

Product Liability

Exclusions Cast Pall on Most Experts, But Less So for Toxic Tort Plaintiffs

The reputation and employability of some expert witnesses—often highly-regarded engineers, scientists and medical professionals—may be irreparably harmed after they are rejected by trial courts under the U.S. Supreme Court’s strict *Daubert* admissibility standards.

But other experts may be better able to recover from publicized judicial attacks on their qualifications under *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993), which requires trial judges to ensure expert testimony be reliable and the product of a sound methodology before being admitted for a trial.

Why is that so?

Can an Expert Recover From an Exclusion? Interviews with leading litigators, academics and service providers show that a *Daubert* exclusion remains with experts throughout their career (44 PSLR 282, 3/21/16).

Whether an expert can recover from an exclusion may depend on the reasons why a judge found the expert unqualified and/or his methodology was lacking.

Mike Talve, CEO of the Expert Institute in New York, a provider of expert witness services, said his group generally considers a *Daubert* exclusion as “a mark against an expert, but this also needs to be considered within the overall context of their credentials and larger litigation history.”

“Sometimes, testimony can be excluded in part and allowed in part, which has less of an impact on their suitability for future cases than a total exclusion would,” Talve told Bloomberg BNA.

A ruling on qualification grounds can do more reputational damage to an expert than a ruling on methodology, according to Professor Edward J. Imwinkelried of the University of California Davis School of Law, Davis, Calif., whose scholarship focuses on evidence law.

“If an attorney takes the time to learn the basis for the prior exclusion, and the exclusion was on the latter ground, the prior ruling might not deter the attorney from hiring the expert to testify about a different methodology or theory,” Imwinkelreid told Bloomberg BNA.

In certain cases, an exclusion can encourage an expert to improve his methodology, or seek additional education or experience, Professor Colin Miller of the

University of South Carolina School of Law, Columbia, S.C., said.

Every case is different, Miller stressed, “so an expert being excluded in one case does not preclude him from being qualified as an expert witness in a case with a different subject matter or scope.”

Defendants’ attorney John Sear, a partner at Bowman & Brooke in Minneapolis, also noted that some experts can survive an exclusion.

“Because expert testimony admissibility determinations are highly discretionary and often heavily fact-dependent, merely because an expert’s testimony is excluded in one case does not necessarily mean it will be excluded in other cases, even other similar cases,” Sear said.

Imwinkelried agreed. Recovery may be easiest when the relevant scientific community appreciates that the field is “evolving quickly and that the expert testified about a very promising cutting-edge theory.” In such cases, an exclusion might do “relatively little damage to the expert’s reputation within his or her field,” he said.

Multiple Exclusions May Be Death Knell. Defendants’ attorney Tom Peisch, a partner at Conn Kavanaugh in Boston, among others, said that all bets on future employability are off if the expert suffers exclusions in more than one case.

Multiple exclusions “reflect an overall sloppiness that is unacceptable in any expert,” Peisch told Bloomberg BNA.

Talve, who spends more time in the engagement of expert witnesses than “the busiest litigators at the busiest law firms,” says a track record of *Daubert* exclusions should be viewed as a “major red flag.”

“This could indicate to us that the expert doesn’t say ‘no’ to cases that he or she is not qualified to opine on, employs unreliable or unscientific methods, or is consistently misrepresenting their credentials,” he said.

Lee Hollaar, a professor emeritus at the University of Utah’s School of Computing in Salt Lake City, Utah, who has served as an expert in software cases, told Bloomberg BNA that “trying again and being excluded would essentially be fatal.”

Imwinkelreid said that if an expert’s testimony is excluded in a string of cases, “even his or her more open-minded colleagues might begin to think that the expert was using poor judgment and venturing opinions that exceeded the limits of the available research.”

Recovery Easier for Plaintiff's Expert? Sear said recovery from exclusion is harder for a defendant's expert than a plaintiff's expert.

When a defense expert's testimony is excluded because of flaws in their analysis or testimony, defendants are "extremely reluctant to hire them again, even in cases that differ from the type of case in which they were excluded."

On the other hand, plaintiffs' experts often recover quite easily, if they are impacted at all, from exclusion, Sear said.

"In product liability or toxic tort cases, testimony from plaintiff's experts is routinely excluded, but the expert keeps showing up in future cases, undeterred by the past exclusion," Sear told Bloomberg BNA.

Defendants' attorney Douglas G. Smith, a partner at Kirkland & Ellis in Chicago, told Bloomberg BNA there have been "several instances in which the plaintiffs' bar in particular has sought to use experts whose opinions previously have been excluded under Rule 702 and *Daubert* in toxic tort or product liability cases."

Defendants Challenge Experts More Often. Why can plaintiffs' experts recover more easily from an exclusion—even multiple exclusions—than defense experts?

According to Sear, in toxic tort cases, defendants challenge experts more often than plaintiffs do.

"So, if the defendant's expert has been excluded even once in the past, it is intuitively more difficult to argue that the plaintiff's expert shouldn't be allowed to testify. In my experience, it is the old stone-throwing/glass house situation," he said.

Some of these have been situations where "an expert's opinions have been excluded in part and it may be that they are willing to live with the risk that a similar partial exclusion will occur in the future," Smith said.

"Others may be situations in which it may be difficult for plaintiffs to find experts willing to offer opinions in their cases," he said.

Plaintiffs' attorney Nathan Finch, who specializes in toxic tort cases and is a partner at Motley Rice in Washington, agreed that defense attorneys challenge opposing experts under *Daubert* far more often than do plaintiffs' experts.

To the degree that plaintiffs' experts may appear to recover more easily from an exclusion than do defendants' experts, Finch said the reason was economic: There are many more experts on the defense side than on the plaintiffs' side.

Defendants charge their clients "multiples" what plaintiffs charge, and more money is available to flow into expert witness fees, Finch said.

As there is much more money available for defendants' experts, there is "always a market for experts willing to testify on the defense side," he said.

Plaintiffs' attorney Thomas V. Girardi, a founding partner at Girardi & Keese in Los Angeles, agreed with Finch's assessment.

Girardi told Bloomberg BNA that toxic exposure cases are an especially difficult area for finding expert witnesses.

"There are very few good experts in the field so even if an expert has been excluded in the past, a plaintiffs' lawyer must select him anyway," he said.

Imwinkelried agreed the issue may be one of scarcity—there may simply be fewer experts in a particular field giving those experts an advantage.

Another possibility is that the attorneys pressing the theory are "convinced that the prior judges were wrong and determined to press on until they find an 'enlightened' judge who will finally see the merit in the theory," Imwinkelried said.

"Courts are conservative institutions, and it sometimes takes a good deal of time before the lightbulb goes on," he said.

Imwinkelried said that in fields such as toxic torts, "both the bench and the bar have come to expect the presentation of novel theories and pitched admissibility battles. In contrast, in a field such as medicine, the judge may tolerate more subjectivity in the expert's reasoning process," he said.

Peisch offered an entirely different view as to why some plaintiff's experts, at least in toxic tort cases, seem to recover more easily than defendants' experts following an exclusion.

"Probably because many plaintiffs in the toxic tort area are 'pushing the envelope' as to their expert theories, and are therefore forced to rely on flawed experts and untested and unreliable theories," Peisch said.

Finch rejected Peisch's assessment. He said plaintiffs' attorneys are not served by litigating "weak cases" or using experts to advance "extreme theories."

He also rejected the premise that the *Daubert* rule was a good vehicle for evaluating the reliability of expert evidence.

Daubert primarily benefits defendants' attorneys. The rule is essentially a "full employment act for defense lawyers," he said.

"Judges are no better than juries to evaluate the reliability of experts," he said. "Putting on a robe doesn't make it easier to understand toxicology or industrial hygiene."

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