CARLTON FIELDS

Does Your Expert Challenge Quack Like an Untimely *Daubert* Motion?

September 06, 2016

In *Frigaliment Importing Co. v. BNS Int'l Sales Corp.*, 190 F. Supp. 116 (S.D.N.Y. 1960), Judge Friendly famously asked "What is chicken?" A case decided last year raises the question, "What is a *Daubert* motion?" **Rybas v. Riverview Hotel Corp.** In *Rybas v. Riverview Hotel Corp.*, 2015 WL 10096189 (D. Md. Jan. 15, 2015), the defendants moved to exclude some of the plaintiffs' experts' opinions several weeks after a court-imposed deadline for *Daubert* motions, but before the deadline for motions in limine. Both motions avoided reference to *Daubert*, but argued, *inter alia*, that these opinions were "speculative" and "not based on scientific, technical or other specialized knowledge" and "did not have an appropriate foundation." The court ruled that these challenges were untimely *Daubert* motions. The defendants tried to distinguish between *Daubert* grounds, such as the application of scientific principles, and their challenges of "impermissible speculation" and "lack of foundation." The court rejected this argument, ruling the latter grounds raised "quintessentially" *Daubert* challenges, and further declined to use its discretion to entertain these grounds after the deadline had passed. The court, however, agreed that other challenges were not untimely *Daubert* matters. For example, the court deferred until trial a challenge that the expert had not been named as an expert on certain issues. Similarly, addressing the defendants' challenge to "improper legal conclusions," the court noted that the line between such testimony and permissible "ultimate issue" testimony was not always clear, and decided to address this issue in the context of the full trial. The court also granted the defendants' motion to exclude expert testimony on the defendants' mental state. **A Few Lessons** Courts are often unsympathetic to untimely *Daubert* challenges. As *Rybas* noted, these motions may raise difficult but potentially case-dispositive issues, may require lengthy hearings and a long time for the court to render a decision, and may impact the trial date. That court suggested that if no *Daubert* deadline has been imposed, a party planning such a motion should ask the court to set one. Even without a deadline, an objection made after the expert has testified will likely be denied — even one made during trial, but before the expert has testified, runs the risk of being denied as untimely.

See, e.g, Club Car, Inc. v. Club Car (Quebec) Imports, Inc., 376 F.3d 775 (11th Cir. 2004). If you find yourself in the position of challenging expert testimony at trial — whether after a *Daubert* deadline or otherwise — consider arguing, if appropriate, that your challenges do not raise "*Daubert*" issues. For example, you might argue that the subject matter, such as legal conclusions or others' mental states, is not appropriate for expert testimony; that the testimony is actually lawyer closing argument dressed up as expert testimony; or that it addresses irrelevant issues (although even relevance and "helpfulness" arguments arguably fall within *Daubert*). You may be able to argue that your expert challenge is a matter of substantive state law on the competency of witnesses, rather than a federal law challenge based on *Daubert* or Rule 702. *See, e.g., McDowell v. Brown* (11th Cir. 2004) (under Federal Rule of Evidence 601, the "competency" of a medical malpractice witness had to be analyzed under state law). If all else fails, depending on the law in your jurisdiction, you might consider couching your challenge as one to the "legal sufficiency" of the testimony to support the judgment, rather than a *Daubert* challenge to admissibility. The *Rybas* court probably would not be persuaded, but a recent Texas case allowed an argument to be made for the first time on appeal where it was framed as one of the "legal insufficiency" of the expert's testimony, based on gaps in analysis, factually incorrect assertions, and testimony that was "speculative and conclusory on its face." *See Gunn v. McCoy*, 489 S.W. 3d 75, 83-86 (Tex. Ct. App. 2016). On the other hand, if you are defending against an objection to your expert at trial, you could argue for an expansive view of the scope of "*Daubert*" and point to the complexity and significance of the expert issues, the length of time the moving party must have known it would raise this challenge, unfair and prejudicial "sandbagging," and the potential disruption caused by allowing these issues to be raised at trial.

Related Practices

Appellate & Trial Support