Defendants' Chances On Daubert May Vary By Circuit

By **Jessica Miller, Benjamin Halperin and Anthony Balzano** (October 1, 2019, 5:21 PM EDT)

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Last year, in what it called a very close decision, the court overseeing the Roundup Products Liability Litigation admitted expert testimony opining that a chemical in Monsanto's Roundup weedkiller causes non-Hodgkin's lymphoma.[1] In its ruling, which is currently on appeal, the court stated that the U.S. Court of Appeals for the Ninth Circuit applies the U.S. Supreme Court's Daubert mandate governing the admissibility of expert testimony with a "'liberal thrust' favoring admission."

The Roundup court also contrasted the Ninth Circuit's approach with what it characterized as a more stringent approach taken by the U.S. District Courts of Appeal for the Third and Eleventh Circuits — suggesting that the evidence would not be deemed admissible in those circuits.[2]

This article does not address the issues in the Roundup Daubert challenge, but the court's statement prompted the authors to undertake research to determine whether the Ninth Circuit's Daubert rulings differ from those in other circuits. Our research has yielded two conclusions.

First, a survey of recent Daubert decisions — encompassing the last five years — shows that the Ninth Circuit reverses district court exclusions of experts nearly half the time. This reversal rate seems quite high for an area reviewed under the abuse of discretion standard, and it dwarfs that of the Third and Eleventh Circuits, which reversed expert exclusions only a couple times during the same period.

Second, the Ninth Circuit appears to reject the principle (not addressed in Roundup) that "any step that renders [an expert's] analysis unreliable under the Daubert factors renders the expert's testimony inadmissible" — a principle numerous other courts have repeatedly applied in expert exclusion decisions.

Disproportionate Reversal of Expert Exclusion Decisions by the Ninth Circuit

The Ninth Circuit is considerably more likely than other circuits to reverse district courts that exclude expert witnesses. As the following chart shows, over the last five years, the

Ninth Circuit reviewed 19 district court decisions that had excluded expert testimony. Nearly half the time, it found that these exclusions were abuses of discretion and reversed them. By contrast, the Third and Eleventh Circuits respectively reviewed 13 and 27 district court decisions excluding expert testimony. Only two of these were reversed.[3]

CIRCUITS	NINTH	THIRD	ELEVENTH
REVERSED	9[4]	0	2[5]
AFFIRMED	10[6]	13[7]	25[8]

The Ninth Circuit's near-50% rate of reversal of decisions ostensibly reviewed under an abuse of discretion standard sticks out — and suggests that, to date, the Ninth Circuit has been a distinct outlier in applying the Daubert mandate. After all, if an appellate court believes that Daubert should be applied more permissively, it would be expected to enforce that view by reversing decisions it deems too restrictive.

Deferring to experts, on the one hand, leads to tighter scrutiny of district courts on the other. Given the changing character of the Ninth Circuit, with a number of retirements and new appointees, it remains to be seen whether this trend will continue, or whether the new appointees will bring Ninth Circuit Daubert rulings more in line with those of other circuits.

"Any Step" Is Too Strict for The Ninth Circuit, for Now

One issue on which the Ninth Circuit has forged its own path is the "any step" principle articulated by the Third Circuit in 1994, when it explained that the Daubert requirement that "conclusions supported by good grounds for each step in the analysis ... means that any step that renders the analysis unreliable under the Daubert factors renders the expert's testimony inadmissible."[9]

The any-step principle is endorsed in the commentary to the 2000 amendments to Rule 702.[10] And it has been invoked by the Second, Third, Fifth, Sixth, Tenth and Eleventh Circuits, as well as numerous district courts. Appellate decisions citing the any-step principle have overwhelmingly held that experts were properly excluded or should have been excluded. Specifically, there have been 26 federal appellate decisions using the any-step language, and 20 reached results supporting the exclusion of experts.[11]

Courts applying the any-step principle have explained that each step taken in an expert's methodology — or at least an important part of the methodology — must be reliable. In one such decision, the Eleventh Circuit held that an expert's failure to "show the reliability of each of his steps in deducing [a drug's] toxicity from [an] analogy" to a different drug was a "fatal defect under Daubert."[12]

Other decisions have cited "any step" (or similar verbiage) in holding that expert testimony purportedly based on well-accepted methodologies was nevertheless inadmissible due to missteps taken in applying the methodologies. For example, the Third Circuit applied the any-step principle in holding that an expert's particular application of the Bradford Hill criteria (a well-accepted framework for analyzing general causation in toxic tort cases) was unreliable.[13]

The Ninth Circuit, however, appears to disagree with these courts. In City of Pomona, the Ninth Circuit rejected the any-step principle as an overly "guarded approach to the issue of

an expert's adherence to protocol" and proceeded to hold that the district court abused its discretion by essentially being overly nitpicky. The Ninth Circuit explained that it rejects expert opinions that are the "result of a faulty methodology or theory as opposed to imperfect execution of laboratory techniques whose theoretical foundation is sufficiently accepted in the scientific community."[14]

In other words, the Ninth Circuit appears to not only reject the any-step language, but disagree on the broader issue of whether an expert's application of a well-accepted technique is to be scrutinized under Daubert. The City of Pomona decision is the only instance in which the Ninth Circuit has addressed the any-step principle, although several district courts in the Ninth Circuit have invoked it, citing decisions by other appellate courts.[15]

To be sure, there is some uncertainty surrounding what "any step" means and applies to. Consistent with the decisions discussed above that focused on major problems with expert methodologies, courts (including the Third Circuit) have clarified that minor flaws in experts' analyses do not make them per se inadmissible.[16] But courts may struggle in practice to differentiate between major and minor methodological steps.

In this vein, one federal district court surveyed courts' use of the any-step principle and concluded that many courts applying it to exclude experts were really just applying the "too great an analytical gap" rule the Supreme Court articulated in Joiner.[17] Under that view, the any-step principle would appear to be no more than a gloss on Daubert canon.

Regardless of these ambiguities, it is clear that when federal appellate courts do apply the any-step principle, they overwhelmingly do so in decisions supporting expert exclusion. This trend alone indicates that the principle reflects a relatively stringent application of Daubert — which is exactly how the Ninth Circuit characterized it in City of Pomona.

Guidance from the Supreme Court could be needed to clarify whether — to the extent the any-step principle is a more stringent requirement than the "analytical gap" rule — it is a permissible way to apply Daubert. Whatever "any step" truly means, it will be interesting to see whether the Ninth Circuit continues to stand alone in rejecting it.

In sum, the standards courts use to evaluate expert methodologies do seem to vary across federal circuits. The lack of a clear Daubert standard is concerning, because Daubert issues often effectively decide cases — especially in mass tort litigation, which comprises a substantial portion of the federal docket.

A major decision by the Supreme Court could clarify Daubert principles the court last elucidated in the 1990s. This could include guidance on both whether the any-step principle is correct — and more broadly, the degree to which missteps in experts' particular application of uncontroversial techniques should be scrutinized.

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Disclosure: Skadden serves as counsel to Bayer AG's board in the Roundup Product Liability Litigation.

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[1] In re Roundup Prod. Liab. Litig., No. 16-MD-02741-VC, 2018 WL 3368534, at *5 (N.D. Cal. July 10, 2018). Skadden serves as counsel to Bayer's board in this matter.

[2] Id. (comparing Wendell v. GlaxoSmithKline LLC, 858 F.3d 1227 (9th Cir. 2017) and City of Pomona v. SQM N. Am. Corp., 750 F.3d 1036 (9th Cir. 2014) with In re Zoloft (Sertraline Hydrochloride) Prods. Liab. Litig., 858 F.3d 787 (3d Cir. 2017) and McClain v. Metabolife Int'l Inc., 401 F.3d 1233 (11th Cir. 2005).

[3] Cases from these circuits mentioning "daubert" from Jan. 1, 2014, to Sept. 23, 2019, were searched for on Westlaw and manually reviewed. The chart excludes four decisions where the appellate courts affirmed and reversed different aspects of district courts' Daubert rulings. See ThermoLife Int'l LLC v. Gaspari Nutrition Inc., 648 F. App'x 609 (9th Cir. 2016); Pyramid Tech. Inc. v. Hartford Cas. Ins. Co., 752 F.3d 807 (9th Cir. 2014); Karlo v. Pittsburgh Glass Works LLC, 849 F.3d 61 (3d Cir. 2017); Sorrels v. NCL (Bahamas) Ltd., 796 F.3d 1275 (11th Cir. 2015). It also excludes one Ninth Circuit decision that affirmed a district court's decision to preclude a pro se litigant from serving as his own expert. See Hammann v. 1-800 Ideas Inc., 690 F. App'x 956 (9th Cir. 2017).

[4] Corcoran v. CVS Health Corp., No. 17-16996, 2019 WL 2454529 (9th Cir. June 12, 2019); ABS Entertainment Inc. v. CBS Corp., 908 F.3d 405 (9th Cir. 2018); Wendell v. GlaxoSmithKline LLC, 858 F.3d 1227 (9th Cir. 2017); Reed v. Lieurance, 863 F.3d 1196 (9th Cir. 2017); California v. Kinder Morgan Energy Partners LP, 613 F. App'x 561 (9th Cir. 2015); City of Pomona, 750 F.3d 1036; Messick v. Novartis Pharm. Corp., 747 F.3d 1193 (9th Cir. 2014); Lidner v. Ford Motor Co., 585 F. App'x 525 (9th Cir. 2014); U.S. v. Christian, 749 F.3d 806 (9th Cir. 2014).

[5] Seamon v. Remington Arms Co. LLC (In re Estate of Seamon), 813 F.3d 983 (11th Cir. 2016); Adams v. Lab. Corp. of Am., 760 F.3d 1322 (11th Cir. 2014).

[6] U.S. v. Prezioso, No. 18-50056, 2019 WL 3335139 (9th Cir. July 25, 2019); Kelly v. Las Vegas Metro. Police Dept., 723 F. App'x 563 (9th Cir. 2018); U.S. v. Savanh, 727 F. App'x 931 (9th Cir. 2018); In re Nexium Esomeprazole, 662 F. App'x 528 (9th Cir. 2016); Ilyia v. Khoury, 671 F. App'x 510 (9th Cir. 2016); U.S. v. Spangler, 810 F.3d 702 (9th Cir. 2016); Nelson v. Matrixx Initiatives Inc., 592 F. App'x 591 (9th Cir. 2015); Velazquez v. Costco Wholesale Corp., 603 F. App'x 584 (9th Cir. 2015); Ollier v. Sweetwater Union High School Dist., 768 F.3d 843 (9th Cir. 2014); U.S. v. Isaacs, 565 F. App'x 637 (9th Cir. 2014).

[7] Ruggiero v. Yamaha Motor Corp. U.S.A., No. 18-1206, 2019 WL 2498662 (3d Cir. June 17, 2019); Ace Pallet Corp. v. Cons. Rail Corp., 764 F. App'x 197 (3d Cir. 2019); Horan v. Dilbet Inc., 724 F. App'x 148 (3d Cir. 2018); Yazujian v. PetSmart, 729 F. App'x 213 (3d Cir. 2018); In re Paulsboro Derailment Cases, 746 F. App'x 94 (3d Cir. 2018); Dominguez on Behalf of Himself v. Yahoo Inc., 894 F.3d 116 (3d Cir. 2018); Columbia Gas Transmission LLC v. An Easement To Construct Operate & Maintain a 20 Inch Gas Transmission Pipeline Across Properties in Washington Cty., Pennsylvania, Quarture, 745 F. App'x 446 (3d Cir. 2018); In re Zoloft, 858 F.3d 787; U.S. v. Delgado, 677 F. App'x 84 (3d Cir. 2017); Senese v. Liberty Mut. Ins. Co., 661 F. App'x 771 (3d Cir. 2016); Baker v. U.S., 642 F. App'x 147 (3d Cir. 2016); Rupert v. Ford Motor Co., 640 F. App'x 205 (3d Cir. 2016); Henry v. St. Croix Alumina LLC, 572 F. App'x 114 (3d Cir. 2014).

[8] U.S. v. Gillis, 2019 WL 4383203 (11th Cir. Sept. 13, 2019); U.S. v. Stahlman, Nos. 17-14387, 18-12866, 2019 WL 3886422 (11th Cir. Aug. 19, 2019); Williams v. Mosaic Fertilizer LLC, 889 F.3d 1239 (11th Cir. 2018); Commodores Entm't Corp. v. McClary, 879 F.3d 1114 (11th Cir. 2018); Jones v. Novartis Pharm. Co., 720 F. App'x 1006 (11th Cir. 2018); Bivins v. Stein, 759 F. App'x 777 (11th Cir. 2018); United

States v. Williams, 684 F. App'x 767 (11th Cir. 2017); Alsip v. Wal-Mart Stores East LP, 658 F. App'x 944 (11th Cir. 2016); Jones v. SmithKline Beecham, 652 F. App'x 848 (11th Cir. 2016); Roper v. Kawasaki Heavy Indus., 646 F. App'x 706 (11th Cir. 2016); Witt v. Stryker Corp., 648 F. App'x 867 (11th Cir. 2016); United States v. White, 660 F. App'x 779 (11th Cir. 2016); Arthur v. Comm'r, Ala. Dep't of Corr., 840 F.3d 1268 (11th Cir. 2016); Payne v. C.R. Bard Inc., 606 F. App'x 940 (11th Cir. 2015); McKee v. United States, 597 F. App'x 625 (11th Cir. 2015); United States v. Hollis, 780 F.3d 1064 (11th Cir. 2015); Torres v. Carnival Corp., 635 F. App'x 595 (11th Cir. 2015); Horton v. Maersk Line Ltd., 603 F. App'x 791 (11th Cir. 2015); Chapman v. P&G Distrib. LLC, 766 F.3d 1296 (11th Cir. 2014); Martin v. City of Atlanta, 579 F. App'x 819 (11th Cir. 2014); Winn-Dixie Stores Inc. v. Dolgencorp LLC, 746 F.3d 1008 (11th Cir. 2014); Gardner v. Aloha Ins. Servs., 566 F. App'x 903 (11th Cir. 2014); Hughes v. Kia Motors Corp., 766 F.3d 1317 (11th Cir. 2014); Lebron v. Sec'y of the Fla. Dep't of Children & Families, 772 F.3d 1352 (11th Cir. 2014); Edwards v. Shanley, 580 F. App'x 816 (11th Cir. 2014).

[9] In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 745 (3d Cir. 1994).

[10] See Fed. R. Evid. 702 Advisory Committee's note to 2000 amendment (citing Paoli).

[11] A search of all federal appellate decisions on Westlaw on Sept. 23, 2019, for "(daubert 702) /p 'any step')" returned three decisions each by the Second, Third and Fifth Circuits, four each by the Fifth and Eleventh Circuits, 10 by the Tenth Circuit and one each by the Sixth and Ninth Circuits. Only five of these decisions reached results supporting admission of experts (i.e., affirming expert admission or reversing expert exclusion). A sixth decision both affirmed and reversed as to different experts that had been excluded and cited "any step" in the context of the latter. See Curtis v. M&S Petroleum Inc., 174 F.3d 661, 671-72 (5th Cir. 1999).

[12] McClain, 401 F.3d at 1244-45.

[13] Zoloft, 858 F.3d at 797; see also, e.g., Tamraz v. Lincoln Elec. Co., 620 F.3d 665, 674 (6th Cir. 2010) (breaking the well-accepted methodology of differential diagnosis into three specific steps that each needed to be applied reliably).

[14] City of Pomona, 750 F.3d at 1047-48.

[15] E.g., Hall v. Baxter Healthcare Corp., 947 F. Supp. 1387, 1400-01 (D. Or. 1996) (citing Paoli).

[16] Amorgianos v. Nat'l R.R. Passenger Corp., 303 F.3d 256, 267 (2d Cir. 2002); Paoli, 35 F.3d at 746 ("The judge should only exclude the evidence if the flaw is large enough that the expert lacks 'good grounds' for his or her conclusions").

[17] United States v. McCluskey, 954 F. Supp. 2d 1224, 1246-47 (D.N.M. 2013) (quoting Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997)).