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Environment

Wide Impact Seen if Supreme Court Agrees To Review *Pomona*, Admissibility Rules

Leading evidence authorities are divided on whether the U.S. Supreme Court will review the Ninth Circuit ruling in *Pomona v. SQM North America Corp.*, an environmental contamination case hinging on the admissibility of scientific evidence.

Professor David L. Faigman of the University of California Hastings College of Law predicted the high court will grant a far-reaching petition for certiorari by defendant SQM North America Corp., loudly awakening a broad array of commercial litigants as if an ''800-pound gorilla was knocking on the door.''

Review is needed in *Pomona v. SQM North America Corp.*, 750 F.3d 1036 (9th Cir. 2014) , Faigman said, because of an ''important split'' in the federal circuits, where we see a ''great deal of variability about trial judges' obligations'' under *Daubert* and Federal Rule of Evidence 702.

But Douglas G. Smith, a litigation partner at Kirkland & Ellis in Washington, and author of a Bloomberg BNA litigation portfolio on scientific evidence, said review is unlikely in the case.

Smith told Bloomberg BNA the *Pomona* case is a narrow one that raises an issue with respect to a particular testing methodology sometimes used in environmental cases—stable isotope analysis.

Evidence expert Gregory P. Joseph also predicted the high court wouldn't review the case.

''I will be surprised if cert. is granted,'' Joseph, of Joseph Hage Aaronson in New York, told Bloomberg BNA in a Sept. 25 e-mail. ''While the Ninth Circuit did use the 'only a faulty methodology or theory' language, it proceeded through a traditional *Daubert* analysis,'' Joseph said.

Faigman, co-author of the five-volume treatise, *Modern Scientific Evidence: The Law and Science of Expert Testimony*, said lower courts following the Ninth Circuit are taking a narrower view of their gatekeeping obligations than envisioned by the Supreme Court.

These courts emphasize the ''liberal thrust'' of the *Daubert* mandates, but less so the dictates to weed out unreliable evidence and speed cases to conclusion, Faigman said.

If the top court reviews the case, it could revisit *Daubert* and the standards for admitting expert evidence.

Review an 'Uphill Battle.' Smith said the Ninth Circuit's decision to adopt a more liberal admissibility approach for the plaintiffs' expert causation evidence was ''wrong,'' and the evidence from the expert should have been excluded.

However, the petitioners will have ''an uphill battle in arguing that this case meets the criteria for Supreme Court review,'' he said. The evidence for ''deep divisions'' within the circuits presented in the Sept. 8 petition is thin, Smith said.

''While some Circuits may appear to be more rigorous in undertaking their gatekeeping duties under Rule 702 and *Daubert* than others, there is a fair degree of uniformity among the federal courts in stringently applying *Daubert* to screen out expert evidence that is irrelevant or unreliable,'' Smith said in a Sept. 26 e-mail.

While the likelihood of Supreme Court review is ''relatively low,'' Smith said, ''the fact that the decision was issued by the Ninth Circuit, which has frequently clashed with Supreme Court precedent, may slightly increase the odds of review being granted.''

Thomas E. Peisch, a partner at Conn Kavanaugh in Boston specializing in product liability, took a middle-ground position.

The Ninth Circuit ''appears to be an outlier these days,'' and the petition for review ''certainly makes a compelling case,'' he told Bloomberg BNA in a Sept. 29 e-mail.

Peisch said he was hard-pressed to think of ''junkier science'' than that served up by the plaintiffs' expert in this case. And the ''District Court got it just right by excluding it after precisely the kind of review that 702 contemplates.''

As the Ninth Circuit view of *Daubert* is ''cramped in the extreme,'' the case is ''most certainly worthy of SCOTUS review,'' he said.

Daubert and its progeny have become ''something of a tangled mess, as the courts wrestle with issues of interpretation, frequently under circumstances not contemplated by the decisions. This is particularly true in the environmental arena, which seems to generate new scientific 'theories' at a good clip these days,'' Peisch said.

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Ninth Circuit Uses Different Standard. At issue is a Ninth Circuit ruling that reinstated the crucial testimony of Neil Sturchio, the causation expert for plaintiff Pomona, Calif., who traced perchlorates in Pomona's ground water to fertilizer imported into southern California from Chile by defendant SQM North America Corp. between 1927 and the 1950s.

The U.S. District Court for the Central District of California rejected Sturchio, director of the Environmental Isotope Geochemistry Laboratory at the University of Illinois, because his methodology wasn't certified by the Environmental Protection Agency, hadn't been tested and relied on a reference database that was too limited.

However, the Ninth Circuit said, ''only a faulty methodology or theory, as opposed to imperfect execution of laboratory techniques, is a valid basis to exclude expert testimony.'' In addition, factual disputes are best settled by a battle of the experts before the fact finder, not by judicial fiat, the court said.

''Even if Dr. Sturchio's conclusions were 'shaky,' they should be attacked by cross examination, contrary evidence, and attention to the burden of proof, not exclusion,'' the appeals court said. It reinstated the evidence and remanded the suit, which sought to recover the cost of investigating and remediating the contamination.

Depth of Split Debated. The petition says the Ninth Circuit ruling in *Pomona* conflicts with these circuit rulings:

- Second Circuit in *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256 (2d Cir. 2002);
- Third Circuit in *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717 (3d Cir. 1994);
- Sixth Circuit in *Tamraz v. Lincoln Elec. Co.*, 620 F.3d 665 (6th Cir. 2010); and,
- Tenth Circuit in *Att'y Gen. of Ok. v. Tyson Foods Inc.* 565 F.3d 769 (10th Cir. 2009).

Faigman said the Ninth Circuit, if not corrected, will create tremendous uncertainty among business litigants. Uncertainty in rules stifles settlements, which prolongs litigation and boosts costs, he says.

''When rules are clear, litigants are more likely to resolve cases quickly,'' he said in a Sept. 25 e-mail.

But the Ninth Circuit in *Pomona* threw a ''monkey wrench'' into that approach, and stands in the way of the Supreme Court's desire to empower judges to resolve cases quickly, efficiently and predictably, he said.

To the extent the Ninth Circuit's May ruling in *Pomona* has resulted in confusion about trial courts' ''fundamental gatekeeping responsibilities,'' there will be a desire among the justices to correct errors and to enforce the ''true understanding'' of the *Daubert* line of cases and Rule 702, Faigman said.

According to Faigman, the Supreme Court has rejected unreliable expert evidence in the four major cases before it, and will be ''chagrined'' to see how some courts are misapplying the lessons of the so-called *Daubert* trilogy—*Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579 (1993); *GE Co. v. Joiner*, 522 U.S. 136 (1997); and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999)—as well as the lesser-known fourth case, *Weisgram v. Marley Co.*, 528 U.S. 440 (2000).

Smith took a different view. The lower court cases the petition cites are ''best viewed as aberrations that, while wrongly decided, do not seem to demonstrate that there is a pattern of courts misconstruing the *Daubert* framework,'' he said.

It isn't clear from the cases petitioners cite, that there is a ''consistent misinterpretation of the law that the Supreme Court must correct, he said. Rather, petitioners seem to have merely cited some examples where courts misapplied the *Daubert* framework in various ways in rendering decisions that are incorrect,'' Smith said.

***Daubert* Revisited?** What would happen if the Supreme Court were to grant review in the case?

Faigman, who recently authored *The Daubert Revolution and the Birth of Modernity: Managing Scientific Evidence in the Age of Science*, 46 U.C. Davis L. Rev. 893 (2013), said that if the Supreme Court were to affirm the Ninth Circuit view in *Pomona*, it would effectively overturn *Daubert* and its progeny.

On the other hand, rejection of the Ninth Circuit approach would send a ''strong message'' to those courts that have been inconsistent to acquiesce and follow the *Daubert* mandates, Faigman said.

Smith, who recently authored *Daubert Challenges At the Class Certification Stage: Another Hurdle* (N.Y.L.J. 2014), agreed with Faigman that the issues in play—the admissibility of expert scientific evidence—are ''exceptionally important.''

''The *Daubert* gatekeeping framework is an important guarantee concerning the reliability and relevance of expert evidence that has broad applicability in all kinds of cases,'' he said.

Smith, however, saw no reason for the Supreme Court to revisit the 21-year-old *Daubert* ruling.

''The Supreme Court has laid out clear principles under Rule 702 and *Daubert*, and those principles are working well to screen out unreliable and irrelevant expert evidence,'' he said. ''There is no need to revisit the *Daubert* framework at this time.''

But Peisch said the latest Ninth Circuit ruling suggests the time may be right to revisit *Daubert*.

The Ninth Circuit's attempt to guide courts and practitioners—by attempting to distinguish ''unreliable'' from ''shaky'' expert evidence—is problematic, Peisch said. ''With all due respect to the 9th Cir., how on earth is a trial judge supposed to make that distinction?''

According to Smith, Supreme Court review would most likely result in a narrow decision that is relatively limited to the facts of the case. On the other hand, ''it is possible that the Court could make broader statements regarding the framework for assessing expert evidence under Rule 702,'' Smith said.

Smith said the petitioners appeared to invite a wide-reaching ruling by contending the Ninth Circuit's decision represents an example of ''a broader problem, where the federal circuits—they argue—are ignoring various prongs of the *Daubert* analysis in different kinds of cases (including cases falling outside of the environmental/toxic tort category),'' Smith said.

Although the prospects for review are uncertain, one thing is clear: If the Supreme Court were to grant review in the case it would capture the attention of the business community and all civil litigants impacted by uncertain admissibility standards.

An updated statement by the Supreme Court as to how Rule 702 is to be applied ''will affect any case involving expert evidence,'' Peisch said.

The enormous implications would bring all litigators and business interests to attention. ''Like an 800-pound was gorilla knocking on the door,'' Faigman said.

BY BRUCE KAUFMAN

The petition for review is available at http://op.bna.com/exer.nsf/r?Open=bkan-9pekgp.