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PRACTICE TIP

The Medicare Secondary Payer Statute

By Sharon L. Caffrey, Christopher L. Crosswhite and John M. Lyons

On Jan. 1, 2010, extensive new Medicare reporting obligations took effect. They apply to insurance companies and other businesses, including product liability and toxic tort defendants that make payments to Medicare beneficiaries as a result of verdicts or settlements resolving liability claims. These organizations — known as Responsible Reporting Entities (“RREs”) — will be required to report virtually all settlements, judgments, awards, and other resolutions of claims establishing responsibility for payments to Medicare beneficiaries, so that Medicare may determine whether it has a stake in any part of the payment. The reporting will also enable Medicare to refuse payment for future medical care relating to the injuries that were the subject of the liability claim. Failure to report may result in significant financial penalties against the RRE.

Congress established these reporting obligations in Section 111 of the Medicare, Medicaid, and SCHIP Extension Act of 2007 (“MMSEA”), codified at 42 U.S.C. Section 1395y (b)(8). Section 111 of MMSEA requires RREs to report any payment obligation to a Medicare beneficiary when the obligation results from

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A Daubert Checklist

Tips for Posturing Your Case for Successful Daubert Challenge

By John D. Sear

Every year, litigators in product liability cases across the country file hundreds of motions to exclude expert testimony under Fed. R. Evid. 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc. (Daubert)*, 509 U.S. 579 (1993). A Westlaw® search for *Daubert* decisions yielded more than 100 results for 2009 alone and more than 1,400 since 1993. Appellate courts affirm trial court decisions — regardless of whether the decisions exclude or admit expert testimony — in the overwhelming majority of cases. One popular Web site has estimated that courts of appeal historically affirm more than 85% of all trial court *Daubert* decisions. See Peter Nordberg, <http://www.daubertontheweb.com/circuits.htm> (last visited Jan. 12, 2010). The high rate of affirmance no doubt stems from the deference courts of appeal give trial court *Daubert* decisions, as required by *General Electric Co. v. Joiner*, 522 U.S. 136 (1997) (holding that appellate courts must review decisions both excluding and admitting evidence under Rule 702 and *Daubert* under the deferential abuse of discretion standard).

If chances of reversal of an adverse ruling are slim to none, then you want to make sure the trial court makes the right decision, so you are not forced to rely upon an appellate court to correct an error. Trial courts will get it right the first time if you follow this tried-and-true checklist.

SCOUR APPLICABLE SCIENTIFIC LITERATURE

“The courtroom is not the place for scientific guesswork, even of the inspired sort. Law lags science; it does not lead it.” *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 319 (7th Cir. 1996). When science does not have answers, experts testifying in court may not pretend that they do:

It is true that open debate is an essential part of both legal and scientific analyses. Yet there are important differences between the quest for truth in the courtroom and the quest for truth in the laboratory. Scientific conclusions are subject to perpetual revision. Law, on the other hand, must resolve disputes

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finally and quickly. The scientific project is advanced by broad and wide-ranging consideration of a multitude of hypotheses, for those that are incorrect will eventually be shown to be so, and that in itself is an advance. Conjectures that are probably wrong are of little use, however, in the project of reaching a quick, final, and binding legal judgment—often of great consequence—about a particular set of events in the past. We recognize that, in practice, a gatekeeping role for the judge, no matter how flexible, inevitably on occasion will prevent the jury from learning of authentic insights and innovations. That, nevertheless, is the balance that is struck by Rules of Evidence designed not for the exhaustive search for cosmic understanding but for the particularized resolution of legal disputes. *Daubert*, 509 U.S. at 596-97.

The peer-reviewed literature helps to define the boundary between admissible testimony grounded in scientific knowledge and inadmissible testimony based upon unscientific guesswork. Scouring the scientific literature up front is the best, and often the only, way to find that boundary and gain insight into the appropriate methodologies employed and legitimate conclusions drawn by knowledgeable experts in the field.

SCOUR EXPERTS' PUBLISHED LITERATURE

Scientific literature published by the experts themselves will illuminate their opinions and methodologies and offer powerful ammunition for a successful *Daubert* attack. "The ultimate test of a scientific expert's integrity is her readiness to publish and be damned." *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1318 (9th Cir. 1995) (quoting Peter W. Huber,

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Galileo's Revenge: Junk Science in the Courtroom at 209 (1991)). When experts publish opinions in peer-reviewed journals, they must adhere to rigorous standards of scientific integrity that prohibit sweeping, scientifically unfounded conclusions — their litigation opinions should be held to the same standards. See, e.g., *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999) (holding that Rule 702 imposes a gatekeeping duty "to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practices of an expert in the relevant field"). When experts choose not to publish on the issue at hand, that choice too bears directly on the reliability of the expert's analysis and conclusions, as the Ninth Circuit recognized in *Daubert* on remand:

None of the plaintiffs' experts has published his work on *Bendectin* in a scientific journal or solicited formal review by his colleagues. Despite the many years the controversy has been brewing, no one in the scientific community — except defendant's experts — has deemed these studies worthy of verification, refutation or even comment. It's as if there were a tacit understanding within the scientific community that what's going on here is not science at all, but litigation. 43 F.3d at 1318.

Either way, knowing what the expert has and has not written and published will better equip you to evaluate and challenge the expert's testimony.

APPLY GOVERNING LAW

It should come as a surprise to no one that different district and circuit courts approach *Daubert* issues differently. To strengthen any *Daubert* challenge and increase the likelihood of success, work within the framework established by your judge, your district, and your circuit. Some judges have established very strict requirements for presentation and briefing of *Daubert* motions and published argument paradigms they encourage attorneys to

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way to determine whether a plaintiff is a Medicare beneficiary, so CMS has developed a system that allows registered RREs to query a database of Medicare beneficiaries at any time.

For latent diseases, such as asbestos-related conditions, the new reporting requirements increase the importance of determining the dates of exposure to the allegedly toxic substances. CMS has determined that only claims resulting from at least one post-Dec. 5, 1980, exposure are reportable under the MMSEA requirements. Therefore, defense counsel should use discovery to determine the exact dates of exposure, but the significant penalties for failing to report a claim suggest that defendants should err on the side of caution and report all claims where the dates of exposure are ambiguous.

SETTLEMENTS

At this time, there are concerns about the confidentiality of settlement agreements, as Medicare regulations require that the existence and amount of all settlements be reported, regardless of whether the parties kept the agreement confidential. Although some commentators have speculated that settlement amounts may be available via Freedom of Information Act requests, there is no precedent suggesting that Medicare

would voluntarily turn over this information. Such data may be protected from routine disclosure by CMS under the Health Insurance Portability and Accountability Act and the Privacy Act (HIPAA). Rather, a bigger concern is that the terms of a confidential settlement may become public if Medicare is required to take legal action to recover payments it made prior to the settlement. Medicare would likely use the settlement amount and other information reported to CMS by the RRE, and possibly the settlement agreement itself, if available, as evidence in its suit. It is also possible that the information reported by a RRE could be made public during a Medicare beneficiary's administrative appeal or lawsuit contesting a denial of benefits based on a submission of an RRE.

The new MMSEA reporting requirements will also likely make it difficult for defendants to settle claims where Medicare has already paid a significant amount toward the plaintiff's medical care for the injury that is the subject of the litigation. This might be especially true in instances where the plaintiff has significant injuries, but the defense on causation is strong and the defendant has been willing only to make a negligible settlement offer to resolve the matter. Plaintiffs may also be unwilling to settle claims if there is a possibility of significant

ongoing medical expenses, as Medicare will know of the settlement and will likely refuse to pay any claims relating to the injury that was the subject of the settlement. In these cases, plaintiffs may prefer to try the case, hoping that Medicare will respect the allocation made by a judge or a jury between medical expenses and compensatory damages, punitive damages, loss of consortium, etc. The MMSEA Section 111 User Guide by CMS currently states that "[t]he CMS is not bound by any allocation made by the parties even where a court has approved such an allocation. The CMS does normally defer to an allocation made through a jury verdict or after a hearing on the merits." (CMS MMSEA Section 111 Medicare Secondary Payer Mandatory Reporting User Guide, at 76). Plaintiffs may begin to try cases where there is the prospect of significant future medical expenses, as it is possible that Medicare will begin paying for medical claims related to the suit after the verdict's allocation for future medical expenses is exhausted.

If there are any prior payments by Medicare relating to the injury that was the subject of the suit, attorneys on both sides should ensure that the Medicare right of reimbursement is satisfied before the plaintiff receives any money.



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follow, *e.g.*, Procedures for Rule 702 Motions, http://www.cod.uscourts.gov/Documents/Judges/MSK/msk_702procedures.pdf (specifying form and content of Rule 702 motions); *United States v. Nacchio*, 608 F. Supp. 2d 1237, 1252 n.23 (D. Colo. 2009) ("A very homely, and admittedly imperfect analogy that I routinely use is that an opinion is the witness's end product. It is like a 'cake' that needs a baker (qualified expert), recipe (methodology), and ingredients (facts and data)."). When judges or districts or circuits articulate their approach to *Daubert* in prior decisions, chances are good that they

will use the same approach in your case — using some other judge's or district's or circuit's law will weaken your motion unnecessarily.

EXPLOIT THE MANUAL ON SCIENTIFIC EVIDENCE

The Manual on Scientific Evidence, published by the Federal Judicial Center, "offer[s] helpful suggestions to judges called upon to assess the weight and admissibility" of expert testimony. *See Atkins v. Virginia*, 536 U.S. 304, 327 (2002). The manual contains chapters, or "reference guides," on a variety of topics commonly the subject of expert testimony, from multiple regression analysis, to epidemiology, to toxicology, to medicine, to engineering practices and methods. The manual is available in its entirety

on the Federal Judicial Center's Web site, www.fjc.gov. It does not instruct judges about what evidence to admit or exclude but, rather, educates them on the particular field of study and how to analyze and apply it. The judge hearing and deciding your motion will refer to the manual in analyzing the admissibility of evidence. You should too.

EXPLOIT EXPERT'S CV

Experts routinely fill their curriculum vitae with lists of memberships in professional organizations. Most professional organizations have their own standards, which members should follow in the interest of good science and professional integrity. Disregarding those standards without

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good reason for doing so casts serious doubt upon the scientific integrity of the expert's analysis and conclusions. See *Truck Ins. Exch. v. Magnetek, Inc.*, 360 F.3d 1206, 1213 (10th Cir. 2004) (affirming exclusion of causation expert testimony in part because the expert's opinion "did not meet the standards of fire investigation [the expert] himself professed he adhered to"). Experts can hardly assert that they have employed inside the courtroom the same level of intellectual rigor that characterizes their work outside it if they disregard the principles espoused by the organizations they have joined. Successful *Daubert* challenges will demonstrate that the expert has abandoned his or her own scientific principles that guide their practice in the "real world."

QUESTION OPINIONS EXPRESSED WITH CERTAINTY

Daubert cautions that nothing in science is known with absolute certainty. 509 U.S. at 590. When experts proclaim knowledge of something with certainty, but the scientific knowledge does not share that certainty, they open themselves up to the criticism that their analysis is unscientific and testimony inadmissible. At the same time, what's good for the goose is good for the gander — that is, experts you retain and designate cannot express their opinions with absolute certainty. The need for scientific integrity applies to everyone.

NARROWLY FOCUS *DAUBERT* CHALLENGES

It makes little sense to challenge an expert's qualifications when the expert is highly qualified or, at least, qualified enough to meet the liberal qualification standard of Rule 702. Instead, use the expert's strengths to your advantage. For instance, an expert who is highly credentialed and degreed should know better than to state opinions unsupported by the available scientific knowledge. Applaud the expert for identifying

the relevant scientific studies while castigating him or her for ignoring their limitations. Launching sweeping challenges to every aspect of the expert's testimony dilutes and distracts from the strongest arguments in favor of exclusion; do not give the court any reason to deny any part of the motion.

REMEMBER *DAUBERT* FACTORS ARE GUIDELINES, NOT RULES

The *Daubert* factors — testing, peer-review and publication, rate of error and existence of standards, and general acceptance — are guidelines for assessing scientific reliability and relevance, not hard and fast requirements that all testimony must satisfy in every case. Exercising their broad discretion in how to determine reliability, trial courts have identified and used several factors beyond the four discussed in *Daubert*. See, e.g., *Milanowicz v. Raymond Corp.*, 148 F. Supp. 2d 525, 532 (D.N.J. 2001) (itemizing nine other factors considered in determining admissibility of engineering expert testimony). Avoid the temptation to force arguments into the *Daubert* reliability criteria when the criteria do not apply. Instead, weave them and any other relevant criteria throughout your argument so the court will see how they apply, if at all, in a meaningful way.

CONSIDER APPLICABLE STATE LAW

State law plays a role in the *Daubert* analysis. After all, the evidence rules dictate whether evidence is admissible, but state law governs sufficiency of the admissible evidence. When challenging a causation expert, for example, frame the issue and argument in terms of the plaintiff's burden of proof. In many cases, a plaintiff will rely exclusively on the testimony of an expert to satisfy the burden of proof on a particular issue, making knowledge and application of applicable state substantive law defining the elements of claims and sufficiency of evidence all the more important. See *Hall v. Baxter Healthcare Corp.*, 947 F. Supp. 1387, 1398 (D. Or. 1996) ("Under this sub-

stantive standard [established by Oregon law], if an expert cannot state the causal connection in terms of probability or certainty, the expert's testimony must be excluded ..."). If the expert's opinion is insufficient to sustain the burden of proof under the state's substantive law, it will often be inadmissible under *Daubert* and Rule 702.

EVALUATE EACH STEP IN THE EXPERT'S ANALYSIS

"Under *Daubert*, any step that renders the analysis unreliable ... renders the expert's testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology." *Mitchell v. GenCorp Inc.*, 165 F.3d 778, 782 (10th Cir. 1999) (quotations omitted). Experts often lack essential facts, data, and analysis necessary to support their conclusions. Carefully scrutinizing the experts' analyses will frequently reveal that they base their conclusions upon little more than their own assurances, assumptions, and personal opinion unsupported by any sound scientific knowledge or reasoning. Highlighting the flaws in the analysis will strengthen the argument for exclusion. See *Zenith Elecs. Corp. v. WH-TV Broad. Corp.*, 395 F.3d 416, 419 (7th Cir. 2005) ("Shapiro's method, 'expert intuition,' is neither normal among social scientists nor testable — and conclusions that are not falsifiable aren't worth much to either science or the judiciary."); *Gross v. King David Bistro, Inc.*, 83 F. Supp. 2d 597, 601 (D. Md. 2000) (holding that the "*Daubert* analysis commands that in court, science must do the speaking, not merely the scientist") (quotations omitted).

CONCLUSION

Following this checklist will help focus the issues for the trial court, increase the chances of success on any *Daubert* motion, and preserve the trial court's favorable ruling on appeal.



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