Daubert Motions

Setting the Procedural Stage for Success

by Martin C. Calhoun

Many attorneys are familiar with the admissibility standards that the United States Supreme Court established almost a decade ago to keep "junk science" out of federal courts: admissible expert testimony must be both scientifically reliable and relevant. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589-92 (1993); see also, Fed.R.Evid. 702. The Supreme Court subsequently held that these admissibility standards, which *Daubert* applied to scientific evidence, govern all types of expert testimony. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999).

Moreover, an amendment to Rule 701 of the Federal Rules of Evidence, effective December 1, 2000, precludes lay witnesses from giving opinion testimony "based on scientific, technical, or other specialized knowledge within the scope of Rule 702," which "eliminate[s] the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing." Rule 701, Advisory Committee Notes to 2000 Amendments. In short, *Daubert* and its progeny have "shift[ed] the focus to the kind of empirically supported, rationally explained reasoning required in science, [which] has greatly improved the quality of the evidence upon which juries base their verdicts." *Rider v. Sandoz Pharmaceuticals Corp.*, 295 F.3d 1194, 1197 (11th Cir. 2002)

Although the substantive admissibility standards established in *Daubert* have been discussed in numerous court opinions and scholarly articles, certain important procedural aspects of *Daubert* proceedings have received less attention. *Daubert* issues are often case-dispositive and usually arise in connection with summary judgment arguments. See, *e.g.*, *Hollander v. Sandoz Pharmaceuticals Corp.*, 289 F.3d 1193 (10th Cir. 2002) (granting summary judgment for defendant on *Daubert* grounds); *Glastetter v. Novartis Pharmaceuticals Corp.*, 252 F.3d 986 (8th Cir. 2001) (same). For this reason, attorneys and trial judges who have not had much experience with *Daubert* issues may overlook significant differences between *Daubert* and summary judgment proceedings. To set the stage for a successful *Daubert* challenge, attorneys should consider emphasizing these differences to ensure that the court uses procedures that apply to *Daubert* motions—and not the more familiar summary judgment approach required by Rule 56 of the Federal Rules of Civil Procedure.

Burden of Persuasion and Inferences do not Favor Plaintiffs

The burden of persuasion in *Daubert* proceedings is materially different than the burden imposed on a party seeking summary judgment. To obtain summary judgment, the moving party must establish that "there is no genuine issue as to any material fact" and that the party "is entitled to judgment as a matter of law." Rule 56(c). Satisfying this burden is especially challenging because courts must resolve material factual disputes, and draw all reasonable inferences, in the non-moving party's favor. See, *e.g.*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Allison v. McGhan Medical Corp.*, 184 F.3d 1300, 1306 (11th Cir. 1999).

But in *Daubert* proceedings, the deck is not stacked against the movant. When a *Daubert* motion is filed, the *non-moving party* has the burden of establishing, by a preponderance of proof, that a proper foundation exists for the admissibility of that party's proffered expert testimony. See, *e.g.*, *Daubert*, 509 U.S. at 592 n.10; *Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194, 199 (4th Cir. 2001); *Allison v. McGhan*, 184 F.3d at 1306. The non-moving party must persuade the court that the expert's testimony satisfies the *Daubert* standards, and the "court is not required to simply 'tak[e] the expert's word for it.'" *Caraker v. Sandoz Pharmaceuticals Corp.*, 188 F.Supp.2d 1026, 1030 (S.D.Ill. 2001), quoting Rule 702, Advisory Committee Notes to 2000 Amendments.

Moreover, the party opposing a *Daubert* motion to exclude evidence is not entitled to have the court resolve disputed issues of fact in that party's favor. "On a motion for summary judgment, disputed issues of fact are resolved against the moving party…. But the question of admissibility of expert testimony is not such an issue of fact…." *General Electric Co. v. Joiner*, 522 U.S. 136, 143 (1997).

This distinction can be especially important in complex products liability lawsuits, where individual pieces of evidence may support different conclusions as to whether a product caused a plaintiff's injuries. For example, in a breast implant case, the Eleventh Circuit affirmed a summary judgment ruling that resulted from a *Daubert*-based exclusion of plaintiff's experts' causation opinions. *Allison v. McGhan, supra*. The district court had found that four epidemiological studies offered to support an expert's causation opinion were "in direct contrast to over twenty other epidemiological studies which found no statistical correlation between silicone breast implants and systemic disease." *Id.*, 184 F.3d at 1315.

If a court were to analyze the causation issue presented by these epidemiological studies solely—and incorrectly—through the Rule 56 summary judgment lens (assuming no other causation evidence), the court might be inclined to construe these "facts" in the plaintiff's favor and hold that she had shown the need for a jury trial by presenting sufficient evidence to create a genuine issue of material fact regarding causation. But, as *Allison* demonstrates, the correct approach in these circumstances would require the court first to scrutinize such causation evidence through the *Daubert* lens. In that context, the plaintiff would not receive the benefit of any inferences. Instead, because the plaintiff would have the burden of establishing the admissibility of her experts' causation opinions by showing that they satisfy *Daubert*, epidemiological studies that are scientifically unreliable or irrelevant to the injuries at issue in a particular case, see *Allison*, 184 F.3d at 1315, would not support the admissibility of those opinions. In other words, once a court concludes that an expert's causation opinions must be excluded on *Daubert* grounds, there are no factual inferences to draw in the plaintiffs' favor on the causation element, and summary judgment necessarily follows because the plaintiffs "cannot prove their claim without expert

continued on page 61

Martin C. Calhoun is a partner in the Washington, D.C. law firm of Spriggs & Hollingsworth, where his practice includes applying *Daubert* principles to defend pharmaceutical products liability and toxic tort lawsuits.

***Daubert* Motions, from page 19**

testimony." *Hollander v. Sandoz Pharmaceuticals, supra*, 289 F.3d at 1214.

Rule 104(a) Triggers Evidentiary Hearing

Different evidentiary standards apply to *Daubert* and summary judgment proceedings. When deciding summary judgment motions, courts focus on whether the party opposing the motion has presented evidence that would be admissible at trial. See, *e.g.*, *Pamintuan v. Nanticoke Memorial Hospital*, 192 F.3d 378, 387 n.13 (3d Cir. 1999); *Horta v. Sullivan*, 4 F.3d 2, 8 (1st Cir. 1993).

However, because *Daubert* motions must be resolved under Rule 104(a) of the Federal Rule of Evidence, courts deciding such motions are "'not bound by the rules of evidence.'" *Daubert*, 509 U.S. at 592 n.10, quoting Rule 104(a); see also, *Ruffin v. Shaw Industries, Inc.*, 149 F.3d 294, 296-97 (4th Cir. 1998); *Siharath v. Sandoz Pharmaceuticals Corp.*, 131 F.Supp.2d 1347, 1350 n.4 (N.D.Ga. 2001), *aff'd sub nom., Rider v. Sandoz Pharmaceuticals Corp.*, 295 F.3d 1194 (11th Cir. 2002). Determining "[p]reliminary questions concerning… the admissibility of evidence," Rule 104(a), is an entirely different decision-making process than determining whether a party has presented sufficient admissible evidence to survive a summary judgment motion and warrant a trial on the merits.

Cross-Examination Can Knock Out the Expert

Despite the reference to a "hearing" in Rule 56, courts usually decide summary judgment motions on the papers or after oral argument, based on deposition testimony, affidavits, documents, or other materials submitted by the parties. Courts rarely hold evidentiary hearings on summary judgment motions. See, *e.g.*, *March v. Levine*, 249 F.3d 462, 473 (6th Cir. 2001); *Seamons v. Snow*, 206 F.3d 1021, 1025-26 (10th Cir. 2000). Such hearings may be deemed unnecessary because courts are prohibited from assessing witness credibility or deciding factual disputes when resolving summary judgment motions. See, *e.g.*, *Seamons*, 206 F.3d at 1025-27.

As a practical matter, the typical approach of deciding summary judgment motions without evidentiary hearings often gives the non-moving party a significant tactical advantage. Unless admissions or other information elicited during discovery have left the non-moving party without any wiggle room, he can at least attempt to avoid summary judgment simply by submitting his own affidavit (or an expert witness's affidavit) to create a genuine issue of disputed fact. At that point, the moving party cannot cross-examine the affiant at a hearing, and a rebuttal affidavit often would have the counter-productive effect of drawing attention to a purported factual dispute.

By contrast, using an affidavit to defeat a *Daubert* motion is not as easy because courts frequently exercise their discretion to hold evidentiary hearings on such motions. Indeed, after the Supreme Court remanded *Daubert* in its 1993 decision, the circuit court stated that a trial judge is *required* to hold an *in limine Daubert* hearing when conflicting evidence exists that is material to determining whether the expert witness used a scientifically reliable methodology. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1319 n.10 (9th Cir. 1995). Although not requiring *Daubert* hearings, other circuit courts have acknowledged the importance of such hearings. For example: "We have long stressed the importance of *in limine* hearings under Rule 104(a) in making the reliability determination required under Rule 702 and *Daubert*." *Padillas v. Stork-Gamco, Inc.*, 186 F.3d 412, 417 (3d Cir. 1999). Another court said that *Daubert* hearings "are almost always fruitful uses of the court's time and resources in complicated cases involving multiple expert witnesses." *City of Tuscaloosa v. Harcros Chemicals, Inc.*, 158 F.3d 548, 564 n.21 (11th Cir. 1998). See also, *Kumho Tire v. Carmichael, supra*, 526 U.S. at 152 (district courts have discretion as to how they resolve *Daubert* motions, including "decid[ing] whether or when special briefing or other proceedings are needed to investigate reliability").

When a court orders a *Daubert* evidentiary hearing, experts whose opinions have been challenged can no longer hide behind their affidavits. They are required to explain their methodologies and opinions, giving the court an opportunity to scrutinize their testimony first-hand and see how the expert holds up under cross-examination. Cross-examination can be a powerful tool for showing that an expert's proffered opinions are not scientifically reliable, as one federal court recognized after conducting a *Daubert* hearing in a pharmaceutical products liability case:

> Cross-examination of experts is very important in determining whether their testimony is reliable or relevant. Cross-examination of plaintiffs' expert witnesses in this case is particularly instructive. Dr. Kulig demonstrated frequent episodes of poor or selective memory, and his answers, when challenged, demonstrate the unreliability of his conclusions.

Glastetter v. Novartis Pharmaceticals Corp., 107 F.Supp.2d 1015, 1024-25 (E.D.Mo. 2000) (excluding plaintiffs' experts' causation opinions), *aff'd*, 252 F.3d 986 (8th Cir. 2001).

Evidentiary hearings are especially useful to courts facing *Daubert* motions because, in this context, a disputed issue of fact does not necessarily mean that the motion must be denied. Instead, when conflicting evidence is presented on an issue that is material to the court's determination of whether the proffered expert testimony satisfies the *Daubert* requirements of scientific reliability and relevance, the court is required to conduct preliminary fact-finding with respect to those issues. See, *e.g.*, *Moore v. Ashland Chemical, Inc.*, 151 F.3d 269, 276 (5th Cir. 1998) (citing Rule 104(a)); *Daubert*, 43 F.3d at 1318-19 n.10 (same).

Ask the Court to Schedule *Daubert* Proceedings

Courts routinely enter scheduling orders at the outset of a lawsuit. These orders set deadlines for how the case will proceed through various stages, including discovery and the filing of summary judgment motions. See, *e.g.*, Fed.R.Civ.P. 16(b). However, standard scheduling orders (and the local rules that apply to them) rarely set separate deadlines for *Daubert* motions and do not take into account the significant amount of time required between the close of discovery and trial for adequate *Daubert* briefing and a possible evidentiary hearing.

When a court overlooks these logistical issues, the plaintiff usually benefits. *Daubert* motions often present complex scientific issues, and a rushed, overburdened trial court is one of the biggest obstacles to obtaining a *Daubert* ruling that excludes a plaintiff's expert's opinions. In other words, defendants' interests are served by scheduling orders that give them sufficient time to prepare substantial *Daubert* motions and give courts ample opportunity to decide such motions before trial, including conducting evidentiary hearings in appropriate cases.

Consequently, attorneys defending cases that may present significant *Daubert* issues should consider informing courts of that possibility before the courts issue scheduling orders. By specifically identifying a case at the earliest stages as a "*Daubert* case" and asking

the court to set time aside for appropriate *Daubert* proceedings, defense counsel increase the likelihood of obtaining a scheduling order that enables the court to issue a careful, well-considered *Daubert* opinion well in advance of trial—instead of a hasty ruling issued from the bench the morning of the first trial day.

Trial Courts have Broad Authority When Deciding *Daubert* Motions

When deciding a summary judgment motion, a trial court's authority is narrow and strictly circumscribed by Rule 56(c). Appellate courts subject summary judgment rulings to scrutiny under the *de novo* standard of review. See, *e.g.*, *Bailey v. Allgas, Inc.*, 284 F.3d 1237, 1242 (11th Cir. 2002); *Brooks v. Outboard Marine Corp.*, 234 F.3d 89, 91 (2d Cir. 2000).

But trial courts have substantially more freedom when deciding *Daubert* issues. As with other kinds of evidentiary rulings, courts have discretion to grant or deny a motion to exclude expert evidence on *Daubert* grounds. See, *e.g.*, *Kumho Tire v. Carmichael, supra*, 526 U.S. at 158; *Brumbaugh v. Sandoz Pharmaceutical Corp.*, 77 F.Supp.2d 1153, 1155 (D.Mont. 1999). On appeal, courts apply the deferential, abuse-of-discretion standard when reviewing *Daubert* rulings. See, *e.g.*, *Kumho Tire*, 526 U.S. at 158; *General Electric v. Joiner*, *supra,* 522 U.S. at 143.

Conclusion

Attorneys seeking to exclude expert testimony should consider educating the trial judge about the procedural differences between *Daubert* and summary judgment proceedings, especially when the judge has not had extensive experience with *Daubert* motions. These differences are significant because courts may be reluctant to grant summary judgment motions and sometimes summarily deny them to give plaintiffs their "day in court." By shining a spotlight on these differences—and perhaps even filing a separate *Daubert* motion to exclude evidence (instead of making *Daubert* arguments in a summary judgment motion)—attorneys may overcome this occasional judicial aversion to issuing dispositive rulings.

Judges who fully understand the significant procedural differences between *Daubert* and summary judgment proceedings are more likely to scrutinize proffered expert testimony rigorously to ensure that it meets *Daubert*'s "exacting standards of reliability," *Weisgram v. Marley Co.*, 528 U.S. 440, 455 (2000), than judges who mistakenly believe that summary judgment principles and procedures govern *Daubert* issues as well. A defendant who ensures that the judge grasps these procedural distinctions sets the stage for a successful attack on the opponent's key evidence and increases the chances that the court will diligently discharge its gatekeeping role by "separat[ing] expert opinion evidence based on 'good grounds' from subjective speculation that masquerades as scientific knowledge." *Glastetter v. Novartis Pharmaceuticals, supra*, 252 F.3d at 989. FD