

# Ninth Circuit Rejects Challenges to Conjoint Analysis in Consumer Class Action

## Publications

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In recent years, conjoint analysis has proliferated as a methodology for calculating class-wide damages in consumer class actions. While conjoint analysis first emerged as a marketing tool for measuring consumers' relative preferences for various product attributes, many plaintiffs (and their experts) have attempted to employ conjoint analysis as a tool for measuring the "price premium" attributable to a labeling statement or the effect that the disclosure of a product defect would have had on the product's price. Defendants, in turn, have taken the position that conjoint analysis is only capable of measuring consumer preferences, cannot account for the array of competitive and supply-side factors that affect the price of a product, and that it is therefore incapable of measuring the price effect attributable to a labeling statement or a disclosure. Consistent with that position, defendants in consumer class actions frequently argue not only that conjoint analysis is unsuited to measuring class-wide damages consistent with *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013), but also that it is inadmissible under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). But a recent Ninth Circuit decision, *MacDougall v. American Honda Motor Co.*, --- F. App'x ---- (9th Cir. 2021) may threaten defendants' ability to challenge conjoint analysis on *Daubert* grounds.

In *MacDougall*, the plaintiffs brought a consumer class action against Honda premised on Honda's alleged failure to disclose the presence of a transmission defect in its vehicles. The plaintiffs attempted to quantify the damages attributable to this omission through a conjoint analysis, which purported to "measure the difference in economic value—and thus the damages owed—between Defendants' vehicles with and without the alleged transmission defect giving rise to this action." *MacDougall v. Am. Honda Motor Co.*, No. 17-1079, 2020 WL 5583534, at \*4 (C.D. Cal. Sept. 11, 2020). Honda argued that this conjoint analysis was flawed and inadmissible, both "because it only accounts for demand-side and not supply-side considerations" and "because it utilizes an invalid design that obtains mostly irrational results." *Id.* at \*5. The district court agreed with Honda, excluded the expert's conjoint analysis, and entered summary judgment in Honda's favor based on the plaintiffs' failure to offer admissible evidence of class-wide damages. In so holding, the court concluded that the expert's conjoint analysis "calculates an inflated measure of damages because it does not adequately account for supply-side considerations" and only measures a consumer's willingness to pay for certain product features—not the market price that the product would

command in the absence of the purported defect. *Id.* “[W]ithout the integration of *accurate* supply-side considerations,” the district court explained, “a choice-based conjoint analysis transforms into a formula missing half of the equation.” *Id.* And separate and apart from this central economic defect, the district court found that other errors in the expert’s methodology—including his failure to conduct a pretest survey and the limited number of product attributes tested in the conjoint survey—rendered his conjoint analysis unreliable and inadmissible. *See id.* at \*7-9.

The Ninth Circuit reversed. Beginning from the premise that expert testimony is admissible so long as it is “relevant” and “conducted according to accepted principles,” the Ninth Circuit found that the admissibility of expert testimony was a “case-specific inquiry” and therefore rejected Honda’s argument that “conjoint analysis categorically fails as a matter of economic damages.” Slip Op. at 2-3. The Ninth Circuit then concluded that Honda’s methodological challenges based on “the absence of market considerations, specific attribute selection, and the use of averages to evaluate the survey data go to the weight given the survey, not its admissibility.” *Id.* at 3 (citations and internal quotation marks omitted). And while the Ninth Circuit acknowledged that the district court relied on numerous decisions that had rejected the use of conjoint analysis in consumer class actions, it held that these decisions did not concern the “admissibility of conjoint analysis under Rule 702 or *Daubert*” but instead its “substantive probity in the context of either class-wide damages under *Comcast* . . . or substantive state law.” *Id.* at 2.

In distinguishing between the question of whether conjoint analysis is admissible under *Daubert* and whether it is capable of measuring damages on a class-wide basis consistent with *Comcast*, the Ninth Circuit preserved an opening for defendants to challenge the use of conjoint analysis to measure class-wide damages at the class certification stage. Nonetheless, *MacDougall* undoubtedly weakens defendants’ ability to challenge the admissibility of conjoint analysis on methodological grounds, and it is possible that some district courts may read the Ninth Circuit’s opinion to stand for the broad proposition that juries, rather than judges, should decide whether conjoint analysis can properly measure economic damages.

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