Arizona Supreme Court Holds That Joint Tortfeasors Are Severally Liable Only In Strict Products Liability Actions

By Iman R. Soliman, and William F. Auther, Bowman and Brooke LLP

In *State Farm Insurance Cos. v. Premier Manufactured Systems Inc.*, 217 Ariz. 222, 172 P.3d 410 (2007), the Arizona Supreme Court held that the legislature's abolishment of joint and several liability extends to strict product liability actions; consequently, juries must allocate fault among all party and non-party tortfeasors, and each tortfeasor is severally liable only for the plaintiff's total damages.

Background

In *State Farm*, a homeowner sustained property damage from a leak in a water filtration system installed in his home. Premier Manufactured Systems, Inc. ("Premier") assembled and sold the water filtration system, which consisted of a series of filters inside plastic canisters linked by tubing. Worldwide Water Distributing, Ltd. ("Worldwide") manufactured the plastic canisters and sold them to Premier. As subrogee for its insured, State Farm sued Premier and Worldwide, alleging that Premier and Worldwide were each strictly liable in tort for distributing a defective product.

Premier filed an answer denying liability. Worldwide failed to answer, and the superior court entered a default judgment against it. The judgment, however, was not collectible because Worldwide had gone out of business and did not have insurance coverage. State Farm therefore filed a motion for partial summary judgment against Premier arguing that Premier was jointly and severally liable for 100% of the homeowner's damages. Premier argued that its liability, if any, was several only under Arizona Revised Statute section 12-2506, and that the statute required an allocation of fault between Premier and Worldwide. The superior court agreed with Premier and denied State Farm's motion.

Subsequently, State Farm and Premier entered into a stipulated judgment holding Premier 25% liable and Worldwide 75% liable for the total damages, but preserving for appeal the issue of whether Premier was jointly and severally liable for Worldwide's share of the total damages.

On appeal, the court of appeals affirmed the superior court's holding that Premier's liability was several only and that each tortfeasor's fault must be apportioned under section 12-2506. *State Farm Ins. Cos. v. Premier Manufactured Sys., Inc.*, 213 Ariz. 419, 420, 142 P.3d 1232, 1233 (Ct. App. 2006). The Arizona Supreme Court granted State Farm's petition for review because it presented an issue of statewide importance.

The Court's Analysis

The case was litigated because State Farm wanted to collect the insolvent's (Worldwide's) portion of fault from Premier. The Court did not spend time on this issue but instead deferred to the legislature's power to modify or abrogate common law. In doing so, the Court articulated several principles.

First Principle: The general abolition of joint and several liability in 1987 was intended to apply to parties strictly liable in tort for distributing a defective product.

State Farm argued that the legislature's amendment of UCATA in 1987, which abolished joint and several liability and adopted comparative fault, did not apply in strict liability actions for distributing a defective product.

The Court rejected State Farm's argument, finding that a strict products liability action is an action for "personal injury, property damage or wrongful death" under Arizona Revised Statute section 12-2506(A). Based on the plain language of the 1987 amendment, the Court reasoned that each defendant's liability is several only, unless one of the exceptions to section 12-2506 applies.

Second Principle: The mere purchase of a product component by a manufacturer from a supplier does not establish an agent or servant relationship between the manufacturer and the supplier under section 12-2506(D)(2).

As an exception to section 12-2506(A), section 12-2506(D)(2) holds a person jointly and severally liable for the fault of another person if "[t]he other person was acting as an agent or servant of the party." Ariz. Rev. Stat. §12-2506(D)(2).

State Farm argued that Premier, by purchasing a product component from Worldwide, became an agent of Worldwide with respect to the product that caused the homeowner's damages. The Court rejected State Farm's argument, holding that "[t]he mere purchase of a product from a supplier does not establish a master-servant or principal-agent relationship between the buyer and the seller." *State Farm*, 217 Ariz. at 226, 172 P.3d at 414. The Court reasoned that "in a strict products liability action, the various participants in the chain of distribution are liable not for the actions of others, but rather for their own actions in distributing the defective product." *Id.* (citing *Jimenez v. Sears, Roebuck & Co.*, 183 Ariz. 399, 402, 904 P.2d 861, 864 (1995); *O.S. Stapley Co. v. Miller*, 103 Ariz. 556, 559-60, 447 P.2d 248, 251-52 (1968)). Thus, every party in the chain of distribution of a defective product commits its own "actionable breach of legal duty." Its fault is based on its own actions — distributing a defective product — rather than on a master-servant or principal-agent relationship with other wrongdoers.

Conclusion

This case was litigated because of the risk of loss issue. Who should bear the burden of loss from an insolvent products liability defendant? State Farm argued that the burden of loss from an insolvent products liability defendant should fall on other entities in the product's chain of distribution rather than on the injured claimant. Ironically, the Court spent little time discussing public policy reasons for the risk

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of loss on either side; instead, the Court deferred to the judgment of the legislature. The Court, in essence, affirmed the principle that the legislature is free to modify or abrogate common law even when the effect places the risk of loss on an injured claimant. The Court also gave effect to the plain language of the statute over efforts to undermine the legislature's intent. Consistent with the evolution of products liability law, the Court held that in strict products liability cases, the various participants in the chain of distribution are not liable for the actions of others in the chain of distribution; they are only liable for their own actions in distributing a defective product. This long awaited decision is clear and leaves no room for any well-crafted and creative exception to overcome the abolishment of joint and several liability.

Daubert Checklist: Tips for Posturing Your Case for Successful *Daubert* Challenge

By John D. Sear, Bowman and Brooke LLP

Every year litigators in product liability cases across the country file hundreds of motions to exclude expert testimony under Fed. R. Evid. 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Appellate courts affirm trial court decisions — regardless of whether the decisions exclude or admit expert testimony — more often than not. The high rate of affirmance no doubt stems from the deference courts of appeal give trial court *Daubert* decisions, as required by *General Electric Co. v. Joiner*, 522 U.S. 136 (1997). Practitioners must make sure the trial court makes the right decision, so they are not forced to rely upon an appellate court to correct a wrong one. Trial courts will get it right the first time if you follow this tried-and-true checklist.

1. Scour Applicable Scientific Literature

"The courtroom is not the place for scientific guesswork, even of the inspired sort. Law lags science; it does not lead it." *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 319 (7th Cir. 1996). When science does not have answers, experts testifying in court may not pretend that they do:

> Conjectures that are probably wrong are of little use, however, in the project of reaching a quick, final, and binding legal judgment — often of great consequence — about a particular set of events in the past. We recognize that, in practice, a gatekeeping role for the judge, no matter how flexible, inevitably on occasion will prevent the jury from learning of authentic insights and innovations. That, nevertheless, is the balance that is struck by Rules of Evidence designed not for the exhaustive search for cosmic understanding but for the particularized resolution of legal disputes.

Daubert, 509 U.S. at 596-97. The peer-reviewed literature helps to define the boundary between admissible testimony grounded in scientific knowledge and inadmissible testimony based upon unscientific guesswork. Scouring the scientific literature up front is the best way to find that boundary and gain insight into the appropriate methodologies employed by knowledgeable experts in the field.

2. Scour Expert's Published Literature

Scientific literature published by the experts themselves will illuminate their opinions and methodologies and offer powerful ammunition for a successful *Daubert* attack. "The ultimate test of a scientific expert's integrity is her readiness to publish and be damned." *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1318 (9th Cir. 1995) (quotations omitted). When experts publish opinions in peer-reviewed journals, they must adhere to rigorous standards of scientific integrity that prohibit sweeping, scientifically unfounded conclusions — their litigation opinions should be held to the same standards. *E.g.*, *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999) (holding that Rule 702 imposes a gatekeeping duty "to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practices of an expert in the relevant field"). When experts choose not to publish on the issue at hand, that choice too bears directly on the reliability of the expert's analysis, methodology, and conclusions. Knowing what the expert has and has not written and published will better equip you to evaluate and challenge the expert's testimony.

3. Apply Governing Law

Work within the framework established by your judge, your district, and your circuit. Some judges have established very strict requirements for presentation and briefing of *Daubert* motions and published argument paradigms they encourage attorneys to follow. *E.g.*, *Procedures for Rule 702 Motions*, *http://www.cod.uscourts.gov/Documents/Judges/MSK/msk_702procedures.pdf*; *United States v. Nacchio*, 608 F. Supp. 2d 1237, 1252 n.23 (D. Colo. 2009) (A very homely, and admittedly imperfect analogy that I routinely use is that an opinion is the witness's end product. It is like a 'cake' that needs a baker (qualified expert), recipe (methodology), and ingredients (facts and data)). When judges or districts or circuits articulate their approach to *Daubert* in prior decisions, chances are good that they will use the same approach in your case — using some other judge's or district's or circuit's law will weaken your motion unnecessarily.

4. Exploit "Manual on Scientific Evidence"

The "Manual on Scientific Evidence," published by the Federal Judicial Center, "offer[s] helpful suggestions to judges called upon to assess the weight and admissibility" of expert testimony. *See Atkins v. Virginia*, 536 U.S. 304, 327 (2002). The manual contains chapters, or

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"reference guides," on a variety of topics commonly the subject of expert testimony, from multiple regression analysis, to epidemiology, to toxicology, to medicine, to engineering practices and methods. The manual is available on the Federal Judicial Center's website, *www.fjc.gov*. It does not instruct judges about what evidence to admit or exclude but, rather, educates them on the particular field of study and how to analyze and apply it. The judge hearing and deciding your motion will refer to the manual in analyzing the admissibility of evidence. You should too.

5. Exploit Expert's CV

Experts routinely fill their curriculum vitae with lists of memberships in professional organizations. Most professional organizations have their own standards, which members should follow in the interest of good science and professional integrity. Disregarding those standards without good reason for doing so casts serious doubt upon the scientific integrity of the expert's analysis and conclusions. *See Truck Ins. Exch. v. Magnetek, Inc.*, 360 F.3d 1206, 1213 (10th Cir. 2004) (affirming exclusion of causation expert testimony in part because the expert's opinion "did not meet the standards of fire investigation [the expert] himself professed he adhered to"). Experts can hardly assert that they have employed inside the courtroom the same level of intellectual rigor that characterizes their work outside it if they disregard the principles espoused by the organizations they have joined. Successful *Daubert* challenges will demonstrate that the expert has abandoned his or her own scientific principles that guide their practice in the "real world."

6. Question Opinions Expressed with Certainty

Daubert cautions that nothing in science is known with absolute certainty. 509 U.S. at 590. When experts proclaim knowledge of something with certainty, but the scientific knowledge does not share that certainty, they open themselves up to the criticism that their analysis is unscientific and testimony inadmissible. At the same time, what's good for the goose is good for the gander — that is, experts you retain and designate cannot express their opinions with absolute certainty. The need for scientific integrity applies to everyone.

7. Narrowly Focus *Daubert* Challenges

It makes little sense to challenge an expert's qualifications when the expert is qualified enough to meet the liberal qualification standard of Rule 702. Instead, use the expert's strengths to your advantage. For instance, an expert who is highly credentialed and degreed should know better than to state opinions unsupported by the available scientific knowledge. Applaud the expert for identifying the relevant scientific studies while castigating him or her for ignoring their limitations. Launching sweeping challenges to every aspect of the expert's testimony dilutes and distracts from the strongest arguments in favor of exclusion.

8. Remember *Daubert* Factors Are Guidelines, Not Rules

The *Daubert* factors — testing, peer-review and publication, rate of error and existence of standards, and general acceptance — are guidelines for assessing scientific reliability and relevance, not hard and fast requirements that all testimony must satisfy in every case. Exercising their broad discretion in how to determine reliability, trial courts have identified and used several factors beyond the four discussed in *Daubert*. *See, e.g.*, *Milanowicz v. Raymond Corp.*, 148 F. Supp. 2d 525, 532 (D.N.J. 2001) (itemizing nine other factors considered in determining admissibility of engineering expert testimony). Avoid the temptation to force arguments into the *Daubert* reliability criteria when the criteria do not apply.

9. Consider Applicable State Law

State law plays a role in the *Daubert* analysis. When challenging a causation expert, for example, frame the issue and argument in terms of the plaintiff's burden of proof. In many cases, a plaintiff will rely exclusively on the testimony of an expert to satisfy the burden of proof on a particular issue, making knowledge and application of applicable state substantive law defining the elements of claims and sufficiency of evidence all the more important. *See Hall v. Baxter Healthcare Corp.*, 947 F. Supp. 1387, 1398 (D. Or. 1996) ("Under this substantive standard [established by Oregon law], if an expert cannot state the causal connection in terms of probability or certainty, the expert's testimony must be excluded. ..."). If the expert's opinion is insufficient to sustain the burden of proof under the state's substantive law, it will often be inadmissible under *Daubert* and Rule 702.

10. Evaluate Each Step in Expert's Analysis

"Under *Daubert*, any step that renders the analysis unreliable ... renders the expert's testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology." *Mitchell v. Gencorp Inc.*, 165 F.3d 778, 782 (10th Cir. 1999) (quotations omitted). Experts often lack essential facts, data, and analysis necessary to support their conclusions. Carefully scrutinizing the experts' analyses will frequently reveal that they base their conclusions upon little more than their own assurances, assumptions, and personal opinion unsupported by any sound scientific knowledge or reasoning. Highlighting the flaws in the analysis will strengthen the argument for exclusion.

Conclusion

Following this checklist will help focus the issues for the trial court, increase the chances of success on any *Daubert* motion, and preserve the trial court's favorable ruling on appeal.

New Guidance on the Enforceability of Limitation of Liability Provisions

By William Auther, Mary Kranzow and Amanda Pyper, Bowman and Brooke LLP

The enforceability of limitation of liability (LOL) provisions and the extent to which liability can be capped was recently addressed by the Arizona Supreme Court in *1800 Ocotillo v. The WLB Group*, 542 Ariz. Adv. Rep. 11 (2008). The primary issues in determining the enforceability of such provisions often hinge on the application of certain public policy statutes prohibiting parties from limiting liability for negligence as well as anti-indemnity statutes restricting parties' ability to shift liability for negligence. Such prohibitions gain support from the theory that people should be responsible for their own negligence. On the other hand, parties should also be free to contractually allocate liability as they see fit. As reflected in the decision below, the tension between these competing principles is often at issue when courts must rule upon the enforceability of LOL provisions.

In *1800 Ocotillo*, a real estate developer, 1800 Ocotillo, (Ocotillo), entered into a contract with an engineering-architectural firm, The WLB Group (WLB), to conduct a survey identifying boundary lines and rights-of-way. The contract contained an LOL provision limiting WLB's liability to its fees. After WLB completed the survey, the canal operator claimed a right-of-way that was not reflected in the survey, which led to the City of Phoenix denying Ocotillo certain construction permits. Ocotillo subsequently brought suit against WLB for negligence and WLB defended the action by invoking the LOL provision. The trial court rejected Ocotillo's argument that the LOL provision was against public policy. The appellate court affirmed, holding that the LOL provision was not against public policy, but remanded the case as it found the provision to constitute an assumption of risk, the defense of which must be submitted to the jury pursuant to Article 18, Section 5 of the Arizona Constitution.

The Arizona Supreme Court agreed with the general principle that commercial parties should be free to negotiate a LOL provision for claims arising out of contracts. The Court then affirmed the appellate court's ruling that LOL provisions capping damages to reasonable amounts, i.e. fees earned, were not against public policy.

The Court specifically rejected Ocotillo's assertion that the LOL provision violated Arizona's anti-indemnification statute governing contracts between architects and engineers. Indemnification insulates a protected party from all liability, thereby eliminating a party's incentive to exercise due care in the performance of a contract. In the instant case, however, the Court found that WLB retained sufficient incentive to exercise due care, because otherwise, it would "lose the very thing that induced it to enter into contract in the first place."

The Court also vacated the appellate court's finding that the LOL provision was an assumption of risk subject to Article 18, Section 5 of the Arizona Constitution. The Court found that an assumption of risk, traditionally, applied "only to defenses that effectively relieve the defendant of any duty," whereas "the WLB/Ocotillo liability-limitation provision does not purport to relieve WLB of all liability nor does it have that effect." Accordingly, because the LOL provision did not relieve WLB of all liability, it was not an assumption of risk defense requiring submission to the jury. The Court nonetheless remanded the case to the court of appeals to determine if the clause was freely negotiated between the parties or if it was contrary to Ocotillo's reasonable expectation.

The *Ocotillo* decision is important for two reasons. First, it allows parties to contractually limit liability so long as the limitation does not eliminate the incentive to exercise due care. Second, it allows courts to grant summary judgment without the need to submit the question to the jury. This preserves the primary benefit of such provisions – the efficient resolution of claims.

The law on this issue is still unsettled, as it remains unclear as to what liability cap constitutes a sufficient incentive for a party to exercise due care in the performance of a contract. Indeed, the question remains as to how limited the liability can be before it will be deemed no liability at all. The Arizona Supreme Court appeared to leave open the possibility that a contractual limit on liability could be so low as to effectively eliminate the incentive to exercise due care.

Adding yet another layer of complexity, recent decisions in other jurisdictions indicate that the enforceability of a LOL provision may also be influenced by its effect on third parties to the contract. In June 2008, the Georgia Supreme Court in *Lanier at McEver, L.P. v. Planners and Engineers Collaborative, Inc.*, 284 Ga. 204, 663 S.E.2d 240 (2008), analyzed a LOL provision under a Georgia statute (OCGA § 13-8-2 (b)) which prohibited certain construction contracts from indemnifying a party for its negligence. The engineering firm in that case moved for partial summary judgment against a developer by seeking to enforce a contractual provision limiting exposure to its fees. Although the provision did not exculpate the engineering firm from all liability, it created a duty for the developer to indemnify the firm from any *third-party* claims in excess of its fees. Because the LOL provision absolved the protected party from liability for any potential claims brought by the public, the Court held that the provision violated the public policy principles behind the anti-indemnification statute. *Cf. Baylock Grading Co., LLP v. Smith*, 189 N.C. App. 508, 658 S.E.2d 680 (Ct. App. 2008) (enforcing LOL provisions where third parties were not precluded from bringing negligence actions against the negligent party).

Accordingly, under the current framework, parties are best advised to take care to

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create a LOL provision with a limit that has a reasonable relationship to the magnitude of the services rendered or potential liability exposure without waiving liability for third party claims. This may increase the likelihood of courts upholding the LOL provision when analyzing states' public policy and anti-indemnification statutes in the event of litigation.

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