July 29, 2020

Rebecca A. Womeldorf, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544
RulesCommittee_Secretary@ao.uscourts.gov

Re: **Amending Federal of Evidence 702 – Comments from the Coalition of Litigation Justice, Inc. Supporting Stronger Gatekeeping in Federal Courts**

Dear Ms. Womeldorf:

The members of the Coalition for Litigation Justice, Inc. (the "Coalition") have an interest in ensuring that the rules and legal obligations applied in asbestos and other toxic tort litigation are consistently applied in conformity with sound science and public policy.[1] The Coalition regularly files *amicus* briefs that address legal and scientific issues in toxic tort litigation. The Coalition submits these comments in regard to proposed amendments to Rule 702. We urge the Committee to consider the dramatic impact on the rule of law when judges do not apply the strictures of Rule 702 correctly or with sufficient vigor. We further urge the Committee to modify the Rule and its comments to ensure full and effective application of the gatekeeping obligations by all federal court judges.

## INTRODUCTION

The Coalition's members regularly submit *amicus* briefs urging courts to apply expert gatekeeping rules in a manner that prevents unsupported and speculative expert testimony to influence jury decisions. Many of those cases are decided under federal Rule 702. The Coalition's efforts to ensure that courts are utilizing reliable science depends heavily upon the manner in which federal courts interpret and apply Rule 702.

## I. The Committee Should Direct Trial Judges to Investigate the Underlying Bases for the Opinion as a Mandatory Element of Rule 702 Review

The Coalition's experience in the last ten years in regard to the application of Rule 702 has been decidedly mixed. Many federal court judges have applied the Rule with sufficient rigor to look behind the expert's claims and statements by reviewing the scientific articles and other

[1] The Coalition consists of its members Century Indemnity Company; Allianz Reinsurance America, Inc.; Great American Insurance Company; Nationwide Indemnity Company; Resolute Management, Inc. a third-party administrator for numerous insurers; and TIG Insurance Company.

claimed support for the opinions. In many instances, as a result of that review, these courts have found that the expert's statements are often unsupported in the literature, or in some cases are outright misrepresentations of the science.

At the same time, there are federal court judges whose inclination is to "let it all in," despite the codification of *Daubert* in Rule 702. These judges studiously avoid examining the expert record other than to cite to the expert's own statements in support of their opinions. This shallow approach to gatekeeping has a predictable outcome – every such opinion allows the expert to testify. These opinions stand in sharp contrast to those by more rigorous judges, who frequently read the cited studies, examine the underlying scientific data, and challenge the expert's logic and overstatements – and then where necessary find that the experts are out of step with the science they claim to rely on.

To illustrate one such instance, the federal MDL judge overseeing a large docket of asbestos cases, despite performing an enormous benefit by dismissing many cases and clearing out that docket, allowed plaintiff experts to testify repeatedly that each and every exposure to asbestos, regardless of degree or dose, is a cause of disease. This "every exposure" theory has been rejected repeatedly by many courts.[2] The MDL court's rulings illustrate the problem – the opinions contain references to the experts' testimony – "Dr. Hammar opines…", "Dr. Hammar relies on…", Dr. Hammar notes …", etc. – with no investigation into the validity of those statements.[3] After remand of one of these cases to its home court in Utah, the Utah federal judge excluded the same experts, finding in part that the experts' statements were not supported by the cited studies.[4]

In a state court example, the intermediate Ohio appellate court decision in *Schwartz v. Honeywell Int'l., Inc.,* 66 N.E.3d 118, 125-128 (Ohio Ct. App. 2016), repeatedly referred to statements made by plaintiffs' experts as support for the reliability of their own testimony. Over *forty times* in the *Schwartz* opinion, the panel simply restated the expert's testimony by noting that the expert "testified," "opined," "found," "discussed," "considered," or "stated" certain opinions. *Id*. at 125-128. Not once did the court actually examine the basis for those statements or decide whether they were credible and derived from a scientific methodology. The Ohio Supreme Court reversed the ruling after determining that the expert testimony was in fact unsupported and unreliable. *Schwartz v. Honeywell Int'l, Inc.,* 102 N.E.2d 477 (Ohio 2018).

[2] For a discussion of the court rulings on the "every exposure" theory, as well as a discussion of the rigor needed for judicial review of low dose cases, *see* William Anderson & Kieran Tuckley, *How Much Is Enough? A Judicial Roadmap to Low Dose Causation Testimony in Asbestos and Tort Litigation,* 42 Am. J. Trial Advoc. 39 (2018).

[3] *See e.g., Anderson v. Saberhagen Holdings, Inc*., 2011 WL 605801 (E.D. Pa. Feb. 16, 2011).

[4] *Anderson v. Ford Motor Co*., 950 F. Supp. 2d 1217, 1223 (D. Utah 2013) ("Plaintiff's experts are unable to point to any studies showing that "any exposure" to asbestos above the background level of asbestos in the ambient air is causal of mesothelioma.").

Virtually every court that has admitted similar "every exposure" forms of testimony has made the same error – accepting the *ipse dixit* of the expert to self-qualify the expert's reliability.[5] If the court declines to pull back the curtain, the serious problem goes unchecked. In sharp contrast stand the many federal court opinions rejecting "every exposure" testimony, and every one of them includes significant discussion of the bases of the opinions – i.e., the complete lack of support in the cited studies, logic, and literature.[6]

The Coalition supports an amendment to the comments of Rule 702 instructing trial judges that a review under Rule 702(b) is insufficient if it merely cites to the experts' self-serving testimony as a basis for letting the expert testify. Examples of courts that perform the analysis correctly – including a review of cited scientific support – should be included in the comment to provide illustrations of a proper application of Rule 702 gatekeeping.

## II. The Review Requirements of *Daubert* and Rule 702 Must Be Strengthened and Consistently Enforced in Federal Courts in Light of the Dramatic Increase in Trial Verdict Damages

In the last few years, plaintiffs have sought, and often received, enormously high damages awards in product liability and tort cases. This escalation creates massive pressure on the court's Rule 702 review – any error by the judge in letting in nonscientific evidence is far more damaging today than it was a few years ago. The Committee must not allow trial judges to relax their guard over "shaky" or insufficient science.

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[5] *See, e.g., Neureuther v. Atlas Copco Compressors, L.L.C.*, 2015 WL 4978448, at *4 (S.D. Ill. Aug. 20, 2015) (citing only to expert's own statements before finding "nothing invalid" about the testimony); *Waite v. AII Acquisition Corp.*, 194 F. Supp. 3d 1298, 1314-17 (S.D. Fla. 2016), *aff'd on other grounds*, 901 F.3d 1307 (11thh Cir. 2018), *cert. denied*, 139 S. Ct. 1384 (2019) (repeated references to expert's own testimony); *Davis v. Honeywell Int'l Inc.*, 245 Cal. App. 4th 477, 487 (2016) (citing only to expert's own explanation).

[6] Federal and state decisions under Rule 702 or state equivalents include *Flores v. Borg-Warner*, 232 S.W.3d 765, 765 (Tex. 2007); *Georgia-Pacific Corp. v. Stephens*, 239 S.W.3d 304, 321 (Tex. Ct. App. 2007); *In re W.R. Grace & Co.*, 355 B.R. 464, 476 (Bankr. D. Del. 2006); *Martin v. Cincinnati Gas & Elec. Co.*, 561 F.3d 439, 443 (6th Cir. 2009); *Smith v. Kelly-Moore Paint Co., Inc.*, 307 S.W.3d 829, 834 (Tex. Ct. App. 2010); *Butler v. Union Carbide Corp.*, 712 S.E.2d 537, 552 (Ga. Ct. App. 2011); *Wannall v. Honeywell Int'l, Inc.*, 292 F.R.D. 26, 43 (D.D.C. 2013), *aff'd*, 775 F.3d 425 (D.C. Cir. 2014); *Moeller v. Garlock Sealing Techs.*, 660 F.3d 950, 950–55 (6th Cir. 2011); *Smith v. Ford Motor Co.*, 2013 WL 214378, at *5 (D. Utah Jan. 18, 2013); *Anderson v. Ford Motor Co.*, 950 F. Supp. 2d 1217, 1225 (D. Utah 2013); *McIndoe v. Huntington Ingalls Inc.*, 817 F.3d 1170, 1177 (9th Cir. 2016); *Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457 (9th Cir.), *cert denied*, 135 S. Ct. 55 (2014) (returning case for more stringent *Daubert* review); *Stallings v. Georgia-Pacific Corp.*, 675 F. App'x 548, 549 (6th Cir. 2017); *Scapa Dryer Fabrics, Inc. v. Knight*, 788 S.E.2d 421, 425 (Ga. 2016); *Bostic v. Georgia-Pacific Corp.*, 439 S.W.3d 332, 338 (Tex. 2014); *Comardelle v. Pennsylvania Gen. Ins. Co.*, 76 F. Supp. 3d 628, 634 (E.D. La. 2015); *Sclafani v. Air & Liquid Sys. Corp.*, 2013 WL 2477077, at *4 (C.D. Cal. May 9, 2013); *Yates v. Ford Motor Co.*, 113 F. Supp. 3d 841, 849 (E.D.N.C. 2015), *reconsideration denied*, 143 F. Supp. 3d 386 (E.D.N.C. 2015); *Vedros v. Northrup Grumman Shipbuilding, Inc.*, 119 F. Supp. 3d 556, 565 (E.D. La. 2015); *Davidson v. Georgia Pacific LLC*, 2014 WL 3510268, at *5 (W.D. La. July 14, 2014), *vacated and remanded on other grounds*, 819 F.3d 758 (5th Cir. 2016); *Crane Co. v. DeLisle*, 206 So. 3d 94, 106 (Fla. Ct. App. 2016); *Suoja v. Owens-Illinois, Inc.*, 211 F. Supp. 3d 1196, 1207-08 (W.D. Wis. 2016); *Doolin v. Ford Motor Co.*, 2018 WL 4599712, at *12 (M.D. Fla. Sept. 25, 2018); *Krik v. Exxon Mobil Corp.*, 870 F.3d 669, 677 (7th Cir. 2017).

A list of jury verdicts and damages since 2016 in talc and Roundup™ litigation alone demonstrates the escalation in verdict amounts (some were reversed on appeal or are on appeal):

- $80.27 million – *Hardeman* (Roundup™ MDL, reduced to $25 million post-trial)
- $289 million - *Johnson* (Roundup™, California), reduced to $78.5 million post-trial, then to $20.5 in intermediate court of appeal
- $2.055 billion - *Pilliod* (Roundup™, California), reduced to $86.7 million post-trial
- $37.2 million - *Barden* (talc, New Jersey, 4 plaintiffs)
- $70 million - *Giannecchini* (talc, Missouri)
- $29.4 million - *Leavitt* (talc, California)
- $4.69 billion – *Ingham* (talc, Missouri), 22 plaintiffs
- $25.75 million – *Anderson* (talc, California)
- $117 million – *Lanzo* (talc, New Jersey)
- $55 million – *Reistesund* (talc, Missouri)
- $72 million – *Fox* (talc, Missouri)

These verdicts are mostly in state court, but they illustrate the trend, and federal courts are not immune. The experience in the Roundup™ federal MDL trial noted above demonstrates the problem. Judge Chhabria, in his pretrial ruling on summary judgment and *Daubert* motions, found that the admissibility of the plaintiffs' expert evidence was "a very close question," and that the "evidence of a causal link between glyphosate exposure and NHL in the human population seems rather weak."[7] He further concluded that "[t]he evidence, viewed in its totality, seems too equivocal to support any firm conclusion that glyphosate causes NHL. This calls into question the credibility of some of the plaintiffs' experts, who have confidently identified a causal link."[8] In this opinion, the court characterized the plaintiffs' evidence as "shaky."[9] The judge then declared that "plaintiffs appear to face a daunting challenge at the next phase,"[10] and again found that "it is

[7] *In re Roundup Prods. Liab. Litig*., 390 F. Supp. 3d 1102, 1108 (N.D. Cal. 2018).

[8] *Id.* at 1109.

[9] *Id.* at 1151.

[10] *Id.* at 1109.

a close question whether to admit the expert opinions"[11] of even the best of plaintiff's five experts. In a later ruling, the judge found that the plaintiffs' experts "barely inched over the line."[12]

Despite these obvious problems, the court held that, under Ninth Circuit law, he was only allowed to exclude true "junk science," and thus he permitted four of the experts to testify. The result, as noted above, was an $80 million verdict based on "shaky" science. The case is on appeal.

Our system of justice can no longer afford to allow such marginal testimony under Rule 702. Verdicts in the hundreds of millions or even billions of dollars must be based on, if anything, significantly more reliable testimony than even *Daubert* itself would require today. For this reason, the Coalition urges the Committee to continue to enhance court gatekeeping authority under Rule 702, and to include any necessary provisions and comments to ensure that federal verdicts cannot be premised on "shaky" science that barely gets over an extremely low bar.

The Coalition thus supports the comments of Lawyers for Civil Justice and enhancements to increase judicial emphasis on Rule 702(b) and (d) as noted above and as submitted by other commenters.[13]

Respectfully submitted,

The Coalition for Litigation Justice, Inc.

[11] *Id.* at 1151.

[12] *In re Roundup Prods. Liab. Litig*., 358 F. Supp. 3d 956, 957 (N.D. Cal. 2019).

[13] *See* Lawyers for Civil Justice, Comment to the Advisory Committee on Evidence Rules and its Rule 702 Subcommittee, Clearing Up the Confusion: The Need for a Rule 702 Amendment to Address the Problems of Insufficient Basis and Overstatement (Sept. 6, 2019); Lawyers for Civil Justice, Comment to the Advisory Committee on Evidence Rules and its Subcommittee on Rule 702, In Support of Amending Rule 702 to Address the Problem of Insufficient Basis for Expert Testimony (Oct. 10, 2018); Federation of Defense & Corporate Counsel, Comment on Potential Amendment to Federal Rule of Evidence 702 (June 30, 2020); Letter from 50 General Counsel re Amending Federal Rule of Evidence 702 to Clarify Courts' "Gatekeeping" Obligation (Mar. 2, 2020).

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| **From:** | Anderson, William |
| **To:** | RulesCommittee Secretary |
| **Subject:** | Comments on Rule 702 Amendment |
| **Date:** | Wednesday, July 29, 2020 4:56:19 PM |
| **Attachments:** | Coalition for LItigation Justice Rule 702 Comments.pdf |

Ms. Womeldorf, I represent the Coalition for Litigation Justice, Inc. Please find attached the comments of the Coalition for consideration by the Committee on possible amendments to Rule 702. Thank you for your attention.

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