Ninth Circuit Overturns Daubert Exclusion, Again Noting Trial Court Is A Gatekeeper, Not A Fact Finder

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In a recent case involving the City of Pomona ("Pomona") v. SQM North America Corporation ("SQM"), Pomona alleged that SQM's importation of sodium nitrate for fertilizer caused a perchlorate contamination in the city. Although the district court excluded under Daubert the expert testimony of Pomona's expert witness on causation, the Ninth Circuit reversed the ruling, stating that *"facts casting doubt on the credibility of an expert witness and contested facts regarding the strength of a particular scientific method are questions reserved for the fact finder*". The case was remanded for trial.

Expert testimony admissibility is governed by Federal Rule of Evidence 702, which states:

"If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise, if

- *the testimony is based upon sufficient facts or data,*
- *the testimony is the product of reliable principles and methods, and*
- *the witness has applied the principles and methods reliably to the facts of the case."*

The Supreme Court interpreted this rule in Daubert v. Merrell Dow Pharma., Inc., as providing judges "*some gatekeeping responsibility in deciding questions of the admissibility of proffered expert testimony*." The Daubert ruling also emphasized that the trial court must assess the principles and methodology, not on the conclusions generated:

"vigorous cross examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence"

This was reiterated in numerous subsequent rulings, including:

- Primiano v. Cook, 598 F.3d 558, 564-65 (9th Cir. 2010) described

o the trial court's role in evaluating proffered expert testimony as "*a gatekeeper, not a fact finder*"

o the test "*is not the correctness of the expert's conclusions but the soundness of his methodology, and when an expert meets the threshold established by Rule 702, the expert may testify and the fact finder decides how much weight to give that testimony*"

o "*Challenges that go to the weight of the evidence are within the province of a fact finder, not a trial court judge. A district court should not make credibility determinations that are reserved for the jury*."

- Alaska Rent-A-Car, 738 F.3d at 969: The judge is "*supposed to screen the jury from unreliable nonsense opinions, but not exclude opinions merely because they are impeachable*."
- Estate of Barabin v. AstenJohnson, Inc., 740 F.3d 457, 463 (9th Cir. 2014): Simply put, "*[t]he district court is not tasked with deciding whether the expert is right or wrong, just whether his testimony has substance such that it would be helpful to a jury*."

In Pomona v. SQM, the Ninth Circuit concluded that

> *"Expert testimony may be excluded by a trial court under Rule 702 of the Federal Rules of Evidence only when it is either irrelevant or unreliable. Facts casting doubt on the credibility of an expert witness and contested facts regarding the strength of a particular scientific method are questions reserved for the fact finder."*

Since Daubert, and the subsequent 1999 Supreme Court decision in Kumho Tire Co. vs. Carmichael clarified that the Daubert criteria for challenges to expert witnesses extended to non-scientific experts, the number of challenges to expert witnesses rapidly increased, with a high degree of successful exclusions. While this prior success rate has encouraged lawyers to continue the trial tactic, rulings such as the ones cited above indicate that some trial courts have exceeded their intended role under Daubert and are inappropriately requiring parties to win the case twice.

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