LAW360

Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

9th Circ. Panel Holds Key To Courts' Gatekeeping Function

Law360, New York (January 23, 2014, 2:31 PM ET) -- On Jan. 15, the en banc U.S. Court of Appeals for the Ninth Circuit issued a decision in Barabin v. AstenJohnson Inc. that significantly strengthened and expanded the gatekeeper role of both trial and appellate courts in determining whether to admit expert testimony.[1]

Under Federal Rule of Evidence 702, before admitting expert testimony, a trial court must determine that the expert is qualified in the relevant field, that the testimony is relevant and that the expert's methodology is reliable.[2] As the procedural history of Barabin demonstrates, however, trial courts have not always followed through on their gatekeeper role, and, instead, have left difficult or controversial questions about the reliability of expert testimony for juries.

In Barabin, the plaintiff alleged that exposure to asbestos from dryer felts used in the manufacture of paper caused his mesothelioma. The manufacturing defendants challenged the qualifications of one of plaintiff's experts and the methodology of another. They also sought an order prohibiting any expert from advancing the theory that every asbestos fiber is causative. The trial court originally excluded the first expert but later reversed itself without explicitly finding that the expert was qualified. It also noted serious questions about both the methodology used by the second expert and the controversial "every fiber" theory of causation but decided that the parties should present those disputes to the jury.

Following trial, the jury returned a verdict for the plaintiff, and the manufacturers appealed.

A closely divided en banc panel of the Ninth Circuit held that the trial court committed reversible error by failing to ensure the relevance and reliability of each expert, theory and methodology challenged under Rule 702.[3] The majority held that a trial court may not avoid difficult or complex issues "by giving each side leeway to present its expert testimony to the jury," but must explicitly find that the proposed testimony is relevant and reliable under Daubert before it may admit such testimony. Moreover, if the trial court fails to perform its gatekeeping role and the challenged evidence is prejudicial to the party seeking exclusion, the proper remedy is a new trial rather than a post-hoc Daubert hearing. That places significant pressure on parties and trial courts to conduct a full pre-trial Daubert hearing and develop a robust record on any challenged aspect of expert testimony lest the entire trial be thrown out on appeal.

The en banc court also held that, if the record below is sufficient, an appellate court may make its own Daubert findings, determine that expert testimony should have been excluded at trial and order entry of judgment for the party seeking exclusion if the testimony was indispensable to the other side's case. Although the Ninth Circuit presumably will employ an abuse-of-discretion standard when deciding the underlying question of admissibility, this holding gives parties a powerful new method of challenging the

admissibility of expert testimony and obtaining appropriate relief when the other side's case depends on inadmissible theories or methodologies.

Five of the 11 judges on the en banc panel dissented in part. They concurred with the majority that the trial court had failed to fulfill its gatekeeping role. They also agreed with the majority's holding that reviewing courts may make their own Daubert findings and order appropriate relief on appeal if the record is adequate. They disagreed with the majority, however, as to the relief that should be ordered when the trial court has failed to fulfill its gatekeeping role and the record is insufficient to allow Daubert findings by the appellate court. According to the dissent, the judgment in such a case should be conditionally vacated and the matter remanded for a post-hoc Daubert hearing,[4] after which the judgment can be reinstated — and appealed again — if the evidence is held to be admissible.

Under Barabin, parties seeking to exclude aspects of their opponent's proposed expert testimony should develop a full record supporting any challenge to the qualifications of an opposing expert, the methodologies employed by an opposing expert or the general theories advanced by opposing experts. They should request pre-trial Daubert hearings on each aspect of the challenged testimony, ask for explicit findings on admissibility and object to any effort by the trial court to punt questions of admissibility to the jury.

Conversely, it is incumbent on the party whose expert testimony has been challenged to obtain an explicit finding on the record that the evidence is admissible under Daubert and rule 702. Moreover, because the Ninth Circuit now serves as a second gatekeeper on the admissibility of expert testimony — and will employ effective remedies if the trial court fails to fulfill its gatekeeping role or erroneously admits unreliable expert testimony — skilled appellate advocacy on Daubert challenges has taken on heightened importance in the Ninth Circuit.

—By Evan M. Tager and Carl J. Summers, Mayer Brown LLP

Evan Tager is a partner in Mayer Brown's Washington, D.C., office where he is a member of the firm's Supreme Court & appellate and class action practices.

Carl Summers is of counsel in Mayer Brown's Washington, D.C., office where he is a member of the firm's Supreme Court & appellate practice.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] Barabin v. AstenJohnson, Inc., No. 10-36142 (9th Cir. Jan. 15, 2014) (en banc).

[2] Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 5l79 (1993).

[3] Slip op. 13.

[4] Id. at 17.

All Content © 2003-2014, Portfolio Media, Inc.