Surviving a "Gatekeeping" Challenge – Expert Rulings Shed Light

by Maggie Tamburro

This week we bring you two fresh district court rulings involving experts who *survived* "gatekeeping" admissibility challenges under Federal Rule of Evidence 702 and *Daubert*.

The rulings serve as a reminder that FRE 702 can embrace a liberal standard of admissibility of expert testimony, depending on the case and the nature of the expert evidence required. In many cases, as the Rule's Advisory Committee Notes state and both rulings reiterate, rejection of expert testimony is still the "exception rather than the rule."

Qualification Challenge – The "Rookie"

The first case, an April 15, 2013 ruling out of the District Court of the M.D. of Pennsylvania, involved a challenge to the qualifications of one of the plaintiff's proposed experts. One of the defendants claimed that plaintiff's expert, a government field investigator, lacked experience and training in areas applicable to the case, (which involved incidents surrounding a gas explosion), and was "a rookie."

Quoting the Third Circuit, the court explained, "Rule 702 requirements constitute 'the trilogy of restrictions on expert testimony: qualification, reliability, and fit.'" The court continued, "Nevertheless, Rule 702 embraces a 'liberal policy of admissibility . . . in which the rejection of expert testimony is the exception rather than the rule.'"

With respect to the qualification prong, the court pointed out that the Third Circuit has previously recognized that a "broad range of knowledge, skills, and training qualify an expert as such." The court noted that FRE's Advisory Committee Notes include within the scope of FRE 702 "not only experts in the strictest sense of the word, e.g. physicians, physicists, and architects, but also the large group sometimes called 'skilled' witnesses, such as bankers or landowners testifying to land values."

Next, the court made an important point: "The Federal Rules of Evidence do not require that an expert be the 'most' qualified." To the contrary (quoting the Third Circuit), "[I]t is an abuse of discretion to exclude expert testimony merely because the trial court does not find the expert "to be the best qualified or because the proposed expert does not have the specialization that the court considers the most appropriate. We have held that witnesses . . . can qualify as experts under Rule 702 on the basis of practical experience alone, and a formal degree, title, or educational specialty is not required."

In the end, the court found the qualification challenge, at least in this case, "untenable under the liberal standard of Rule 702" – finding that at the time of the accident the

expert had been employed in his present government agency position for five years, and during that time had obtained sufficient training, responsibilities, and experience in order to survive a qualifications challenge.

Thus, the court determined that the expert's qualifications survived the admissibility challenge, and that the defendant's contentions addressed the *weight* of the expert's testimony, not its admissibility.

Reliability Challenge – The "Flaw" Must be Fatal

But that wasn't the only challenge (or win) for the expert in the ruling. The court then turned to the defendant's second expert challenge, which focused on the reliability of the expert's investigations. Here, the opposing party contended that due to claimed flaws in the investigative process, the conclusions were based upon "erroneous facts" which led to the alleged faulty expert conclusions. But the court rejected that attack as to admissibility as well.

When does an alleged flaw in the investigative process – which per FRE 702 deems must be reliable – cross the line, and render an expert's conclusions inadmissible?

Here the court found that "a judge 'should not exclude evidence simply because he or she thinks that there is a flaw in the expert's investigative process which renders the expert's conclusions incorrect. *The judge should only exclude evidence if the flaw is large enough that the expert lacks 'good grounds' for his or her conclusions* . . . Hence the focus is not on the conclusions the expert draws, but on the methodology used to reach those conclusions (emphasis added)."

Finding that the opposing party failed to provide any "profound basis" for refuting the expert's observations and analysis, the opposing party failed to demonstrate a "fatal flaw" which would necessitate its exclusion, and the issue was one that went to the weight of the testimony, not its admissibility.

The "Battle of the Experts"

The second case comes to us out of the U.S. District Court for the E.D. of Michigan in an April 22, 2013 Opinion and Order denying a motion to exclude certain expert testimony offered by the plaintiffs in an antitrust case.

The defendants in the case, health-care institutions facing federal Sherman Act, anti-competition allegations brought by registered nurses, challenged the plaintiffs' proposed expert testimony primarily on the grounds that the expert's "benchmark" analysis was based on unreliable methodology and "fatally undermined by unwarranted assumptions, oversimplifications, and leaps in logic."

The plaintiffs' expert's initial expert report was challenged by the defendants' experts, resulting in the plaintiffs' expert submitting a rebuttal report which reflected changes to his initial benchmark analysis in order to address the points made by defendants' experts. Later still, the plaintiffs' expert submitted an errata sheet that corrected some of the figures found in his rebuttal report.

The court was tasked with determining whether the expert's testimony met sufficient reliability factors under FRE 702 and *Daubert* to be admissible.

Quoting a 2002 antitrust case out of the E.D. of Michigan, the court noted the following, "[a] court 'must remain mindful of its limited gatekeeping role" under Rule 702. . . . In particular, the 'rejection of expert testimony is the exception rather than the rule, and the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system.'"

The court found that defendants' challenges to the completeness of the expert's review and "the accuracy of his resulting adjustments do not warrant the wholesale exclusion of [the expert's] testimony as unreliable, but instead are matters to be 'tested on cross-examination and subjected to further scrutiny and criticism by Defendants' own expert' at trial."

The court stated, "such a 'battle of the experts' must be resolved by the trier of fact."

Examining the Why…

So why did the experts here survive the gatekeeping challenges?

As with most expert-related matters, often the answers are multifactorial, depending on the nature of the case, issues at stake, subject matter, and areas of expertise. FRE 702 grants district court judges wide latitude in executing their gatekeeping role – as both cases demonstrate. Although the cases are different, the rulings have one commonality – both district courts found the expert challenges here were not questions for the trial judge in its "gatekeeping" function of determining admissibility, but rather went to the weight of the expert's testimony.

The cases, (which incidentally deal with a host of expert-related issues for those who would like further reading), are:

Federal Insurance Company, as subrogee of Fulton Financial Corporation v. Hendwerk Site Contractors and UGI Utilities, Case No. 1:10-cv-00617 (M.D. Pa. Apr. 15, 2013).

Cason-Merenda and Suhre v. Detroit Medical Center, et al, Case No. 06-15601 (E.D. Mi. Apr. 22, 2013).

Do you agree that rejection of expert testimony is still the "exception rather than the rule"?

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