Sotomayor's Top Five Rulings on Experts

By Robert Ambrogi

Much is made of the fact that Sonia Sotomayor was a federal district judge before she was named to the federal appeals court. After all, if confirmed to the Supreme Court, she would be the only one of the nine justices to have sat on the trial bench.

The experience of someone who has served as a trial judge would be a worthy addition to the high court, many believe. If so, then one of the bread-and-butter issues in which trial judges get no shortage of experience is the admissibility of expert testimony.

So what do Sotomayor's appellate opinions on the 2nd U.S. Circuit Court of Appeals tell us about how her trial court experience shaped her rulings on expert witness issues?

To find out, we reviewed the expert-related cases in which she either wrote the opinion or sat on the panel. Many were mundane, dealing with case-specific questions of whether the trial court should or should not have allowed the expert to testify.

But others were more notable, either because they made new law or expanded the understanding of prior law. Based on our review, here are our selections of Sotomayor's five most important cases involving expert witnesses.

1. *Wills v. Amerada Hess Corp.*, 379 F.3d 32 (2nd Cir. 2004).

This case presented a question never before decided by a federal appeals court: Do admiralty cases under the Jones Act, which have a relaxed standard of proof, also have a lower standard for the admission of expert testimony?

The case involved a widow who alleged her husband's cancer death resulted from exposure to benzene while working on a vessel. The district court dismissed the case on summary judgment, finding that the widow had offered insufficient evidence of causation.

On appeal, the widow argued that traditional standards of reliability and credibility used to determine admissibility of expert testimony should be relaxed under Jones Act cases.

Sotomayor disagreed. "*Daubert's* standards for determining the admissibility of expert testimony apply regardless of whether the plaintiff's burden to prove causation is reduced."

The widow also argued that, under the Jones Act, she should not be required to produce any expert evidence of causation at the summary judgment stage. Sotomayor gave short shrift to this argument.
"In a case such as this, where an injury has multiple potential etiologies, expert testimony is necessary to establish causation, even in view of plaintiff's reduced burden to prove causation."

The widow's final argument was that the trial court had abused its discretion by excluding expert testimony on the level of benzene exposure that could cause cancer. Sotomayor found no abuse of the trial court's discretion.

2. *Jarvis v. Ford Motor Co.*, 283 F.3d 33 (2nd Cir. 2002).

Sotomayor wrote the decision for the three-judge panel in this products liability case alleging the sudden acceleration of a Ford Aerostar. After trial, a jury returned a verdict for plaintiff on her negligent-design claim but not on her claim for strict liability.

Ford objected to the verdict on the ground that it was inconsistent. The trial judge agreed and further held that the evidence was insufficient to support a verdict for plaintiff on either theory. The judge granted judgment for Ford and dismissed the complaint.

Sotomayor's opinion reinstated the verdict in favor of the plaintiff. She found that the evidence was sufficient for the jury to find that the Aerostar malfunctioned due to Ford's negligent design.

Key to her analysis was the testimony of the plaintiff's expert, an electrical engineer. He offered a theory as to why the Aerostar's cruise control was defective and how Ford could easily have remedied it.

The district court held that the expert's theory did not provide direct proof of a defect and therefore was insufficient to prove plaintiff's case. But Sotomayor wrote that plaintiff need only show circumstantial evidence of a defect.

"The district court erred in requiring proof of a specific defect in the Aerostar's cruise control and in not considering Jarvis's circumstantial evidence of a defect," she said.

3. *In re Visa Check/Mastermoney Antitrust Litigation*, 280 F.3d 124 (2nd Cir. 2001)

This antitrust case sought certification of a class action on behalf of merchants against Visa and MasterCard. The district court certified the class and the credit card companies appealed.

Sotomayor wrote the opinion for this three-judge panel affirming the class certification. One panel member dissented.

The central issue was whether the report of the plaintiffs' expert was sufficient to support class certification. The defendants objected to use of the report, arguing that its analysis was flawed.

Sotomayor rejected this argument, holding that the standard of expert testimony for certification of a class is less than is required on the merits of a case.

"The district court correctly noted that its function at the class certification stage was not to determine whether plaintiffs had stated a cause of action or whether they would prevail on the merits, but rather whether they had shown, based on methodology that was not fatally flawed, that the requirements of Rule 23 were met."

4. *Olivier v. Robert L. Yeager Mental Health Center*, 398 F.3d 183 (2nd Cir. 2005).

Sotomayor did not write this opinion, but she was one of two judges in the majority of this three-judge panel. The opinion overturned a jury verdict in a civil rights lawsuit alleging involuntary civil commitment without due process.

Frank Olivier brought the lawsuit against a mental health facility and three doctors. He alleged that the doctors ordered his commitment unlawfully because they did not believe he posed a danger to himself or others. A jury returned a verdict in his favor.

At trial, no party introduced expert testimony. But after the doctors testified as fact witnesses, the trial judge said he would treat them as experts because they rendered psychiatric opinions.

In reversing the verdict, the majority held that the plaintiff's failure to introduce expert testimony rendered the verdict void. "We conclude, based on the record before us, that the jury was not competent to evaluate the professional propriety of the defendant doctors' actions without the assistance of expert testimony."

The dissent argued that expert testimony was presented – in the form of the defendant doctors' testimony – and that nothing further was required for the jury to render a verdict.

5. *In re Initial Public Offering Securities Litigation*, 471 F.3d 24 (2nd Cir. 2006).

In this securities case involving a request for certification of a class action, Sotomayor was not the author of the opinion but participated as a panel member.

The case is significant for two reasons. First, it addressed an issue described as "surprisingly unsettled in this Circuit" – that of what standards govern a trial judge in deciding a motion for class-action certification. Second, it expressly disavowed Judge Sotomayor's *Visa Check* opinion, discussed above.

"We … disavow the suggestion in *Visa Check* that an expert's testimony may establish a component of a Rule 23 requirement simply by being not fatally flawed. A district judge is to assess all of the relevant evidence admitted at the class certification stage and determine whether each Rule 23 requirement has been met, just as the judge would resolve a dispute about any other threshold prerequisite for continuing a lawsuit."

After a detailed review of the evidence and expert testimony in the trial court, the panel vacated the lower court's certification of the class and remanded the case for additional proceedings.

Summing it All Up

What do these cases reveal about Sotomayor? The opinions she authored show a judge who has a clear understanding of district court practice. Her opinions also suggest a tendency to describe lower court proceedings in detail and review them carefully.

What they do not show is any reluctance to second guess the trial judge. On purely discretionary issues, Sotomayor seems inclined to yield to the trial judge's decision. But when any question of law is involved, she appears ready to overrule the trial judge if she believes the law was misapplied.

About the author: Robert J. Ambrogi is the only person ever to hold the top editorial positions at both national U.S. legal newspapers, the National Law Journal, and Lawyers Weekly USA. An experienced attorney, ADR professional, writer and legal technologist, Bob formerly served as director of the Litigation Services division at American Lawyer Media.

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