

**[Products Liability Law Daily Wrap Up, TOP STORY—EXPERT EVIDENCE—9th Cir.: Battle of experts mired by flawed exclusions and admissions of expert testimony, \(Aug. 8, 2017\)](#)**

Products Liability Law Daily Wrap Up

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By Kathleen Bianco, J.D.

A jury verdict in favor of a company charged with causing the contamination of a city's water supply was reversed by the U.S. Court of Appeals for the Ninth Circuit and remanded to the district court for a new trial following a determination that the district court had abused its discretion in the admission and exclusion of certain expert witness testimonies (*City of Pomona v. SQM North America Corp.*, August 7, 2017, Wallace, J.).

The City of Pomona, California, which administers a public water system, discovered in 2007 that the source of its water, the Chino Basin aquifer, had levels of the chemical perchlorate in excess of the Maximum Contaminant Level (MCL) of six parts per billion (ppb) permitted by the California Department of Public Health (CDPH), which regulates contaminants in drinking water and has the power to suspend or revoke a municipality's water system operating permit for failure to comply with an MCL.

In October 2010, Pomona filed suit against SQM North America Corporation (SQMNA) to recover the cost of investigating and remediating perchlorate contamination in the groundwater in and around Pomona, California. Pomona alleged that SQM's importation of natural sodium nitrate from the Atacama Desert in Chile for use as a fertilizer was the primary source of Pomona's perchlorate contamination. On October 31, 2011, SQM moved for summary judgment on two grounds—that Pomona had not suffered a compensable injury under strict products liability law based on California's "economic loss rule"; and that even if Pomona had sustained a compensable injury, Pomona's claim was barred by the applicable three-year statute of limitations. The federal district court in California denied judgment as a matter of law on both arguments.

Following a pre-trial *Daubert* hearing (pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)), the trial court granted SQM's motion *in limine* to exclude the expert testimony of Dr. Neil Sturchio, Pomona's expert witness on causation who was the Director of the Environmental Isotope Geochemistry Laboratory at the University of Illinois at Chicago. Dr. Sturchio began working on Pomona's perchlorate case in April 2011, using a stable isotope methodology. Pomona well water samples were collected and shipped to Dr. Sturchio with blind labels. He analyzed the isotopic composition of the perchlorate in Pomona's groundwater using stable isotope analysis and compared the resulting information with a reference database of known perchlorate sources. He followed a four-step methodology with multiple sub-parts. Based on the analysis, Dr. Sturchio opined that the dominant source of perchlorate in the Pomona groundwater was from the Atacama Desert in Chile and that the samples also contained minor amounts of perchlorate from other non-Atacama sources, including synthetic or indigenous natural sources.

Based largely upon Dr. Sturchio's findings, Pomona argued that the perchlorate found in its groundwater had the same distinctive isotopic composition as the perchlorate imported into southern California from Chile by SQMNA between 1927 and the 1950s. SQMNA moved to exclude Dr. Sturchio's opinions, arguing that "stable isotope analysis" failed to satisfy *Daubert* and was insufficiently reliable to be received in evidence under Rule 702 of the Federal Rules of Evidence. After an evidentiary hearing, the district court excluded Dr. Sturchio's opinions as unreliable on the grounds that: (1) the opinions were subject to future methodological revisions and not yet certified; (2) the procedures he used had not yet been tested and were not subject to retesting; and (3) the reference database used by Dr. Sturchio was too small. As a result of the exclusion, the parties stipulated to dismiss the case allowing the city to appeal the exclusion of the expert's testimony. The U.S. Court of Appeals

for the Ninth Circuit reversed the district court's exclusion of Dr. Sturchio's expert testimony and remanded the case for trial. The remand order was issued in December 2014.

At the onset of the new trial, the city requested to reopen fact and expert discovery to reflect scientific developments that had been advanced during the three years that the original case was on appeal. Specifically, the city sought permission to allow Dr. Sturchio to supplement his expert report to include additional data concerning isotopic analysis of perchlorate that had been developed in recent years. The district court denied the request, opining that the city failed to demonstrate that the new information was material, and determined that to allow the updating of the report could delay the trial. Prior to the start of the trial, the district court also issued a tentative ruling on the city's motion *in limine* seeking to exclude the testimony of SQMNA's expert, Dr. Richard Laton based on the city's claim that the testimony was unreliable under the standards set by *Daubert*. The district court denied the motion without explanation. After seven days of testimony and arguments, the jury returned a verdict in favor of SQMNA. The city appealed, challenging the denial of its motion to update Dr. Sturchio's expert report and the cursory denial of its motion to exclude the testimony of Dr. Laton.

**Dr. Sturchio's testimony.** The district court's refusal to allow the city's expert to update his report to account for scientific developments that had occurred in the three years since the report had originally been written was an abuse of discretion, the Ninth Circuit ruled. In considering a request to reopen discovery, district courts are instructed to consider certain factors, including: (1) the imminence of trial; (2) opposition to the request; (3) prejudice to the non-moving party; (4) diligence of the moving party in obtaining discovery within the guidelines established by the court; (5) foreseeability of the need for additional discovery; and (6) the likelihood that the discovery will lead to relevant evidence. While the district court identified the correct legal standard, its application of that standard was found to have been faulty.

As to the trial court's first contention that the reopening of discovery would delay trial, the appellate panel determined that any delay would have been of the district court's own making. The city filed its formal motion on February 9, 2015, roughly four months before the trial was set to begin. If the court had promptly ruled on that motion instead of waiting roughly six weeks, the reopening of discovery may not have caused a delay. Thus, the problem was not a result of a lack of diligence by the city, the appellate panel reasoned.

Next, the appellate court took issue with the lower court's finding of a lack of materiality. As the updates to the report would have addressed many of the issues initially raised regarding the sufficiency of the testimony, they clearly were material. Specifically, the updated report would have shown that, in the three years since the report was generated, other laboratories began conducting perchlorate isotopic analysis. Additionally, the updated report also would have shown that the reference database that had been deemed too small initially was larger and included samples from around the world. The failure to allow for the updating of the expert report to account for significant scientific developments was not only erroneous, but also prejudicial due to the fact that it likely would have affected the outcome of the case.

**Dr. Richard Laton.** The district court's denial of the city's motion to exclude the testimony of Dr. Laton without explanation was an abuse of discretion because it constituted an abdication of its role as gatekeeper, the appellate panel ruled. Ninth Circuit precedent has established that a failure to provide any "analysis or explanation" for a court's decision regarding expert testimony under *Daubert* will result in a finding that the court had abused its discretion by failing to fulfill its role as gatekeeper.

Under the articulated standard, the district court's one word rejection of the city's motion was an abuse of discretion subject to reversal. SQMNA's claim that the city failed to preserve its objection to the testimony by challenging it during trial was unavailing. The appellate panel rejected the argument, finding that the city's request to voir dire the witness was a renewal of its challenge, providing the district court with another opportunity to rule on the issue. The court of appeals further found these errors committed by the lower court to have been prejudicial to the parties. Accordingly, the district court's judgment was vacated and the case was remanded for a new trial.

The case is No. [15-56062](#).

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Companies: City of Pomona; SQM North America Corp.

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