testimony, concluding that unsupported legal conclusions and plausible expert methodologies were no longer sufficient to support class certification.

The Third and Seventh Circuits are consistent with the Fifth Circuit. Holding that expert testimony critical to class certification must satisfy admissibility standards, the Third Circuit rejected the district court’s finding that expert antitrust impact analyses and methodologies “could evolve to become admissible evidence” at trial.[23] Noting that the U.S. Supreme Court implied that Daubert hearings were applicable at the certification stage[24] and holding that Rule 23 must be “satisf[ied] through evidentiary proof,”[25] the Third Circuit found that “[e]xpert testimony that is insufficiently reliable to satisfy the Daubert standard cannot ‘prove’ that the Rule 23(a) prerequisites have been met ‘in fact,’ nor can it establish ‘through evidentiary proof’ that Rule 23(b) is satisfied.”[26] Thus, “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.”[27] The Seventh Circuit ruled similarly,[28] holding that when an expert’s testimony is critical to class certification, a district court must conclusively rule on any challenges prior to the certification determination. When confronted with “expert testimony that is not scientifically reliable[, it] should not be admitted, even ‘at this early stage of the proceedings.’”[29]

Other circuits continue to stress the significance of rigorously scrutinizing proffered evidence. Many have expressed the need to conduct a sufficiently rigorous analysis of the underlying facts,[30] explaining that “while an evaluation of the merits to determine the strength of plaintiffs’ case is not part of a Rule 23 analysis, the factors spelled out in Rule 23 must be addressed through findings, even if they overlap with issues on the merits.”[31] One circuit has concluded that where plaintiffs rely on a novel or complex theory, courts must conduct a “searching inquiry” into the theory’s factual merits.[32] There, the court did not designate a specific standard of proof, but nonetheless emphasized that analysis of expert testimony should be adequately comprehensive to identify when “there is no *realistic* means of proof.”[33] Like the Second, Third, Fifth and Seventh Circuits, the trajectory of these circuits is a continuation of firm evidentiary standards at the class certification phase. Rather than lessen plaintiff’s burden, these circuits acknowledge the decisive blow dealt by a class certification order and have adopted evidentiary standards accordingly.

What's Next for Defendants in the Ninth Circuit

In the aftermath of Sali, ominous headlines such as "Ninth Circuit Concludes that Admissibility is Not a Factor in Deciding Class Certification"[34] blared news that the sky was falling on the defense side of class action lawsuits. While these reports may have generated clicks, they glossed over the language of the ruling itself, which put in place safeguards to prevent the doomsday scenario some commentators envisioned. Although it remains unclear how courts will apply Sali, there is sound reason to doubt that this ruling materially changes the landscape for parties defending class actions in the Ninth Circuit.

Although the Ninth Circuit did in fact draw an attention-grabbing line in the sand, it also rejected the idea that all evidence should be treated equally. Sali explicitly provides, for example, that admissibility *should be* a factor in a court's analysis of the Rule 23 requirements.[35] What Sali takes away is a court's ability to entirely preclude class certification evidence on the sole basis of admissibility; it does not direct courts to give inadmissible evidence any more credence than such evidence would have been otherwise due. In other words, a district court that would have been inclined to exclude evidence on the basis of admissibility will not be forced to grant certification because such evidence must now be considered. Rather, "ultimate admissibility should go to the weight that evidence is given at the class certification stage."[36] While courts may not perfunctorily exclude inadmissible evidence on that basis alone, they are free to discard such evidence after consideration. This is all that Sali requires.[37]

While class action defendants in certain circuits namely the Second, Third, Fifth and Seventh may oppose class certification efforts by attacking the admissibility of proffered evidence and Ninth Circuit defendants may not, Sali has not lowered the bar for class certification seeking plaintiffs. Defendants can continue to hang their hat on the same principles the Sali court lays out, primarily that a "district court should analyze the persuasiveness of the evidence presented at the Rule 23 stage."[38] Whether Ninth Circuit district courts implement the "Daubert-lite" analysis found in the Eighth Circuit[38] for expert evidence or an analogous method to measure the weight of class certification evidence, defendants should and will continue to attack inadmissible evidence offered in support of class certification.

Bottom line: Although Sali may prevent courts from excluding inadmissible evidence at the class certification stage, it fails to transform unreliable, unverifiable or otherwise faulty evidence into evidence sufficient to support a class certification order. Because Sali offers a clean "out" for courts to deny class certification — consider, then reject, inadmissible evidence — an outbreak of class certification orders in the Ninth Circuit is not likely. Simply put, Sali is not the game-changing ruling plaintiffs would like it to be.

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[1] Sali v. Corona Regional Medical Center, 889 F.3d 623 (9th Cir. 2018).

[2] Sali, slip op. at 5.

[3] Id., at 6-7.

[4] Id., at 11.

[5] Id.

[6] Id., at 17.

[7] Id., at 10.

[8] Id., at 12.

[9] Id., at 14 (footnote omitted).

[10] Id., at 15 (internal quotations and citations omitted).

[11] Id., at 16-18.

[12] Id., at 17.

[13] Id., at 13.

[14] Id., at 18.

[15] In re Zurn Pex Plumbing Products Liability Litigation, 644 F.3d 604 (8th Cir. 2011).

[16] Id. at 613.

[17] Id. at 613.

[18] Unger v. Amedisys Inc., 401 F.3d 316 (5th Cir. 2005).

[19] Id. at 324.

[20] Id. at 322-23.

[21] Id. at 322-23.

[22] 471 F.3d 24, 40-41 (2d Cir. 2006).

[23] In re Blood Reagents Antitrust Litigation, 783 F.3d 183 (3d Cir. 2015).

[24] Wal-Mart Stores Inc. v. Dukes, 131 S. Ct. 2541, 2553-54 (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 … ." (internal citation omitted)).

[25] Comcast Corp. v. Behrend, 133 S. Ct. 1426 , 1431(2013) (challenging lower courts' conclusion that an "attack on the merits of the methodology [had] no place in the class certification inquiry" and unwillingness to consider challenges to plaintiffs' expert damage testimony).

[26] In re Blood Reagents Antitrust Litigation, 783 F.3d at 187.

[27] Id. at 187.

[28] Am. Honda Motor Co. v. Allen, 600 F.3d 813 (7th Cir. 2010).

[29] Id. at 818-19.

[30] Gariety v. Grant Thornton LLP, 368 F.3d 356, 358-59 (4th Cir. 2004); Rodney v. Northwest Airlines Inc., 146 Fed. App'x 783, 787 (6th Cir. 2005); Vallario v. Vandehey, 554 F.3d 1259 (10th Cir. 2009).

[31] Gariety, 368 F.3d at 366.

[32] In re New Motor Vehicles Canadian Export Antitrust Litig., 522 F.3d 6 (1st Cir. 2008).

[33] Id. at 29 (emphasis added).

[34] Jaclyn Floryan," Ninth Circuit Concludes that Admissibility is Not a Factor in Deciding Class Certification" https://www.employmentclassactionupdate.com/2018/05/ninth-circuit-concludes-that-admissibility-is-not-a-factor-in-deciding-class-certification/ (accessed June 8, 2018).

[35] Sali, slip op. at 14.

[36] Id., at 18.

[37] Id., at 14, fn. 2.

[38] Id., at 18.

[39] Cox v. Zurn Pex Inc. (In re Zurn Pex Plumbing Prods. Liab. Litig.), 644 F.3d 604, 614 (8th Cir. 2011).