

No Daubert Hearing Equals \$10 Million Error in 9th Circuit



by [Maggie Tamburro](#)

The U.S. Supreme Court isn't the only judicial panel to wrestle with difficult *Daubert* questions lately.

While the Supreme Court ponders the potential fate of *Daubert's* role in [certifying a class](#), on the opposite side of the country the 9th Circuit has decided a case that makes failure to hold a *Daubert* hearing a very costly error in that regional jurisdiction.

In a decision published November 16, 2012, the 9th Circuit panel has held that a district court's failure to hold a *Daubert* hearing or otherwise determine the relevance and reliability of expert testimony was an abuse of discretion, resulting in reversible error which dictated a new trial.

The defendants involved in the case might be pleased with the panel's decision, as the district court entered a judgment for plaintiffs of almost \$10 million following a jury verdict – a pricey award against defendants which was effectively erased when the 9th Circuit vacated the judgment and remanded the case.

For the Record . . .

The decision is one that merits attention by plaintiff and defense counsel in the 9th Circuit (and potentially other regional circuits), as it underscores the importance that a relevancy and reliability determination be sufficiently made on the record before expert testimony can be presented to a jury. Failure to do so can jeopardize a verdict, as well as be potentially costly in both time and possible future legal fees.

The case involved a claim that plaintiff developed mesothelioma caused by occupational exposure to asbestos. Following a motion in limine filed by one of the defendants, the district court excluded one of plaintiffs' experts based upon his alleged "dubious credentials and his lack of expertise . . ." That, however, wasn't the end of the case.

At a pretrial conference, upon plaintiffs' motion seeking reconsideration of the district court's initial ruling excluding the expert, the district court changed its

mind and reversed its decision to exclude, allowing the expert testimony based upon additional information supplied in plaintiffs' motion.

A jury trial ensued (together with various motions by defendants) and the district court ultimately entered a judgment affirming a jury award of almost \$10 million in favor of plaintiffs.

No *Daubert* Hearing Equals Reversible Error

However, the district court made a mistake that the 9th Circuit would later find fatal on appeal – although it considered additional information about the expert contained in the plaintiffs' motion for reconsideration, the district court never actually held a *Daubert* hearing.

As a result, the 9th Circuit was unsatisfied with the lack of reliability or relevance determinations on the record at the district court level. The panel implied that the explanation given by the district court for failure to hold a *Daubert* hearing was insufficient, stating, "The extent of the court's explanation was: 'I think plaintiffs did a much better job of presenting to me the full factual basis behind [plaintiffs' expert] testifying and his testimony in other cases. . . .'"

The circuit panel rejected this approach, stating, "Unfortunately, because no *Daubert* hearing was conducted as requested, the district court failed to assess the scientific methodologies, reasoning, or principles [plaintiffs' expert] applied. None of the *Daubert* factors was considered. Instead, the court allowed the parties to submit the experts' unfiltered testimony to the jury."

The circuit panel pointed out "the decision to admit or exclude expert testimony is often the difference between winning and losing a case . . . The potentially significant influence of expert testimony underscores the importance of assiduous 'gatekeeping' by trial judges."

According to the 9th Circuit, the district court dropped the ball when it came to its gatekeeping role set forth in FRE 702 and *Daubert* – that of first determining whether an expert's proffered testimony is reliable and "trustworthy" before allowing its presentation to the jury. Once the district court was presented with additional information in plaintiffs' motion, submitted in response to defendant's motion in limine to exclude, "at a minimum the district court was required to assess the scientific reliability of the proffered expert testimony."

Criticizing the district court for leaving the relevance and reliability determinations here to the jury, the 9th Circuit stated, "*Kumho* and *Daubert* make it clear that the court must, on the record, make some kind of reliability determination." Concluding that the district court failed to do that here, the 9th Circuit determined that the district court abused its discretion and committed reversible error.

The result? The majority circuit panel, rather than remanding the case first for *Daubert* determination (as was suggested by one Circuit Judge in a concurring opinion), decided that the *Daubert* error at the district level was severe enough to warrant a new trial. Thus, the district court judgment was vacated, and the case remanded for a new trial.

Is a *Daubert* Hearing Always Required?

Whether or not a full *Daubert* hearing is necessary is a question that has differed among regional circuits, depends on case facts and circumstances, and has been the subject of interesting [legal commentary](#). Circuit courts (as was similarly alluded to by the U.S. Supreme Court during recent *Comcast Corp. v. Behrend* oral arguments) seem to be concerned not so much with strict adherence to a predetermined format or “[magic words](#),” but rather a showing – on the record, no less – that the district court has sufficiently assessed an expert’s proffered testimony and determined it is reliable and relevant before it can be presented to a jury.

The case is [Barabin v. Astenjohnson, Inc.](#) (9th Circuit, Nov. 16, 2012).

Under what circumstances do you think a full *Daubert* hearing is required? Do you agree with the 9th Circuit’s finding that a new trial was warranted in this case? Or do you think the parties should have been allowed to conduct and “retroactively” apply a *Daubert* hearing, with the decision to conduct a new trial dependent on the outcome of the hearing?

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