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Battle Of The 'Experts': Daubert And Milward

Law360, New York (January 11, 2012, 1:34 PM ET) -- On Jan. 9, 2012, the U.S. Supreme Court denied certiorari in U.S. Steel v. Milward, a Court of Appeals for the First Circuit decision interpreting federal standards for the admissibility of expert witness opinion testimony. The First Circuit's opinion remains controlling in that circuit, but the implications of the decision are bound to reverberate in product liability cases beyond that forum.

The controversy over Milward stems from the First Circuit's endorsement of a "weight of the evidence" standard for assessing the reliability of expert testimony on general causation. The decision arguably produces a rift with the Daubert law of other circuits, ignores key Supreme Court precedents interpreting Rule 702 of the Federal Rules of Evidence, and green-lights the admissibility of expert opinions based on little more than subjective judgments.

Milward is a product liability case in which Brian Milward claims he developed acute promyelocytic leukemia (APL), a rare form of leukemia, from his occupational exposure to a lubricant containing varying percentages of benzene. Dr. Martyn Smith, a toxicologist, testified for the Milwards on general causation.

Smith concluded that benzene could cause Milward's APL based on the collective weight of five lines of evidence appearing in the peer-reviewed literature. Acknowledging that epidemiological data did not report a statistically significant relationship between benzene and APL, Dr. Smith relied primarily upon data relating to potential mechanisms by which benzene exposure could cause the disease.

Defendants filed a Daubert motion challenging Smith's general causation opinion. After conducting an evidentiary hearing, the district court granted the motion, concluding that Smith's opinion failed to satisfy the reliability requirements of Rule 702.

On appeal to the First Circuit, a panel reversed and remanded the case for trial, finding that Smith's "weight of the evidence" approach can be used to support his general causation opinion.

The First Circuit concluded that the district court had exceeded the scope of its discretion by improperly applying the Daubert standard. Specifically, the panel determined that Smith's opinion was sufficiently reliable because his approach resembled a differential diagnosis method in which he considered and ranked all the relevant scientific evidence.

By denying certiorari, the Supreme Court, at least for now, has left the door open for parties sponsoring expert opinion testimony on general causation to invoke Milward's less stringent "weight of the evidence" approach, particularly where statistically significant epidemiological data do not exist.

The potential impact of Milward in product liability cases will vary depending upon several factors. Among the threshold issues will be whether the forum where a case is pending already has settled Daubert case law outlining standards and methodologies applicable to

general causation opinions, and whether statistically significant epidemiological data exist to support the challenged expert's opinion.

Beyond these preliminary considerations, however, parties may need to argue vigorously that Milward should not be followed. The "weight of the evidence" approach seemingly ignores the first two Daubert factors for admissibility — the ability to scientifically test the expert's ultimate conclusion and the known rate of error for the expert's methodology.

In many product liability cases, parties who sponsor expert witness testimony on general causation are likely to argue that Milward should be followed. They will point out that their experts considered all the applicable evidence, weighed and ranked the various forms of data, and performed these tasks just as they do in their professional work outside litigation.

Parties who anticipate using Rule 702 and Daubert, or similar state rules and decisions, to challenge expert opinions on causation will need to develop a Milward strategy as a part of their own expert discovery. It will be advisable to conduct probing inquiries into the methods employed and data relied upon by causation expert witnesses.

If a court follows Milward, the moving party will need to demonstrate that the expert failed to satisfy the "weight of the evidence" approach by ignoring relevant data, inappropriately interpreting conflicting data, making faulty inferences and leaps of logic, and generally not following good scientific practice.

Parties should also consider the special circumstances of the Milward decision which could limit its applicability to causal opinions in other cases.

For example, the First Circuit's decision did not dismiss the role of epidemiology out of hand. Indeed, the court emphasized that this was not a case in which the available epidemiological data found the absence of an association; rather, this was a case of a rare disease in which an association was reported, although it was not statistically significant.

While epidemiologists may well differ with the First Circuit in its implication that an insignificant association is somehow relevant — and more probative than the absence of an association — for the time being, at least one circuit court of appeals has drawn that distinction.

The Supreme Court may well have an opportunity to review the Milward decision after that case is tried to a jury, or visit the First Circuit's decision in another case.

Until that happens, however, parties should not surrender the core argument that Milward fails to apply the Daubert standard correctly. After all, the scientific method has not changed in the 17 years since the Daubert opinion was issued, and the high court's trilogy of Daubert cases still constitutes the best articulation of standards designed to ensure the reliability of scientific evidence at trial.

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