

## Amicus Urges Supreme Court to Reverse Causation Junk Science Decision

October 20, 2011 by [Sean Wajert](#)

DRI (the Defense Research Institute) last week submitted an amicus brief urging the Supreme Court to review a federal appeals court decision that threatens to undermine the gatekeeper role of the trial courts on expert testimony. *United States Steel Corp. v. Milward v. Acuity Specialty Products Group Inc.*, No. 11-316 ( U.S., [amicus petition](#) filed 10/12/2011).

Most of our readers know that [DRI](#) is an international organization that includes more than 23,000 attorneys involved in the defense of civil litigation. DRI has long been a voice in the ongoing effort to make the civil justice system more fair, efficient, and—where national issues are involved—consistent. (Your humble blogger is a member.)

In this case, the plaintiff alleged that he contracted a rare form of cancer, acute promyelocytic leukemia (APL), through exposure to benzene or benzene contaminants. The plaintiff's expert acknowledged that science has not determined what causes or can cause APL, but opined that, based on his own "judgment," the "weight of evidence" supported a conclusion that APL could be caused by benzene exposure. After a four-day hearing, the district court excluded the expert testimony as unreliable under *Daubert*, and *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997)(district courts need to exclude proof that is connected to the data only by the ipse dixit of an expert), finding that it amounted to no more than a plausible hypothesis. The U.S. Court of Appeals for the First Circuit reversed and reinstated the case, holding that it was an abuse discretion to exclude this evidence as to possible causation.

The First Circuit in this case appeared to think that district courts not only may but must admit speculative expert testimony that rests on nothing more than the expert's subjective judgment that an untested hypothesis is supported by the "weight of the evidence." That decision conflicts with Supreme Court guidance and with the decisions of [other circuits](#) holding that expert testimony is admissible only when it rests on a reliable scientific foundation, and that a district court is not required to accept an expert's ipse dixit but must instead carefully examine the methods and data underlying the expert's opinion to ensure that the expert has reliably applied valid scientific principles. Without such an inquiry, the "gatekeeper" function the Federal Rules of Evidence envision for the district court judge becomes meaningless.

DRI correctly points out that the weight-of-the-evidence methodology the court of appeals endorsed does not satisfy the criteria *Daubert* adopted for assessing the reliability of expert testimony. It is neither testable nor falsifiable; it is not governed by any objective standards; and it has not been generally accepted by the scientific community as a means to assess medical causation absent an observed association between the substance and disease at issue. The fact that some regulatory agencies use an arguably similar, lower bar, methodology to assess risks to public health based on the available data does not mean that it yields "scientific knowledge" admissible under the very different standards governing a court proceeding.

Moreover, the district court's essential gate-keeping role is particularly important on the issue of [medical causation](#). That issue is often dispositive in toxic tort and product liability cases, which can involve enormous stakes not only for the parties, but also for the national economy. The lay jurors who decide these complicated issues are likely to be greatly influenced by testimony that appears to be scientific in nature coming from a witness whom the court has admitted as an "expert." The decision by the First Circuit undermines the critical screening function district courts perform to prevent juries from being misled by speculation masquerading as scientific knowledge.