Using Daubert, Kumho Tire and Kelly To Your Advantage

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I. In Product Cases, Experts Are Being Challenged Like Never Before.

Product liability cases not only live and die by expert testimony, they often require that the trial attorney introduce cutting edge scientific and engineering testimony to prove liability, damages or both. This is especially true in matters such as defective drug cases, where the evidence that a product is unsafe may lie in the hands of a limited group of specialized researchers.

Yet, where new or emerging scientific evidence is employed in courtrooms, judges are charged by statute and decisional law as the gatekeepers who will determine what expert testimony ultimately reaches the trier of fact. Obviously, being in a position to convince the gatekeeper to open the gate is critical in meeting the plaintiff's burden at trial.

Most practitioners are familiar with Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786 (1993), in which the U.S. Supreme Court announced tightened standards for District Court judges performing their gatekeeper roles. Most are also aware that early last year, the high court added some flexibility to its Daubert test in Kumho Tire Co., Ltd. v. Patrick Carmichael, 526 U.S. 137, 119 S.Ct. 1167 (1999), while at the same time affirming that Daubert principles apply to engineering experts as well as scientists. Many also know that in February of this year, the Supreme Court held a federal appeals court may make its own determination that a key expert does not meet the Daubert/Kumho Tire reliability standard and then instruct the trial court to enter judgment against that party without any further proceedings. Weisgram v. Marley Co., ___ U.S. ___, 120 S.Ct. 1011 (2000).

Even so, evaluating applicable gatekeeping rules doesn't end with acknowledging Daubert/Kumho Tire since, in California, the rules vary depending upon whether you are litigating in state or federal court.

In 1994, our Supreme Court in People v. Leahy, 8 Cal.4th 587, 604, 34 Cal.Rptr.2d 663 (1994) held that the time-honored Kelly/Frye rule 1/ survived Daubert as the standard for "evidence based upon application of a new scientific technique" in state court, then reaffirmed that holding twice in the past two years. People v. Soto, 21 Cal.4th 512, 518, 88 Cal.Rptr.2d 34 (1999); People v. Venegas, 18 Cal.4th 47, 76, 74 Cal.Rptr.2d 262 (1998) ("Venegas").

Meanwhile, this past February, the Ninth Circuit limited the application of Daubert/Kumho Tire, declining to extend either U.S. Supreme Court gatekeeping case to certain types of expert testimony. U.S. v. Hankey, 203 F.3d 1160, 1167-1168 (9th Cir. 2000) ("The Daubert factors were not intended to be exhaustive nor to apply in every case.")

The upshot of all this is that for the practitioner pursuing a product liability case, paying attention to precisely what gatekeeping rules apply in which forum becomes critically important. It also means that you can expect your expert technical evidence will be scrutinized at the trial court level like never before.

The rationale for tweaking expert evidence standards is that the system requires some check on reliability of expert testimony. "The objective of [the Daubert requirement] is to ensure the reliability and relevancy of expert testimony." Kumho Tire, supra, 119 S.Ct. at 1176. "The Kelly test is intended to forestall the jury's uncritical acceptance of scientific evidence or technology that is so foreign to everyday experience as to be unusually difficult for laypersons to evaluate." Venegas, supra, 18 Cal.4th at 80, 74 Cal.Rptr.2d 262.

It follows that in any product liability action, a consumer lawyer must adopt a sword and shield approach.

Fashioning a shield simply requires anticipating expert challenges and preparing to ward off a Daubert attack from the inception of your case. Wielding a sword, on the other hand, contemplates actively attacking defense expert evidence using the same reliability standards that defense counsel employ.

In other words, a canny consumer attorney forearmed with the right evidence is in a position to not only protect their own experts from exclusion orders, but along the way to educate the court regarding the weaknesses in the defense's expert case prior to trial. In a highly technical battle, an educated court can make a significant difference in reaching a final, just result.

II. Dealing With Daubert/Kumho Tire In Federal Court.

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786 (1993) involved a product liability action where the plaintiff was claiming injuries from the drug Bendectin. In Daubert, the Supreme Court reversed the Ninth Circuit and reaffirmed a trial court's exclusion of an expert whose testimony linked Bendectin with birth defects. Along the way, the Court made it clear that federal trial judges now serve as expert witness gatekeepers who are charged with deciding whether proposed expert testimony is reliable, relevant, and so, admissible under Federal Rules of Evidence 702. 2.

In evaluating evidence following Daubert, the trial judge first determines under Rule 104(a) "whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." Daubert at 592. The high Court identified four factors that, though not "a definitive checklist or test," may be applied: (1) whether the theory or technique evidence can and has been tested, (2) whether it has been subjected to peer review and publication, (3) whether there is a known or potential rate of error and whether standards controlling the technique's operation exist, and (4) whether the theory or technique is "generally accepted" in the relevant scientific community. Id. at 593-594.

A split in the federal circuits subsequently developed over whether Daubert controlled only purely "scientific" testimony or in related disciplines that employ scientific tools. So, in another product case, Kumho Tire Co., Ltd. v. Patrick Carmichael, 526 U.S. 137, 119 S.Ct. 1167 (1999) (this time involving a defective tire), the Court held that Daubert principles may apply to all expert testimony, while at the same time, broadening the latitude afforded trial courts performing their gatekeeping inquiry.

"The objective of [the Daubert] requirement is to ensure the reliability and relevancy of expert testimony. . . . Thus, whether or not Daubert's specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine." Kumho at 1176.

On February 18, 2000, the Ninth Circuit filed its opinion in U.S. v. Hankey, 203 F.3d 1160 (9th Cir. 2000) in which it declined to extend Daubert/Kumho Tire to expert testimony in a criminal case. "Kumho Tire heavily emphasizes that judges are entitled to broad discretion when discharging their gatekeeping function. Indeed, not only must the trial court be given broad discretion to decide whether to admit expert testimony, it "must have the same kind of latitude in deciding how to test an expert's reliability." The Daubert factors were not intended to be exhaustive nor to apply in every case." Hankey at 1168 (quoting Kumho Tire at 1178). At this writing, the Supreme Court has not granted review of Hankey.

Where does all this leave plaintiff's counsel in District Court in Southern California? Well, it leaves us guessing about some things and positive about others.

What you should be ready for in a product case in District Court is the prospect of two trials in your case: the first being a Daubert hearing before a trial judge acting as gatekeeper, the second being a jury trial to verdict.

The message is, prepare for a Daubert challenge just as you would prepare for trying the liability and damages. Even though Kumho Tire makes clear that the four Daubert factors are not exhaustive, they make for a useful checklist in preparing the expert portion of your case. It is good practice to go over the Daubert factors with your experts early in the case and stress the importance that they put forward evidence that will highlight the reliability of their testimony. As plaintiff's counsel, we often leave experts to the end of the case hoping to save expense — where there is likelihood of a Daubert challenge that practice may provide little or no time for your experts to flesh out their files sufficiently to withstand a determined attack.

Indeed, a Daubert hearing can provide an excellent opportunity to introduce the trial judge to the strong points of your case. Conversely, don't be fearful of filing your own motions in limine seeking to exclude defense expert testimony as unreliable. Often, you will encounter defense experts who themselves are poorly prepared and may well be unable to withstand your assault on their reliability as witnesses. Depose them using the Daubert/Kumho Tire criteria, then attach that testimony to a short motion. Sometimes all it takes are a few encouraging words from the judge to convince the defense that settlement is in their client's best interest.

Still, beware of the possibility that even if you are successful convincing the trial court that your expert is reliable, an appellate panel may act as a additional gatekeeper in your case. Weisgram v. Marley Co., ___ U.S. ___, 120 S.Ct.1011 (2000), involved a product liability case where the plaintiff sought to recover for wrongful death after a faulty heater started a house fire. The District Court trial judge overruled Daubert challenges to the plaintiff's liability experts both before and during trial. On appeal, the Eighth Circuit found the liability experts did not satisfy the Daubert reliability criteria and so were inadmissible under Rule 702. The Court of Appeals then found that further proceedings were unwarranted because the loser on appeal "had a full and fair opportunity to present the case," and instructed the District Court to enter judgment against the plaintiff.

The Supreme Court affirmed the Eighth Circuit, announcing that Federal Rule of Civil Procedure 50 permits an appellate court "to direct the entry of judgment as a matter of law when it determines that evidence was erroneously admitted at trial and that the remaining, properly admitted evidence is insufficient to constitute a submissible case."

The Weisgram ruling underlines how important it is to adequately prepare for a Daubert challenge in any product liability case. Counsel must be prepared for not only close trial court scrutiny, but appellate scrutiny as well.

III. California Applies The Kelly Rule To "New" Science.

California states courts are much more liberal regarding the introduction of expert testimony in product liability cases. Even so, the opportunity for turning the gatekeeper mechanism to your advantage remains.

Since 1976, judicial gatekeeping function in state court involves evaluating "new" scientific evidence using the Kelly/Frye test enunciated in Frye v. United States, 293 F. 1013 (D.C. Cir 1923) as adopted in People v. Kelly, 17 Cal.3d 24, 130 Cal.Rptr. 144 (1976). Under the Kelly standard, evidence based upon application of a new scientific technique may be admitted only after (1) the reliability of the method has been foundationally established, (2) the proponent of the evidence shows correct scientific procedures were used, and (3) the scientific technique on which the evidence being offered has gained general acceptance in the particular field to which it belongs. People v. Soto, 21 Cal.4th 512, 518-519, 88 Cal.Rptr.2d 34 (1999) ("Soto").

Obviously, the Kelly standard presents a lesser obstacle to plaintiffs presenting their expert case. Though defense counsel will often attempt to argue Daubert in state court, our Supreme Court has specifically held on three occasions that the Kelly rather than Daubert standard controls. Soto, supra, 21 Cal.4th at 515, n.3, 88 Cal.Rptr. 34; People v. Venegas, 18 Cal.4th 47, 53, 74 Cal.Rptr.2d 262 (1998); People v. Leahy, 8 Cal.4th 587, 612, 34 Cal.Rptr.2d 663 (1994).

In state court, expert challenges are usually addressed during hearings under Evidence Code section 402 out of the jury's presence. While the standard for excluding expert testimony in state court is relatively liberal, there is precedent for doing so where the expert's testimony is irrelevant under section 350, even where the testimony is un-contradicted. See People v. Trippet,

56 Cal.App.4th 1532, 1540, 66 Cal.Rptr.2d 559 (1997); but see Kelly v. New West Federal Savings, 49 Cal.App.4th 659, 56 Cal.Rptr.2d 803 (trial court abused its discretion in granting defendant's motion in limine to exclude expert's testimony).

Despite the lowered bar for introducing expert testimony in state court, Daubert and its progeny offer some insights into how to prepare your experts for testifying on cutting edge science or technical issues. The fact is, foundation and methodology that will satisfy a Daubert scrutiny will also likely go a long ways to convincing even strongly conservative judges and juries.

IV. Conclusion.

Usually in products cases with cutting edge issues plaintiff's counsel is faced by a vigorous defense fully over-equipped with experts. Defendants aren't the only ones who can challenge the reliability of expert testimony. While as a consumer attorney you must adequately prepare your own experts to withstand a reliability inquiry, you must not neglect any opportunity to attack defense experts as unreliable witnesses when you catch them unprepared prior to trial.

1/ The Kelly/Frye rule is named for People v. Kelly, 17 Cal.3d 24, 130 Cal.Rptr. 144 (1976), in the California Supreme Court which adopted the test in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). The Frye rule in its turn was disapproved by the U.S. Supreme Court in Daubert. Back 2/ "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." Fed.R.Evid. 702.

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