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Courts' Evolving Roles in *Daubert* Decisions

By SUSAN J. BECKER

LITIGATION NEWS ASSOCIATE EDITOR

In *General Electric Company v. Joiner*, 66 U.S.L.W. 4036 (1997), federal district judges are empowered to reject expert scientific evidence when their independent review of the underlying data reveals significant discrepancies between the data relied on by the expert and the conclusions the expert purports to draw from that data.

In addition, the Supreme Court held that courts of appeal must use the traditional "abuse of discretion" standard when reviewing the trial judge's decision to admit or exclude the expert witness testimony, even where the evidentiary ruling is outcome determinative of the case.

"The *Daubert* decision has gotten a lot of attention not only because it provides the governing standards on the admissibility of expert testimony, but also because it seems that it can be cited to support either side of the argument on a particular expert," said Melinda T. Milberg, New York City, Division IV Director and recent past Co-Chair of the Section's Pretrial Practice and Discovery Committee. "The *Joiner* decision is helpful but it certainly doesn't answer all of the issues related to the application of *Daubert*."

In *Daubert*, the Supreme Court interpreted Federal Rule of Evidence 702 to permit an arguably more-relaxed standard for the admission of expert scientific evidence than previously allowed under the popular *Frye* test. Under the *Frye* standard (still followed in some state courts), expert scientific evidence may be admitted only upon a showing that the proffered testimony is based on methodologies and empirical data generally accepted in the relevant scientific community.

The *Daubert* Court retained the "general acceptance" requirement of *Frye* but relegated it to a nondeterminative factor. Other *Daubert* factors governing admissibility of expert scientific testimony include relevance.

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scientific validity, publication of the scientific theory in a peer-reviewed journal, and identification of the known or potential rate of error in the technique employed by the expert.

In *Joiner*, the plaintiff argued that *Daubert* required a more stringent standard of appellate review for district court rulings on scientific testimony, especially where the ruling was outcome determinative of the litigation. Joiner claimed that his small-cell lung cancer was "promoted" by workplace exposure to polychlorinated biphenyls (PCBs) and derivative chemicals found in the electrical transformers that he regularly serviced. The plaintiff conceded that he

had other risk factors for cancer, including cigarette smoking and a family history of cancer.

The defendant makers of PCBs and transformers moved for summary judgment. Although some of the human health hazards associated with PCBs led Congress to ban virtually all production and sales of these chemicals 20 years ago, the *Joiner* defendants argued that there was no proof of Joiner's significant exposure to PCBs and no admissible scientific evidence that the chemicals promoted Joiner's cancer. In response, Joiner cited deposition testimony of his expert witnesses that PCBs alone can promote cancer.

The opinions of plaintiff's experts were based primarily on studies of infant mice who had developed cancer after being directly injected with massive doses of PCBs. The mice's cancer

was significantly different than Joiner's form of the disease. The experts also relied on four epidemiological studies, all of which resulted in somewhat ambiguous findings regarding the relationship between exposure to PCBs and cancer in humans.

The trial judge characterized Joiner's scientific evidence as based on "subjective belief or unsupported speculation." Since Joiner had produced no scientific evidence of causation that satisfied *Daubert* standards, the trial court granted the defendants' summary judgment.

The court of appeals reversed, relying in part on its belief that the Federal Rules of Evidence operate in favor of admissibility of expert testimony. Therefore, the court held "a particularly stringent standard of review" is applicable in cases where

the trial judge excludes expert testimony. Applying that standard in *Joiner*, the court of appeals found error in the trial court's exclusion of the plaintiff's scientific evidence simply because the trial court found that conflicting conclusions might be drawn from the evidence.

The Supreme Court reinstated the district court's exclusion of Joiner's scientific evidence. Contrary to the plaintiff's argument and the Eleventh Circuit's reasoning, the *Joiner* Court opined that *Daubert* did not dramatically change the role of the trial judge in screening scientific evidence; rather, *Daubert* simply restated the "gatekeeper" role that the trial court has performed for more than a century. Accordingly, the *Joiner* Court concluded that *Daubert* provides no rationale for rejecting the "abuse of