Top 10 Expert Rulings of 2010

By Robert Ambrogi

The most important judicial action involving expert witnesses in 2010 came in the year's waning days. On Dec. 6, the Supreme Court agreed to hear a case that could decide the standard for use of expert testimony when a court is weighing whether to certify a class action. The case was already notable, having certified the largest employment class action in U.S. history.

But that was not the only significant court case involving expert witnesses during 2010. Several cases further refined the law governing the use of expert witnesses while others highlighted the critical role expert witnesses can play in a trial.

In this year-end edition of *Bullseye*, as we have done in past years, we highlight the ten most important expert rulings of 2010.

1. Daubert and Class Certification.

Earlier this year, in a closely divided 6-5 decision in a case against Wal-Mart, the en banc 9th U.S. Circuit Court of Appeals certified the largest employment class action ever. The nationwide class includes every woman ever employed at any U.S. Wal-Mart store since December 1998. The plaintiffs seek billions of dollars in damages under Title VII of the Civil Rights Act of 1964.

The ruling was significant in itself, but was made even more so when Wal-Mart sought review by the Supreme Court. On Dec. 6, the Supreme Court entered an order accepting the case for review.

A central issue in the case – one Wal-Mart raised in its petition for review – is the degree to which the standard for expert testimony set by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993), applies at the class-certification stage.

Wal-Mart challenged as unreliable and inadmissible the conclusion of the plaintiffs' expert that Wal-Mart's size made it "vulnerable to gender bias." But the 9th Circuit suggested that *Daubert* is to be applied more leniently at the class-certification stage. "We are not convinced … that *Daubert* has exactly the same application at the class certification stage as it does to expert testimony relevant at trial," the court said.

That puts the 9th Circuit at odds with the 7th Circuit, which explicitly ruled earlier this year that the trial court must conclusively rule on the admissibility of an expert opinion prior to class certification, and with other circuits that have suggested that to be their view of the law.

With its decision to grant review of the Wal-Mart case, the Supreme Court will now have the opportunity to put the question to rest.

Dukes v. Wal-Mart Stores, Inc., 603 F. 3d 571 (9th Cir. 2010).

2. Dueling Experts Lead to Record Verdict.

Oracle Corp. truly had something to be thankful for this Thanksgiving. Just two days earlier, a jury awarded it $1.3 billion in a copyright infringement action against SAP AG. The verdict was the largest ever in a copyright infringement lawsuit and the largest verdict of any kind in 2010.

After an 11-day trial, the outcome of the case appeared to turn on the dueling testimony of two expert witnesses. SAP did not dispute that it was liable for the infringement by its now-shuttered subsidiary, TomorrowNow, which Oracle said had illegally copied its software to avoid paying license fees. Rather, the issue for trial was the level of damages SAP should pay.

Oracle's expert testified that the measure of damages should be the fair market value of the license SAP should have negotiated with Oracle. He put the value of that license at $1.6 billion. SAP's expert contended that the correct measure of damages should be Oracle's lost profits. He valued Oracle's loss at $40.6 million.

After deliberating just a day, the jury returned its jaw-dropping $1.3 billion verdict for Oracle. The jury foreman later said the verdict was intended to reflect the fair market value of the lost licensing fees.

Attorneys for SAP say they will ask the trial judge to reduce the award. Failing that, they will appeal.

Oracle USA Inc. v. SAP AG, Case No. 07-1658 (N.D. Calif).

3. Answering an Unanswered Question

It is rare when a common question about expert testimony has never been squarely 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 its first opinion in the case discussed above, *Dukes v. Wal-Mart Inc.*, saying that a full *Daubert* review is not required at the class-certification stage. The 9th Circuit later withdrew that opinion.

That is why it was notable when the 7th Circuit earlier this year issued a *per curiam* opinion that addressed the question directly and was unequivocal in its answer. At the

time the ruling came out, the 9th Circuit had yet to issue the *Dukes* opinion that is now headed to the Supreme Court. The 7th Circuit held that the trial court must conclusively rule on the admissibility of an expert opinion prior to class certification.

"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).

4. Consumer Surveys as Evidence of Trademark Infringement

When Victoria's Secret began selling a hot pink tank top with the word "Delicious" written in silver across the chest, the owner of the Delicious trademark saw red. Fortune Dynamic, which owned the trademark for a line of footwear, brought suit against the lingerie company, only to have its complaint dismissed on summary judgment.

The trial court granted summary judgment after issuing a ruling excluding the testimony of Victoria's Secret's expert witness. The expert conducted an online survey of young women to determine the likelihood of confusion between Fortune's footwear and Victoria's Secret's tank top. Based on the results of the survey, the expert concluded that there was a likelihood of confusion among consumers between the two products.

The trial court ruled that this evidence was not reliable because the survey compared the two products side-by-side and failed to replicate real-world conditions. But on appeal to the 9th Circuit, the appellate panel reversed the lower court.

"We conclude that the district court abused its discretion in excluding the survey because [the expert] appears to have conducted the survey in accordance with accepted principles, and because the results of the survey are relevant to the ultimate question whether Victoria's Secret's use of 'Delicious' was likely to confuse consumers," the court said.

Fortune Dynamic Inc. v. Victoria's Secret Stores Brand Management Inc., ___ F.2d ___ (9th Cir. Aug. 19, 2010).

5. Taking a Hard Line on Rule 702's Knowledge Requirement

When the 6th U.S. Circuit Court of Appeals overturned a $21 million jury verdict in a product liability case over the insufficiency of expert testimony, legal commentators praised the case for adhering to the clear text of Federal Rule of Evidence 702, rather than the more ambiguous language of the Supreme Court's *Daubert* decision.

The carefully worded opinion reversed a jury verdict in favor of a welder who claimed his exposure to manganese caused him to develop parkinsonism. The court held that the

expert testimony of the medical doctor who attributed the welder's disease to his manganese exposure fell on the wrong side of "the often-elusive line between admissible opinion and inadmissible speculation."

While the court was careful to praise the expert as intelligent and knowledgeable, it said that his testimony concerning causation was at best a working hypothesis, not admissible scientific knowledge. "Because the 'knowledge' requirement of Rule 702 requires 'more than subjective belief or unsupported speculation,'" the court said, "the testimony should have been excluded."

Adding to the significance of the case was that it was one of the first to go to trial of several against manufacturers of welding supplies that were consolidated as multidistrict litigation in the Northern District of Ohio. As the 6th Circuit's opinion noted, this case was seen as a "bellwether … to guide the resolution of the other cases."

Tamraz v. Lincoln Electric Company, ___ F.3d ___ (6th Cir. Sept. 8 2010).

6. 'Monte Carlo' Analysis Held to be Reliable.

Monte Carlo is a name associated with glamorous gambling casinos, but it also refers to a form of statistical analysis. In an environmental case seeking to allocate hazardous-waste clean-up costs between two companies, the 5th U.S. Circuit Court of Appeals ruled that an expert's use of the Monte Carlo method met the standard of reliability to be admissible under *Daubert*.

Neither company contested liability for a portion of the environmental cleanup at a hazardous waste dump near the Houston Ship Channel. At trial, the primary issue was the apportionment of the remediation costs between the two companies, Occidental Chemical Co. and El Paso Tennessee Pipeline Co.

The district court appointed an expert in environmental engineering to assist in allocating cleanup costs. To determine disposal volumes for each company, the expert used the Monte Carlo statistical methodology, a technique that measures the probability of various outcomes, within the bounds of input variables.

Although the method has been used by physicists in nuclear research and in various other fields, Occidental challenged the method as unproven in environmental cases. The method had not been tested in such cases and had a rate of error that could not be reliably evaluated, Occidental argued.

"Just because a Monte Carlo simulation produces a range of outcomes, rather than one single numerical value, does not mean it is speculative," the 5th Circuit said in rejecting these arguments. "If anything, Monte Carlo analysis provides greater certainty than the basic alternatives."

Lyondell Chemical Co. v. Occidental Chemical Corp., 608 F.3d 284 (5th Cir. 2010).

7. Heating up the Debate over 'Reasonable Royalties'

In patent litigation, the question of how to calculate reasonable royalties as a measure of damages for infringement bedevils courts and litigants alike. Uncertainty about the answer is one of the driving forces behind efforts in Congress to reform the nation's patent laws.

The heat got turned up even higher this year when the Federal Circuit Court of Appeals overturned a $500,000 reasonable-royalty award, ruling that the expert testimony on which it was based was speculative and unreliable.

In giving his opinion that a reasonable royalty rate would be 12.5 percent, the expert relied heavily on royalties received by the patentee under its other license agreements. The problem with this, the Federal Circuit said, was that five of the seven licenses on which the expert based his opinion had no relation to the invention at issue.

To make matters worse, the court said, those five unrelated licenses had substantially higher royalty rates – some nearly eight times greater – than the two licenses that were related to the invention. Because of this, the expert's use of those unrelated licenses drove his recommended royalty rates into double digits. The rate he recommended was more than twice those in the licenses that did cover the invention.

"Because the district court's award relied on speculative and unreliable evidence divorced from proof of economic harm linked to the claimed invention and is inconsistent with sound damages jurisprudence, this court vacates the damages award and remands," the Federal Circuit said.

ResQNet.com, Inc. v. Lansa, Inc., 594 F.3d 860 (Fed. Cir. 2010).

8. 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, 611 F.3d 530 (9th Cir. 2010).

9. 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, 605 F.3d 109 (1st Cir. 2010).

10. Lawyers Booted for Hiring Opponent's Expert

Court opinions involving legal ethics and expert witnesses are few and far between. Those that come from a supreme court are even rarer. Thus, it was particularly notable when the North Carolina Supreme Court pulled two out-of-state plaintiffs' lawyers off a product liability case because of their inappropriate conduct in luring away their opponent's expert witness.

The question for the court was whether to revoke the *pro hac vice* status of two lawyers who represented the plaintiffs in a lawsuit against Abbott Laboratories. The lawsuit

alleged that powdered Similac infant formula contained the bacteria known as E. Sak and caused a prematurely born infant to contract a rare form of meningitis.

The factual trail that led to the ruling is complicated. It began in Kentucky, where the same two lawyers handling a Similac case there contacted Abbott's expert and retained him for still another case. At the time of this contact, the expert was under a retainer agreement with Abbott to provide ongoing consulting services in related cases.

Back in North Carolina, Abbott filed a motion asking the judge to revoke the two lawyers' admissions. The lawyers' actions in Kentucky, Abbott argued, had deprived it of the services of its retained expert and thereby crippled its ability to defend itself in the North Carolina lawsuit.

The trial judge agreed, ruling that the attorneys' conduct in the Kentucky case required their disqualifications from the North Carolina case. Although the Court of Appeals reversed the judge, the Supreme Court reinstated the sanction, saying that the trial judge had the "independent inherent authority to discipline attorneys."

The trial judge's finding that the lawyers acted inappropriately by contacting the expert when he was not represented by counsel adequately supports the conclusion that the lawyers created an appearance of impropriety and acted inconsistently with the type of fair dealings expected of them, the Supreme Court found.

Sisk v. Transylvania Community Hospital, 364 N.C. 172 (N.C. 2010).

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