



## Alerts

### California Supreme Court Adopts Daubert Gatekeeper Role for Trial Courts

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*Hinshaw Alert*

Ever since the U.S. Supreme Court clarified the trial court's role to determine the admissibility of expert testimony in *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 579 (1993), litigators and trial courts in California have wrestled with the impact of this decision and its sequelae on California evidence jurisprudence. Finally, the California Supreme Court has, unanimously, clarified the court's role, finding that California Evidence Code Sections 801 and 802 provide trial courts with a gatekeeping function similar to that of the federal courts. In *Sargon Enterprises, Inc. v. University of Southern California*, \_\_\_\_ Cal. 4th \_\_\_\_, 212 DJDAR 15846 (2012), the Court, in a contract case, approved a trial court's rulings on evidentiary issues concerning the admissibility of expert testimony in calculations of lost profits. For the first time, the California Supreme Court has specifically emboldened trial courts to act as gatekeepers, and to review expert testimony for reliability and foundation.

#### Background of Sargon

Plaintiff, Sargon Enterprises, Inc., had patented a dental implant for use in a reconstructive surgery, which specifically eliminated the need for multiple surgeries for the implantation of restorative teeth. In 1996, plaintiff contracted with the defendant, University of Southern California (USC), and its School of Dentistry, to conduct a five-year clinical study of the implant. In May 1999, plaintiff sued defendant, claiming that it had botched the clinical trial, and, as a result, plaintiff was unable to complete the clinical trial and market the product to dentists worldwide.

In the initial trial, the jury determined that defendant USC had breached its contract with the plaintiff, and awarded \$433,000 in compensatory damages. During that trial, the trial judge had excluded, as unreliable, the testimony of plaintiff's damages expert, James Skorheim. Plaintiff appealed.

The Court of Appeal determined that the trial court had erred in excluding evidence of lost profits on the grounds of foreseeability. It also stated, "given that the *in limine* hearings focused on foreseeability and not the amount of lost profit damages, it is premature to determine whether such damages can be calculated with reasonable certainty." *Sargon Enterprises, Inc. v. University of Southern California* (February 25, 2005 B167519) [non-published opinion].) The case was remanded to the trial court for determination of the reasonableness

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and amount of pecuniary losses sustained by plaintiff.

USC moved to exclude James Skorheim's testimony, claiming that his testimony concerning the foreseeability and amount of lost profits was not of assistance to the jury, was speculative, and was based upon information not reasonably relied upon by experts in the field. The trial court conducted an eight-day evidentiary hearing, at which Skorheim was the primary witness, and issued a 33-page written ruling on defendant's motion to exclude Skorheim's testimony. In that ruling, the trial judge determined that the information used by Skorheim in calculating lost profits was *not* of the kind reasonably relied upon by experts in the field. The trial judge also noted that the methodology used was unreasonable. For Skorheim "or any such expert, to rely on much of the data which forms the basis of his opinions, because no data bears any real resemblance to plaintiff's historical profits or to those of any similar businesses. . . . Mr. Skorheim's opinion leaves the determination of up to \$1 billion of lost profits damages to pure speculation." The trial judge then went further, analyzing the rationale and reasoning used by Skorheim in reaching his opinions. (California Evidence Code Section 802). In determining that neither the materials relied upon, nor the methodology used by Mr. Skorheim in determining the amount of damages were reliable, the trial court granted the *in limine* motion.

On appeal, the Court of Appeal determined that the trial court had abused its discretion in excluding Skorheim's testimony. By a 2-1 vote, the court reversed the judgment and remanded the matter for new trial on lost profits. "We have carefully reviewed the trial court's criticisms of Skorheim's proffered testimony, and conclude they were better left for the jury's assessments." In the dissent by Justice Johnson, he opined that while "[T]he law does not offer precise parameters to the quantum of proof required to establish lost profit damages, a trial court must be permitted to draw the line in the sand, either letting the evidence in as meeting the certainty threshold, or excluding it as below that threshold. The placement of that threshold is left to the trial courts so long as it was within the bounds of the law." Justice Johnson found that the trial court's decision below was "founded on a detailed, methodical, and well-reasoned examination of the law of contracts, and the limits on lost profit damages. . . . The task of determining the threshold measure of certainty to permit Skorheim's opinion to go to the jury should be left to the gatekeeping function of the trial court, in the context of its evidentiary rulings, after an evaluation of all of the facts, evidence, and arguments."

The Supreme Court granted USC's petition for review to determine whether the trial court erred in excluding Skorheim's testimony.

### **The California Supreme Court's Decision**

After a methodical and detailed examination of the basis for Skorheim's testimony, and the methodology used, the California Supreme Court determined that the trial court's decision was the correct one.

"Under Evidence Code section 801, the trial court acts as a gatekeeper to exclude speculative or irrelevant expert opinion. As we recently explained, [t]he expert's opinion may not be based on 'assumptions of fact without evidentiary support [citation], or on speculative or conjectural matters. . . . [ ] Exclusion of expert opinions that rest on guess, surmise or conjecture [citation] is an inherent corollary to the foundational predicate for admission of the expert testimony: will the testimony assist the trier of fact to evaluate the issues and must decide? (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal. App. 4th 1108, 1117); (*People v. Richardson* (2008) 43 Cal. 4th 959, 1008; accord *People v. Moore* (2011) 51 Cal. 4th 386, 405.)" *Sargon, supra* at 15853.

The Supreme Court continued, noting California Evidence Code Section 802, "expressly permits the court to examine experts concerning the matter on which they base their opinion before admitting their testimony. The *reasons* for the experts' opinions are part of the matter on which they are based just as is their *type* of matter. Evidence Code section 801 governs judicial review of the *type* of matter; Evidence Code section 802 covers judicial review of the *reasons* for the opinion." (emphasis in original). *Id.* at 15854.

The Supreme Court did, however, caution trial judges to not overstep their authority.

The trial court's preliminary determination whether the expert opinion is founded on sound logic is not a decision on its persuasiveness. The court must not weigh an opinion's probative value or substitute its own opinion for the expert's opinion. Rather, the court must simply determine whether the matter relied on can provide a reasonable basis for the



opinion or whether that opinion is based on a leap of logic or conjecture. The court does not resolve scientific controversies. Rather, it conducts a 'circumscribed inquiry' to determine whether, as a matter of logic, the studies and other information cited by the experts adequately support the conclusion that the expert's general theory or technique is valid." Imwinkelried & Fagman (*supra*) [Evidence Code section 802: the neglected key to rationalizing the California law of expert testimony] 42 Loyola LAL REV at 449." *Id.*

### **Conclusion**

By this decision, a unanimous California Supreme Court has left no doubt that trial courts are gatekeepers of expert testimony, and that trial courts are empowered to examine expert testimony for purposes of reliability, methodology and assistance to the jury. While not as specific as the *Daubert* trilogy concerning the methodology and materials which can be used by experts, the Court seems to import, by use of California Evidence Code Sections 801 and 802, the existing jurisprudence of the federal courts on the admissibility of expert testimony. No longer can attorneys claim that the admissibility of expert testimony is something which the trial courts must pass on, that it goes to "weight" as opposed to admissibility. By this decision, the Supreme Court has laid to rest the argument that if an expert qualifies, he testifies.

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