Top Five Expert Rulings of 2010 (So Far)

By Robert Ambrogi

Halfway through, 2010 is already shaping up to be a year of significant rulings involving expert witnesses. In this edition of BullsEye, we look back over the first half of 2010 and highlight the five most important expert rulings handed down this year.

1. Answering an Unanswered Question

It is rare when a common question about expert testimony has never been decided by a single appellate court. But that was the case with the question of whether federal courts must resolve challenges to the plaintiffs' expert witnesses before certifying a case as a class action.

The closest a federal appeals court ever came to ruling on the question was in 2007, when the 9th U.S. Circuit Court of Appeals issued an opinion, *Dukes v. Wal-Mart Inc.*, saying that a full *Daubert* review is not required at the class-certification stage. Several months later, the 9th Circuit withdrew the opinion and replaced it with another that was silent on the issue.

That is why it was notable when the 7th Circuit issued a *per curiam* opinion that addressed the question directly and was unequivocal in its answer. The trial court must conclusively rule on the admissibility of an expert opinion prior to class certification, the court ruled.

"We hold that when an expert's report or testimony is critical to class certification, … a district court must conclusively rule on any challenge to the expert's qualifications or submissions prior to ruling on a class certification motion," the 7th Circuit said. "That is, the district court must perform a full *Daubert* analysis before certifying the class if the situation warrants."

American Honda Motor Company Inc. v. Allen, 600 F.3d 813 (7th Cir. 2010).

2. An 'Expert' By Any Other Name …

If a rose by any other name would smell as sweet, does the same hold true for an expert witness? In a case challenging the trial court's failure to designate a witness as an expert, the 9th Circuit said the key test of error is not how the court labeled the witness, but what it allowed the witness to say.

The question came up after defendants were convicted of conspiracy to commit securities fraud. On appeal, they argued that the judge abused his discretion by failing to permit a defense witness to testify as a securities expert.

Even though the trial court did not permit the witness to testify as an expert, it did allow him to testify as what it called a "summary" witness. With this designation, the judge gave the defendants wide range to question the witness. In and of itself, the trial court's failure to call the witness an "expert" was not error, the 9th Circuit said.

"The determination that a witness is an expert is not an express imprimatur of special credence; rather, it is simply a decision that the witness may testify to matters concerning 'scientific, technical, or other specialized knowledge,'" the court reasoned. "It is the *scope* of testimony excluded by the district court that we must examine, not the court's nominal decision not to *label* [him] an 'expert.'"

To the extent the judge limited the scope of the witness's testimony in this case, the error was harmless and did not require reversal of the convictions, the 9th Circuit concluded.

United States v. Laurienti, __ F.3d __ (9th Cir. June 16, 2010).

3. 'Magic Words' Do Not an Expert Make

A medical expert is required to state his medical opinions within a reasonable degree of medical certainty. So what should happen when a medical expert's testimony is sprinkled with phrases such as "my guess is" and "I am not sure."?

That was the question presented to the Mississippi Court of Appeals in the appeal of a defense verdict in a medical malpractice case. These phrases, the plaintiff argued on appeal, demonstrated that the expert's opinions were not based upon a reasonable degree of medical certainty.

Upholding the testimony, the Court of Appeals ruled that there is no requirement than an expert "use magical language in his testimony," provided the import of the testimony is apparent.

"[The expert] did not always use the magic words 'within a reasonable degree of medical certainty or probability' during his testimony," the court explained. "However, [the expert] stated under oath from the very beginning of his testimony that he would state his medical opinion based on a reasonable degree of medical certainty or probability."

Considering his testimony as a whole, the court concluded, that is what he did.

Vanlandingham v. Patton, No. 2008-CA-01994-COA (Miss. App., June 1, 2010).

4. Knowledge Trumps Credentials in an Expert

Credentials are a key determinant of an expert's qualification to testify. But how tightly should credentials limit the scope of an expert's testimony? May an expert's testimony cross over into an area in which he has no formal credentials?

Lack of formal credentials should not bar expert testimony, the 1st Circuit concluded, if the testimony would assist the judge or jury in understanding a fact in issue and rests on a reliable foundation.

The question arose in an obstetrical malpractice case in which the judge barred the expert from providing testimony on the standard of care because she was not board-certified in OB/GYN. Rather, she was certified in perinatal and neonatal medicine.

Considering the expert's overall experience and training, the 1st Circuit held, she clearly had the specialized knowledge that would enable her to assist the judge and jury in understanding the case.

"The Rules of Evidence require that the judge admit expert testimony relevant to the disposition of the case when it will assist the trier of fact in understanding a fact in issue and rests on a reliable foundation," the court said.

Pagés-Ramírez v. Ramírez-González, ___ F.3d ____ (1st Cir., May 19, 2010).

5. Expert's Reputation Precedes Him

Trial judges often issue rulings without providing explanations. That helps them move cases more quickly. But it can present a quandary to an appeals court having to review the ruling.

Such was the case when the trial judge excluded the plaintiffs' expert in an insurance-coverage case against Allstate stemming from Hurricane Katrina. The judge issued an order granting the defendant's motion to exclude the expert, but he never explained why.

On appeal, the 5th Circuit noted the judge's lack of explanation. But the court also noted that four other federal judges from within the same federal judicial district had previously excluded testimony from the very same expert. Those other four judges had given their reasons, calling the expert unqualified, his methodologies flawed and his opinions speculative.

"Even without the benefit of an explanation as to its reasoning from the district court, rulings of other judges in the Eastern District of Louisiana and the facts propounded by Allstate demonstrate that a determination to exclude [the expert's] testimony as an expert witness under Rule 702 does not amount to an abuse of discretion," the court concluded.

Nunez v. Allstate Insurance Company, ___ F.3d ___ (5th Cir., April 20, 2010).

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