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ARTICLES

Does Daubert Apply to Expert Evidence Submitted at the Class Certification Stage?

By Rudy Perrino – August 31, 2011

Numerous federal courts have struggled with the question of whether it is permissible for courts to apply Rule 702 and the standards articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), to expert evidence submitted in support of a class certification motion and with the broader question of whether, at the class certification stage, Rule 23 authorizes courts to reach the underlying merits of a claim where those merits directly overlap with the Rule 23 issues. Some courts have concluded that courts must refrain from ruling on the merits of a case, even where they overlap with the questions to be resolved on a motion for class certification. *See, e.g., Rodney v. Nw. Airlines*, 146 F. App'x 783, 786 (6th Cir. 2005) (“In analyzing the predominance requirement, courts ‘take care to inquire into the substance and structure of the underlying claims *without passing judgment on their merits.*’” (quoting *Robinson v. Texas Auto. Dealers Ass’n*, 387 F.3d 416, 421 (5th Cir. 2004) (emphasis added)). If courts are not allowed to rule on the merits, then it follows that circuit courts cannot employ the tools available to them under Rule 702 and the *Daubert* case.

Perhaps the strongest example of a court holding that the *Daubert* standard does not apply at the class certification stage can be found in *Dukes v. Wal-Mart*, 222 F.R.D. 189, 191 (C.D. Cal. 2004), *aff’d*, 509 F.3d 1168, 1179–80 (9th Cir. 2008), *rev’d*, No. 10-277, slip op. at 27 (June 20, 2011). There, the district court determined that *Daubert* did not apply to expert evidence submitted in support of a motion to certify a class of Title VII sex discrimination claims against Wal-Mart. “Rather, the question [at the class certification stage] is whether the expert evidence is sufficiently probative to be useful in evaluating whether class certification requirements have been met.” *Id.* (citations omitted). This superficial look behind the pleadings is analogous to the standard adopted in *Rodney*. There, the Sixth Circuit Court of Appeals relied on language from the Fifth Circuit case of *Robinson v. Texas Automobile Dealers Ass’n*, cautioning that, on a motion for class certification, the court should “inquire into the substance and structure of the underlying claims without passing judgment on their merits.” *Robinson*, 387 F.3d at 421. In doing so, the Fifth Circuit constrained the court’s inquiry to “‘identifying the substantive issues that will control the outcome, assessing which issues will predominate, and then determining whether the issues are common to the class.’” *Id.*, quoting *O’Sullivan v. Countrywide Home Loans, Inc.*, 319 F.3d 732, 738 (5th Cir. 2003). In other words, courts would only be authorized to identify, but not resolve, merits at the class certification stage, even if those merits were integral to the Rule 23 considerations.



Other courts, while not addressing the question of *Daubert*'s applicability head on, have authorized a more probing inquiry into the merits at the class certification stage but have adopted less than a full-blown "preponderance of the evidence" standard for the admissibility of evidence at that stage. For example, in *In re IPO Securities Litigation*, 227 F.R.D. 65, 93 (S.D.N.Y. 2004), the court certified a securities fraud class through application of a "some showing" standard to the evidence presented by the plaintiffs, which it derived from the Second Circuit's opinions in *Caridad v. Metro-North Commuter Railroad*, 191 F.3d 283, 292 (2d Cir. 1999), and *In re Visa Check/MasterMoney Antitrust Litigation*, 280 F.3d 124, 134–35 (2d Cir. 2001). In doing so, the court rejected application of a full-blown "preponderance of the evidence" standard that had been adopted by the Third and Fourth Circuits, concluding that such a standard was inappropriate under *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974) at the certification stage. This decision was later reversed by the Second Circuit, 471 F.3d 24 (2d Cir. 2006), on precisely these grounds. However, it still serves to highlight the confusion created by what, until recently, seemed to be conflicting statements by our Supreme Court.

These struggles with the standards to be applied at the class certification stage actually derive not from conflicting statements from the Supreme Court, but from its dual mandates with respect to the consideration of class certification motions. In *Eisen*, the Court stated that "[w]e find nothing in either the language or history of Rule 23 that gives a court *any* authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." 417 U.S. at 177. To do so, the Court cautioned, could prejudice the defendant's case through final resolution of core elements of the plaintiff's claims without the benefit of a full-blown trial. *Id.* at 178. In *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982), the Court issued the seemingly contradictory directive that a court may certify a class action only if it is satisfied, after engaging in a "rigorous analysis," that the requirements of Rule 23(a) have been satisfied. *Id.* at 160–61. While these two statements may, at first blush, appear to be contradictory, they in fact can be reconciled if their context is taken into consideration.

In *Falcon*, the statement is as it appears. On a motion for class certification, a court is to roll up its sleeves and take a hard look at whether the claims of the named plaintiff(s) meet the requirements of Rule 23(a). In some cases, compliance with the requirements of Rule 23 can be ascertained through a rigorous analysis of the pleadings themselves. *E.g.*, *Falcon*, 457 U.S. at 160. In many cases, however, courts will have to conduct a "limited preliminary inquiry," looking behind the pleadings to determine compliance with the rule. *Blades v. Monsanto*, 400 F.3d 562, 566 (8th Cir. 2005). "[T]he court must look only so far as to determine whether, given the factual setting of the case, if the plaintiffs general allegations are true, common evidence could suffice to make out a prima facie case for the class." *Id.* Where expert evidence is essential to the class certification question, some courts have recognized that it is appropriate to give full consideration to the expert's qualifications and the foundations behind his or her opinion, ruling conclusively on its admissibility pursuant to all applicable standards, including Rule 702 and



Daubert. Am. Honda Motor Co. v. Allen, 600 F.3d 813, 815–16 (7th Cir. 2010); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 323 (3d Cir. 2008); *Blades*, 400 F.3d at 575. Others, as discussed above, have struggled with these seemingly conflicting statements, failing to proceed to a merits-based discussion.

Whatever confusion might have previously existed was recently resolved through the Court’s ruling in *Dukes v. Wal-Mart*, No. 10-277, slip op. at 9–11 (June 20, 2011). That case involved an appeal from the certification of a Title VII sex discrimination class consisting of more than 1.5 million present and former female employees of Wal-Mart. Although the Court declined in that case to resolve the question of whether Rule 702 and the standards articulated in *Daubert* should be applied at the certification stage, it did direct courts to engage in a “rigorous analysis” to determine whether the prerequisites of Rule 23(a) have been satisfied. *Id.* Finally, the Court made it quite clear that in engaging in this level of analysis, it cannot be helped if the determination “generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff’s cause of action.” In reaching this conclusion, the Court distinguished and clarified its earlier statement in *Eisen*, that “[w]e find nothing in either the language of history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.” According to the Court, its statement in *Eisen* was in reference to the lower court’s preliminary inquiry into the merits to determine who should bear the costs of notice—an issue the Court noted was unrelated to the question of class certification. *Dukes*, No. 10-277, slip op. at 9–11. For that reason, it was inappropriate for the lower court to reach these unrelated merits-based issues at the class certification stage. Any other reading of *Eisen* “is contradicted by our other cases.” *Id.* at 10 n.6.

The critical issue to the Court in the *Dukes* case was the issue of commonality. The majority opinion clarified that what is important to the issue of commonality is not that the class possess common questions, for “[a]ny competently crafted class complaint literally raises common ‘questions.’” *Id.* at 9, citing Nagareda, “Class Certification in the Age of Aggregate Proof,” 84 *N.Y.U.L. Rev.* 97, 131–32 (2009). “Reciting [common] questions is not sufficient to obtain class certification. Commonality requires the plaintiff to demonstrate that the class members ‘have suffered the same injury.’” *Id.*, quoting *Falcon*, 457 U.S. at 157–58, n.13. “What matters to class certification . . . is not the raising of common “questions”—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.” *Id.* at 9–10, citing Nagareda, *supra*, at 132.

The Court then went on to explain that in order to resolve the question of commonality, it is sometimes necessary to go behind the pleadings and engage in a “rigorous analysis” of the merits of the case, insofar as they have bearing on the question of certification. *Id.* “Frequently, that ‘rigorous analysis’ will entail some overlap with the merits of the plaintiff’s underlying claim.



That cannot be helped. . . . The necessity of touching aspects of the merits in order to resolve preliminary matters, e.g., jurisdiction and venue, is a familiar feature of litigation.” *Id.* at 10 (citations omitted).

After definitively clarifying that courts must reach the merits at the class certification stage, where those merits are enmeshed with the issues to be resolved, the Court proceeded to conduct its own “rigorous analysis” of the plaintiffs’ proof on the issue of commonality. *Id.* at 12–19. In doing so, the Court spent a significant amount of time analyzing the plaintiffs’ evidence of a discriminatory policy, which had been proved primarily through the opinion of a sociological expert. *Id.* at 13–19. While the Court’s analysis did not require it to reach the standards articulated in Rule 702 and *Daubert*, it did seemingly approve of their application at the class certification stage: “The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. 222 F.R.D. at 191. *We doubt that is so.*” *Id.* at 14 (emphasis added).

In short, the Court in the *Dukes* case seemed to resolve finally much of the confusion about the standards that apply at the class certification stage. *Dukes* stands for the proposition that on a rigorous analysis of the requirements of Rule 23, where resolution requires evaluation of the merits, courts are to extend their rigorous analysis of those merits, even ruling on them conclusively where required. Where resort to expert evidence is necessary to evaluate the Rule 23 requirements, then courts must conduct the same rigorous analysis of the expert evidence, applying all applicable standards to that analysis, including those contained in Rule 702 and articulated in the *Daubert* case. However, courts must be careful not to extend their analysis beyond the confines of Rule 23, limiting their inquiry to only those merits that are necessary for final resolution of the class certification question.

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Preparing for and Taking an Effective Deposition, Part One

By Ladd Sanger – August 31, 2011

Most practicing attorneys understand the important role depositions play in the resolution of a lawsuit. They often represent the best opportunity to obtain substantive information, uncover new facts, and set foundations for impeachment. Furthermore, the deposition is unique among discovery devices: Responses are not summarized and filtered by other attorneys, and answers are not buried in reams of responsive documents. For many, however, preparing for a deposition is limited to quickly gathering only the most essential of documents and crafting an outline from memory on the flight in. No single factor contributes more to the relative success, or failure, of a

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deposition more than proper preparation. Take the time to prepare for and organize your deposition adequately before you leave the office, and you might be surprised at just how much a truly effective deposition can influence the outcome of your case.

To begin, you must thoroughly consider your objectives in taking this particular deposition. Depositions will typically fall into two general categories: discovery depositions, whether gathering broad information or seeking key admissions and facts; and depositions intended to preserve the testimony of the witness for use at trial. Regardless of the general objective of the deposition, you should always strive to elicit testimony as if it were going to be used in court. Deposition testimony may be used at trial for impeachment, as a statement of a corporate representative, if the witness is unavailable, or for the rehabilitation of a witness. When preparing for and taking the deposition, remember its ultimate purpose—to obtain and preserve testimony. Your deposition must be thorough enough to ensure the witness has fully disclosed his or her recollection or opinion.

Most important, throughout the entire process of preparing for and taking the deposition, always keep your primary goal in mind. Why do you want to depose this witness in the first place? For each witness deposed, the ultimate goal should be clear. Determine your objectives and then thoroughly prepare so as to accomplish them.

Preparing for the Deposition

Preparing for a deposition entails a thorough familiarity with the facts and legal concepts of the case. You should initially review the pleadings to refresh your recollection as to the claims and defenses asserted. Make a short list of the claims, and then pull the pattern jury charge for each so that you are aware of all elements requiring prove up. In every deposition, you should attempt to prove as many elements of your prima facie case as the witness's scope of testimony will allow. Also take into account what evidence is needed to support each element. Where will the proof come from? Is this deponent the best, or even the only, source?

Consider your opponent's case as well: What is needed to negate your cause of action? What elements are necessary to raise an affirmative defense? You should also anticipate and plan your response to dispositive motions, especially when past experience with opposing counsel or the specifics of the case indicate that a dispositive motion will likely be made. You can no longer wait until trial to prove your essential elements.

Next, review the discovery produced in the case to date. This serves two functions: It familiarizes you with the facts and materials available, and it allows you to pull documents for use as exhibits at the deposition. A thorough look at the discovery produced may also reveal areas in which information is lacking. While this is of obvious benefit in determining what testimony you will seek or which documents you may request, there is more to consider. For example, is it possible to propound additional discovery requests, obtain a privilege log, or



compel complete responses? If such action will improve the effectiveness of the deposition, you may well be better off in delaying your notice until you have all the information necessary. If a delay is not desirable, or even possible, but certain testimony can only be obtained in light of future discovery productions that you have high expectations will occur, you can always reserve time to depose the witness further at a later date.

The more knowledge you take to the deposition, the more effectively you can question the witness. Exhaust all available sources in researching your witness's background and that of any corporate affiliations. Ideally, you will be able to locate prior deposition testimony of the witness you are going to depose, most conveniently via databases such as TrialSmith. *See* www.trialsmith.com. While most litigators are well aware of the legal research value provided by the ubiquitous subscription sources, such as [LexisNexis](#) and [Westlaw](#), most contain extensive public record databases as well. Vast amounts of information are obtainable through the Internet at absolutely no cost. Many of the governmental agencies, such as the [Securities and Exchange Commission](#), [Federal Energy Regulatory Commission](#), [Food and Drug Administration](#), and [National Transportation Safety Board](#) have online databases available free of charge. Often overlooked, a simple search on Google or any other search engine can lead to material undetected by other means. Likewise, there are a multitude of industry-specific online directories, collections of news sources, blogs, and web pages covering every conceivable topic and subfield. *See* [Technorati](#) and [Blawg.com](#).

There is no need to limit witness research only to textual sources. Reach out to your network of acquaintances—contact non-party witnesses, those in the same industry as your witness, and other attorneys. If the subject matter of the deposition is unfamiliar or technically complex, make the most of your own consultants and experts.

Do not restrict your search solely to your deponent, either. If you are deposing a corporate representative, search for past employees or other persons similarly situated within the same company. It is possible that a person with a very similar job title or the witness's predecessor has been deposed in another case and you may gain valuable insight by skimming that deposition for insight into the corporate structure and procedure.

Next, consider what questioning approach best suits this particular deposition, whether it be by topic, subject matter, or in chronological order. Keep in mind that any order to your questions will give the witness and the defending attorney an idea of where you are going. Therefore, consider laying out your questions so you can ensure that you covered all of the areas that are important and then mix the questions up in your outline or during the deposition. Whatever approach you ultimately choose, make sure it allows you to fully explore each element, fact, and document required to meet your overall objectives.



Creating an Outline

With the information gathered from your investigation, you should have a good idea of the content and structure of your deposition. Develop an outline that is comprehensive enough to allow you to remember each pertinent detail, but avoid compiling a laundry list of complete questions. By simply writing out a series of questions, you will be hampered in responding to unanticipated answers and in pursuing new lines of questioning as they arise. A rigid script also urges the reader's attention to the next question in line, often allowing less-than-complete answers to slip by unnoticed. On the other hand, a true outline encourages the questioner to focus on the deponent's response, listen during a deposition, and observe the body language of the deponent to develop lines of questioning fully and obtain information that you may not have known existed. In addition, a detailed outline may allow the witness and the defending attorney to know how much longer the deposition will take and which areas you will be covering.

In limited circumstances, however, it is important to write out a question word for word. Consider the importance and complexity of the question to determine whether it needs to be framed, for example, when you are attempting to elicit testimony to fit a particular point of law for a pending motion or to ask an expert witness a hypothetical question that must contain numerous elements to stave off an incomplete hypothetical objection. If the question needs to be framed, frame it precisely as it will be used at trial.

With practice, you will develop an outline and note-taking system that suits your particular style. One popular method is to use a three-ring binder with the outline of subjects you wish to cover. Beneath the subjects, write key words that will jog your memory. These outlines should be spaced to allow room for writing down notes and checking off those areas that you have covered. Include specific documents that need to be identified, authenticated, or explained. Likewise, incorporate the elements of the various claims and defenses that you identified in your preparation, allowing you to make notes on particular areas of the witness's testimony that may bear on those elements.

For less experienced attorneys, it may be advisable to include checklists for proving up documents, medical bills, or the questions necessary to lay a foundation for later questions. You cannot ask too many foundational questions such as the following: Who was present? What happened? What was said? What documents exist? Is there anything else you remember? It is easier to have a standard foundation/prove-up checklist that you can refer to during the deposition rather than put it under each exhibit or document that you will be proving up. A practical way to handle checklists is to make a page with all the necessary checklists on one sheet in a small font. This sheet can be two sided and laminated so it can be used in any deposition.

Items to Take with You to the Deposition

Prior to leaving for the deposition, preferably no later than the night before, you should collect



and review all the materials that you wish to bring with you. Consider giving your legal assistant a checklist to help with preparing your deposition notebook, to reduce preparation time, and to ensure that you have not overlooked anything important. A copy of the deposition notice should be taken to each deposition and given to the court reporter so the reporter has the style of the case. You may also want to make the notice and request for documents an exhibit to the deposition, for use when ensuring that the witness brought the requested materials. Doing so also serves to establish a solid record in the event the witness later produces responsive documents that were not produced at the deposition. You should also ask the witness whether any documents were withheld and the basis for the documents being withheld, e.g., privilege.

Always bring business cards for the court reporter, videographer, and opposing counsel so they know how to contact your office and where the transcript and recording are to be delivered. Make sure you have a means to view your up-to-date calendar so that you may easily schedule additional depositions, production of documents, or other dates relating to the case at mutually convenient times for all of the attorneys and parties.

In technically complex cases, it may be helpful to give the court reporter a glossary of relevant terms to which they can refer. For example, in an aviation case, you can expect that deposition testimony of pilots or engineers will be rife with acronyms and jargon with which the court reporter will likely not be familiar. Unique names or spellings should also be included in the glossary of terms. Often, court reporting firms are able to provide paralegals with past experience in specific types of testimony, so inquire among local companies in advance of depositions regarding highly technical subject matters.

You should consider taking a copy of the applicable Rules of Civil Procedure, Rules of Evidence, and any local rules governing discovery that may become a subject of dispute during the deposition. Likewise, bring and briefly review the applicable rules governing deposition procedures, especially when in an unfamiliar forum. If the court has a telephone number for the magistrate judge or special master who is in charge of deciding discovery disputes, you should take it to all depositions. Having this number handy, you can often call any bluffs by opposing counsel and stave off improper instructions not to answer or disruptive defense tactics.

You should have your outline in your deposition notebook, along with annotated copies of exhibits from which you will be asking questions. Always apply Bates and exhibit labels in advance, before making copies for the witness, opposing counsel, and the court reporter. If opposing counsel fails to Bates label documents produced prior to the deposition, apply your own. Marking exhibits in advance and maintaining that same designation throughout the case allows for easy and organized reference in later discovery, in hearings, or at trial. If the deposition is a continuation of a prior deposition and exhibits are being marked consecutively, remember to note the last exhibit number used to determine the proper number for the next exhibit. One of the most efficient ways to use documents is to highlight and annotate those which



you plan to discuss with the witness. By writing on the document, you can focus on it and the witness rather than having to refer to questions in your outline with regard to the document. While not necessary in every deposition, sometimes a copy of the pleadings is helpful to dispel any arguments concerning claims or questions about the scope of permissible discovery.

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Part two of this article, covering conducting the deposition, will appear in the next issue of Mass Torts Litigation.

The Admissibility of Governmental Records in Aviation Cases

By Mollie O'Brien – August 31, 2011

For the aviation law practitioner, whether on the plaintiff or defense side, the ability to use or exclude documents prepared by the National Transportation Safety Board (NTSB) or the Federal Aviation Administration (FAA) as evidence at the time of trial is critical to effectively litigating the case and will ultimately work to shape the character of the rest of the evidence. While the paper trail associated with the FAA's regulation of aviation safety or an NTSB investigation is vast, counsel must be aware of the evidentiary issues that arise from using these materials as bases for expert opinion or as evidence at the time of trial. This article examines the parameters and arguably established limitations of using governmental reports, including documents prepared by the NTSB and the FAA in the context of litigating an aviation case.

The Public Records Exception to the Hearsay Rule

Aside from any statutory framework, NTSB and FAA documents, as governmental reports, are subject to Federal Rules of Evidence 402, 403, and 803. A public record that sets forth factual findings resulting from an investigation made pursuant to authority granted by law falls under the hearsay exception enumerated in Rule 803(8)(C). Under Rule 803(8), governmental documents are presumed admissible. The Advisory Committee Notes to Rule 803 explain that the "[j]ustification for the [public records] exception is the assumption that a public official will perform his duty properly and the unlikelihood that he will remember the details independently of the record." Subsection (8)(C) "assumes admissibility in the first instance, but with ample provision for escape if sufficient negative factors are present." This rule governs the admissibility of government agency reports and provides that the following reports are not hearsay:

Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report [], or (C) in civil actions [], factual

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findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

See Fed. R. Evid. 803(8).

Further, this rule takes a broad approach to admissibility, consistent with the Federal Rules. *See Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 109 S. Ct. 439 (1988). The hearsay exception is to be applied in a “common sense manner” and “construed liberally in favor of admissibility.” *Id.* Factually based conclusions or opinions are included in the exception enumerated in Rule 803(8)(C).

To be admissible under Rule 803(8)(C), a government document must also have indicia of trustworthiness. *Moss v. Ole S. Real Estate, Inc.*, 933 F.2d 1300, 1305 (5th Cir. 1991) (“If the reports are untrustworthy, they are inadmissible.”). In determining whether the report is trustworthy, the Advisory Committee Notes to Rule 803 state the court may consider several factors, including (1) the timeliness of the investigation, (2) the special skill or experience of the official, (3) whether a hearing was held and the level at which it was conducted, and (4) possible motivation problems in preparation of the report. In addition, courts consider the overall completeness and finality of a report as factors that support the report’s trustworthiness. *In re Complaint of Nautilus Motor Tanker Co., Ltd.*, 862 F. Supp. 1251, 1255 (D.N.J. 1994); *see Coleman v. Home Depot, Inc.*, 306 F.3d 1333, 1342 (3d Cir. 2002); *Borough of Lansdale v. PP & L, Inc.*, No. 02-8012, 2007 WL 2597559, at *8 (E.D. Pa. Sept. 4, 2007).

Accordingly, a public record under Rule 803(8)(C) will be presumed admissible unless the objecting party demonstrates that enough negative factors are present to indicate a lack of trustworthiness. *In re Jacoby Airplane Crash Litig.*, No. 99-6073(HAA), 2007 WL 2746833, *11 (D.N.J. Sept. 19, 2007). Simply stated, only if there is evidence that the person responsible for preparing a report had any improper motive or interest in submitting an unfair or inaccurate report, the governmental report will be deemed trustworthy.

In *Beech Aircraft Corp. v. Rainey*, the Supreme Court ruled that the public records exception to the hearsay rule included not only factual findings from official investigations but also opinions and other evaluative materials flowing from factual findings contained therein. 109 S. Ct at 448–49. *Rainey* involved a Judge Advocate General (JAG) report concerning an airplane crash and its cause as expressed in the report. The Court held that as long as the conclusions in the JAG report were based on the factual investigation and satisfied the rule’s trustworthiness requirement, the trial judge could admit these findings into evidence. *Id.* at 449–50. And as long as a conclusion is merely based on factual investigation and satisfies the rule’s trustworthiness requirement, it is admissible along with other portions of the report.

The immediate effect of *Rainey* was to clarify a disputed issue in the federal courts. Prior to this ruling, federal courts would exclude opinions on the grounds that the opinions were not “factual findings” and were therefore inadmissible under the hearsay exception. *Id.* at 446. The Supreme Court ruled that it would be impossible to separate factual content from conclusions or opinions. *Id.* Moreover, the underlying rationale of *Rainey* expanded the admissibility of government documents in general on the ground that so long as the content of the evaluative document survived scrutiny under 803(8)(C) and the other Federal Rules of Evidence, including Rule 403, the document would be deemed admissible.

The considerations outlined in *Rainey* hold true in the context of documents prepared by the FAA and are consistently applied by courts in assessing the admissibility of FAA documents. With respect to NTSB documents, however, statute largely controls whether a report of the board will be deemed admissible. And, even if use of the board document is permitted or not outright excluded by statute, the document must pass muster under the Federal Rules, including Federal Rule of Evidence 403. Some courts find that the use of certain government documents may be misleading to the jury where the position set forth in the government document directly or indirectly acts as an imprimatur or a rubber stamp on the positions taken in litigation. *See Rockwell Int’l Corp. v. City of New York*, 454 U.S. 1164 (1982) (characterizing government reports as carrying a special “aura” of reliability); see also *City of New York v. Pullman, Inc.*, 662 F.2d 910, 915 (2d Cir. 1981), *cert denied sub nom. Rockwell Int’l Corp. v. City of New York*, 454 U.S. 1164 (1982).

Limited Admissibility of NTSB Documents

The admissibility of documents prepared by the NTSB is typically controlled by the trial court’s interpretation of statute and contingent on whether the document can be characterized as a “Report of the Board.”

Pursuant to its statutory mandate, the NTSB is an independent federal agency responsible for determining the probable cause of accidents and making subsequent recommendations to help prevent future accidents. The NTSB analyzes and makes recommendations regarding ways to prevent similar accidents but does not promulgate, adjudicate, or enforce aviation safety regulations. *See Chiron Corp. & PerSeptive Biosystems, Inc. v. Nat’l Trans. Safety Bd.*, 198 F.3d 935, 936–37 (D.C. Cir. 1999).

Congress entrusts the NTSB with broad and extensive powers to accomplish its mandate and an officer or employee of the board can enter a site where an accident occurred and “do anything necessary to conduct an investigation.” 49 U.S.C. § 1134(a)(1) (1994). Further, the board has sole discretion in testing or inspecting aircraft and accident parts and in determining how testing is conducted, its investigations having “priority over any investigation by another department, agency, or instrumentality of the United States Government.” *See* 49 U.S.C. § 1131(a)(2) (1994). While the board’s staff runs the investigation and has sole authority over the investigation’s



character and scope, outside interested parties may be designated to participate. *See Chiron Corp.*, 198 F.3d at 938 (D.C. Cir. 1999). The FAA is the only federal agency that has the right to participate in the NTSB's investigation; however, the board may designate private parties such as aircraft or component part manufacturers to participate. *See* 49 C.F.R. § 831.11 (1998).

As a result of its investigation, the NTSB produces a public docket or factual report containing the facts observed in the course of its investigation. *About the NTSB: Data & Information Products*, www.ntsb.gov/investigations/process.html; *Chiron Corp. v. Nat'l Transp. Safety Bd.*, 198 F.3d 935, 938–39 (D.C. Cir. 1999); *see* 49 C.F.R. § 831.4. The board itself then issues a document called an accident report, accident brief, or probable cause report setting forth its opinions and conclusions regarding the most likely cause of the accident.

Statute largely controls whether an accident report may be admitted in litigation. *See* 49 U.S.C. § 1154. As stated in 49 U.S.C. § 1154(b), “[n]o part of a report of the Board, related to an accident or an investigation of an accident, may be admitted into evidence or used in a civil action for damages resulting from a matter mentioned in the report.”

However, the statute's scope is limited both on its own terms and by regulation. Section 1154(b) refers specifically to “a report of the Board.” Federal regulations explain that “reports of the board” are further defined:

Board accident report means the report containing the Board's determinations, including the probable cause of an accident issued either as a narrative report or in a computer format (“briefs” of accidents). Pursuant to [49 U.S.C. §1154(b)], no part of a Board accident report may be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such reports.

49 C.F.R. § 839.2 (2010).

By contrast, “[f]actual accident report means the report containing the results of the investigator's investigation of the accident. The Board does not object to, and there is no statutory bar to, admission in litigation of factual reports.” *Id.*

Thus, while certain factual information from NTSB investigators may be used in civil litigation, the report of the board's conclusions may not be used. A factual accident report is the product of the NTSB's investigation, and 49 C.F.R. § 835.2 sets out that there is no bar to using the factual accident report. This section was amended to clarify the NTSB's policy regarding admission of factual accident and accident reports.

Prior to this 1998 amendment, several courts interpreted “factual accident reports” as synonymous with factual findings of the NTSB appearing in NTSB accident reports. Although

some courts have permitted litigants to use excerpts from the factual portions of NTSB reports, more recent rulings have taken a prohibitive stance on admitting these reports into evidence for their factual findings or otherwise. *Compare Chiron Corp.*, 198 F.3d at 940–41 (D.C. Cir. 1999) (holding that NTSB documents were not admissible), *with Am. Airlines, Inc. v. United States*, 418 F.2d 180, 196 (5th Cir. 1969) (permitting use of graphs generated from information contained in safety committee’s report) and *Berguido v. Eastern Air Lines, Inc.*, 317 F.2d 628, 631–32 (3d Cir. 1963) (allowing testimony based on accident report from witness). Indeed, courts have arguably expanded the definition of what constitutes a “report of Board” excluding documents containing factual information, such as NTSB safety recommendations, as falling under the statutory bar. *See, e.g., Lidle v. Cirrus Design Corp.*, No. 08 CIV. 1253 BSJHBP, 2010 WL 1644958 (S.D.N.Y. Apr. 22, 2010); *In re Air Crash at Lexington, Ky., Aug. 27, 2006*, No. 5:06-316, 2008 WL 2796875, at *4–5 (E.D. Ky. July 18, 2008) (excluding all safety recommendations relying on *Chiron*); *In re Air Crash Near Peixoto de Azeveda, Brazil, on Sept. 29, 2006*, No. 07 MD 1844 (BMC), 2008 WL 4093568, at *4 (E.D.N.Y. July 2, 2008); *In re Jacoby Airplane Crash Litig.*, No. 99-6073 (HAA), 2007 WL 2746833, at *9–10 (D.N.J. Sept. 19, 2007); *Petroleum Helicopters Inc., v. Rolls-Royce Corp.*, No. 1:05-CV-0410-LJM-WTL, 2007 WL 2249118, at *8 (S.D. Ind. Aug. 2, 2007).

In *Chiron Corp. & PerSeptive Biosystems, Inc. v. National Transportation Safety Board*, an action challenging the NTSB’s decision not to share information brought by two parties to the NTSB’s investigation, the D.C. Circuit ruled that the certain portions of the NTSB report were inadmissible under the statute because “the NTSB investigatory procedures were not designed to facilitate litigation” and because the reports “should not be used to the advantage or disadvantage of any party in a civil suit.” *See Chiron Corp.*, 198 F.3d at 940; *see also Thomas Brooks v. Burnett*, 920 F.2d 634, 646 (10th Cir. 1990) (stating NTSB “has no role in determining civil liability”). The *Chiron* court explained that there was a distinction between the NTSB accident report and an investigator’s accident report and that courts have mistakenly found that investigator findings were the findings of the NTSB.

Recent rulings confirm that there is still some disagreement regarding the admissibility of NTSB documents. *Compare Chiron Corp.*, 198 F.3d at 941 (explaining distinction between investigator’s accident report and NTSB accident report, and recognizing that courts have frequently confused what constitutes the investigator’s findings with the findings of the NTSB) *with Hurd v. United States*, 134 F. Supp. 2d 745 (D.S.C. 2001), *aff’d*, 34 F. App’x 77 (4th Cir. 2002), *Travelers Ins. Co. v. Riggs*, 671 F.2d 810, 816 (4th Cir. 1982) (“[Section 1154(b)] forbids the use of conclusory sections of NTSB reports, and [we] thus hold that the district court properly excluded them.”), and *Major v. CSX Transp.*, 278 F. Supp. 2d 597, 604 (D. Md. 2003) (finding certain parts of the report are admissible and certain portions are inadmissible); *Starling v. Union Pac. R.R. Co.*, 203 F.R.D. 468, 485 (D. Kan. 2001) (holding that “the only parts of the NTSB report that are off limits are those that contain agency conclusions on probable cause of an accident”).

For example, while several courts have relied on the *Chiron* case to hold that certain NTSB documents such as Safety Recommendations are inadmissible, still other courts have decidedly not followed the holding in *Chiron* and have admitted portions of NTSB reports in litigation. In *Hurd v. United States*, the Fourth Circuit, for instance, affirmed the trial court's decision to admit NTSB documents, noting that courts have consistently held that "the factual portions of a NTSB report are admissible into evidence, while excluding any agency conclusions on the probable cause of the accident." *Hurd*, 134 F. Supp. 2d 745.

There is, of course, some validity in permitting the use of NTSB reports in litigation especially where the litigant did not in the first instance participate in the accident investigation. Crash victims and their families are not conferred party status under 49 C.F.R. § 831.11, and other non-parties to NTSB investigations cannot participate in the board's work. The statutory authority that provides the investigator in charge with the explicit authority to grant party status to suitably qualified individuals, agencies, companies and associations and to the FAA in aviation cases—49 C.F.R. § 831.11—implicitly excludes the accident victims and their families from the party participation system.

Arguably, data contained in factual investigative reports or studies conducted by the NTSB, especially where not available elsewhere, should also be admissible under 49 C.F.R. § 835.2. Along these lines, there is some authority for the idea that factual information contained in NTSB documents may be used by non-parties to the NTSB investigation, including experts in litigation. *See Mullan v. Quickie Aircraft Corp.*, 797 F.2d 845, 848 (10th Cir. 1986) (experts may rely on factual reports in forming their opinions); *In re Air Crash Disaster at Stapleton Int'l Airport, Denver, Colo., on November 15, 1987*, 720 F.Supp. 1493, 1495 (D. Colo. 1989) (admission of edited NTSB report and human factors report upheld on appeal with the recommendations and probable cause findings redacted); *Am. Airlines, Inc. v. United States*, 418 F.2d 180, 196 (5th Cir. 1969) (permitting admission of graphs drawn from information in a Safety Committee's report); *In re Jacoby Airplane Crash Litig.*, No. 99- 6073(HAA), 2007 WL 2746833, *9 (D.N.J. Sept. 19, 2007) (rejecting argument that NTSB Recorded Radar Study, a report of an engineer, was barred under section 1154(b), but barred Safety Recommendation as a report of the board, finding that the presence of the acting chairman's signature on the document was more or less controlling).

Ultimately, factual information generated in NTSB investigations, testing, or other analysis in Board investigations are likely reliable and trustworthy considering that agency involvement typically occurs prior to the filing of lawsuits related to the incident. Accordingly, experts should be able to use this information where such testing is not otherwise available.

The Presumed Admissibility of FAA Documents

No statutory provisions govern the admissibility of government documents other than NTSB documents. For that reason, the admissibility of these other government documents depends on



the Rules of Evidence, and, significantly, courts have found FAA documents admissible. Chief among these are airworthiness directives, which are legally enforceable rules applicable to aircraft, propellers, engines, and appliances. 14 C.F.R. § 39.5 (2011). The government issues airworthiness directives when an “unsafe condition exists in the product and the condition is likely to exist or develop in other products of the same type design.” See *Melville v. Am. Home Assurance Co.*, 584 F.2d 1306, 1315 (3d Cir. 1975) (finding that airworthiness directives were admissible pursuant to Rule 803(8)(C) providing that there was no evidence that the directives were untrustworthy).

Advisory circulars may also be admissible, falling within the public records exception to the hearsay rule. The Second Circuit and the Fifth Circuit have held FAA advisory circulars to be admissible, despite the argument that advisory circulars are not law or do not constitute a final rule promulgated by the FAA. See e.g., *Reliant Airlines, Inc., v. Broome Cnty.*, 122 F.3d 1057, 1997 WL 416912, at *3 (2d Cir. 1997) (citing *In re Crash Disaster at John F. Kennedy Int’l Airport on June 24, 1975*, 635 F.2d 67, 77 (2d Cir. 1980)). Both courts ruled that advisory circulars could be admitted as evidence of the standard of care.

The Fifth Circuit admitted advisory circulars containing recommended landing procedures for pilots operating aircraft in uncontrolled airports where the recommendations, “though merely advisory and without the force and effect of law, were offered by the plaintiff as evidence of the standard of care.” *Muncie Aviation Corp. v. Party Doll Fleet, Inc.*, 519 F.2d 1178, 1180 (5th Cir. 1975). The *Muncie* court found that advisory circulars are admissible because their “trustworthiness is guaranteed” and that the documents fall under the hearsay exceptions in Federal Rules of Evidence 803 and 804.

On the other hand, in the litigation involving the 1994 Roselawn, Indiana, air crash, FAA airworthiness directives and flight safety information bulletins were excluded on the grounds that the agency was subject to different agendas and methodologies that could “undermine” the jury’s function. *In re Air Crash Near Roselawn, Ind., on October 31, 1994*, 95 C 4593, 1997 WL 572896 (N.D. Ill. Sept. 10, 1997) (“The Court specifically finds that all post-accident government actions in this case, including the FAA Airworthiness Directives and Flight Safety Information Bulletins and the NTSB Safety Recommendations, are reports which lack trustworthiness because each government agency involved in the post-accident investigation was subject to different agendas and fact-finding methodology which could undermine and confuse the jury's distinct function in this case. The functions of the Court and the jury must be preserved uninfluenced by the findings of government investigators.”).

Further, an argument can be made that non-final documents, preliminary findings, interim decisions, or decisions subject to further review by governmental agencies such as the FAA are not trustworthy. A number of courts have excluded government documents or reports that are preliminary or subject to revision and further review because such reports are not “factual

findings” and are not trustworthy. *See Toole v. McClintock*, 999 F.2d 1430, 1434–35 (11th Cir. 1993) (excluding Food and Drug Administration report that contained proposed findings and invited public comment and forecasted issuance of final document after more study); *Plemer v. Parsons-Gilbane*, 713 F.2d 1127, 1140 (5th Cir. 1983); *City of New York v. Pullman Inc.*, 662 F.2d 910, 915 (2d Cir. 1981); *see also Smith v. Isuzu Motors Ltd.*, 137 F.3d 859, 862 (5th Cir. 1998) (memoranda prepared by National Highway Traffic Safety Administration staff members relating to petition requesting agency to establish stability standards for certain passenger vehicles did not satisfy Rule 803(8)); *United Air Lines, Inc. v. Austin Travel Corp.*, 867 F.2d 737, 742–43 (2d Cir. 1989) (government agency reports did not satisfy Rule 803(8)(C) based in part on interim or inconclusive nature of them); *Koonce v. Quaker Safety Prods. & Mfg. Co.*, 798 F.2d 700, 720 (5th Cir. 1986) (memo outlining future inquiries into safety measures and offering opinions on expected results not admissible under Rule 803(8)(C)). FAA documents reflecting a non-final policy of the agency lack that special reliability and trustworthiness sufficient to fall within the scope of the hearsay exception under Federal Rule of Evidence 803(8)(C).

Nonetheless, counsel seeking to use FAA records or reports have a better chance of prevailing than they would in seeking to use NTSB documents given the distinct regulatory function of the FAA and the finality of most documents issued by the FAA.

Conclusion

For the aviation practitioner, there appears to be a number of avenues supporting admission—or justifying the exclusion—of governmental records or reports issued by the NTSB or the FAA. Because of the nature of the NTSB’s function and because evidence culled from board documents is controlled by a statutory framework in addition to the Federal Rules of Evidence, recent decisions indicate the litigant faces an uphill battle in justifying the admission of NTSB reports or investigative documents, although, in certain situations, policy considerations justify permitting experts and non-parties to rely on factual data generated in the board’s investigations.

The admission of FAA documents into evidence may ultimately depend on whether the document falls under the hearsay exception and whether the document’s probative value outweighs any unfair prejudice resulting from its use. Admission of this evidence depends on the document’s trustworthiness, whether the contents of the document reflect final agency determinations, whether motivational bias or other problems were present in the creation of the document, the timeliness of the investigation, and the expertise of the agency in handling the issue at hand.

Without question, the presence or absence of this evidence at the time of trial will shape the other evidence and transform the contours of any given case. Collectively, then, the admission of governmental records and reports depends on evidence of the document’s trustworthiness and the trial court’s ultimate rulings on whether the document is relevant in the context of all other evidence. That being said, the practitioner has only a few bright-line rules to follow and a



handful of tested strategies to ensure that governmental records can be used or ultimately excluded in aviation cases.

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Divisibility of Damages under CERCLA: Case Law after Burlington Northern

By Andrew J. Scholz and Edward Jacobson – September 1, 2011

Two years ago, the United States Supreme Court rendered one of its most important interpretations of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) when it decided *Burlington Northern & Santa Fe Railway Co. v. United States*, 129 S. Ct. 1870 (2009). In *Burlington Northern*, the Court addressed two separate issues: the scope of liability and apportionment under CERCLA. As for scope of liability, the court ruled that a defendant cannot be found liable as an arranger pursuant to section 107(a)(3) of CERCLA unless the defendant intends for at least some of its products to be disposed of as waste. As for apportionment of liability, the Court ruled that CERCLA does not mandate joint and several liability and that “apportionment is proper when there is a reasonable basis for determining the contribution of each cause to a single harm.” *Id.* This article focuses on the two years of subsequent case law interpreting the apportionment holding of *Burlington Northern*.

At the time of the decision, *Burlington Northern* was seen by many as a game changer in CERCLA litigation with respect to the potential easing of a defendant’s burden in avoiding joint and several liability. *See generally* Rachel Evans, “*Burlington Northern*—Case Comments,” 34 *Harv. Envtl. L. Rev.* 311 (2010); Walewska Watkins, “*Burlington Northern*: The Supreme Court Arranges for Disposal of CERCLA’s Strict Liability,” 23 *Tulane Envtl. L.J.* 203 (2009); Michael Foy, “Apportioning Cleanup Costs in the New Era of Joint and Several CERCLA Liability,” 51 *Santa Clara L. Rev.* 625 (2011). This is because, prior to *Burlington Northern*, it was believed to be virtually automatic that a defendant identified as a potentially responsible party (PRP) with even minimal contributions of hazardous materials to a waste site would be rendered jointly and severally liable for response costs. The *Burlington Northern* decision breathed new life into defendants’ previously dashed hopes that they could try to limit their exposure to CERCLA claims. Nevertheless, successfully obtaining an apportionment ruling in the two years since *Burlington Northern* has proven extremely difficult for defendants in CERCLA actions.

The *Burlington Northern* Decision

This case involved two railroads, Burlington Northern and Union Pacific, which owned approximately one acre of land that was later leased by Brown & Bryant, Inc., a chemical distributor. B&B operated on about five acres of land, which included the one acre leased to

B&B from the railroads. Shell Oil Company supplied pesticides to B&B, which over the years had spilled throughout the site. B&B became insolvent, and the railroads were looked to as PRPs jointly and severally. However, the railroads argued, and the district court held, that divisibility was appropriate as to the railroads and that their responsibility was limited to only 9 percent of the remediation costs. In making its finding on apportionment, the district court relied on three straightforward factors, argued by the railroads:

- the total area of the railroads' portion of the site compared with the total size of B&B's facility (or 19 percent of the total site)
- the duration of time, or lack thereof, that the railroads leased their portion of land to B&B compared with the total time the B&B facility was in operation (or 45 percent of the total time)
- the railroads' contribution of chemicals to the site, which was limited to only two of the three contaminants found there (or 66 percent).

The district court then creatively adopted a mathematical formula that multiplied these factors together, added a margin of error of 50 percent, and arrived at 9 percent responsibility.

The Ninth Circuit Court of Appeals reversed the district court as to apportionment. On appeal to the Supreme Court, the Court held in an 8–1 decision (with Justice Ginsburg dissenting) that the district court had a reasonable basis for divisibility under CERCLA, and the Court approved the use of the various factor test in evaluating the evidence to support divisibility. The Supreme Court further held that joint and several liability is not mandated in every CERCLA case and, moreover, that it was still the defendant's burden to show a "reasonable basis" for apportionment. *Id.* (citing *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 810 (S.D. Ohio 1983) and the Restatement (Second) of Torts § 433A cmt. I, at 440 (1963–64)).

Apportionment Cases since *Burlington Northern*

Burlington Northern had an immediate impact on CERCLA case law in that the courts recognized that the burden had changed and eased in favor of a defendant seeking a divisibility ruling.

The first decision fully addressing the apportionment holding of *Burlington Northern* was *Evansville Greenway and Remediation Trust v. Southern Indiana Gas & Electric Co., Inc.*, 661 F. Supp. 2d 989 (2009). Indeed, the Supreme Court's decision in *Burlington Northern* was rendered during briefing in *Evansville* on the plaintiff's motion seeking the defendant to be jointly and severally liable. The *Evansville* court recognized that, had *Burlington Northern* not been issued, it would have been easy for the court to find a defendant jointly and severally liable; as a result, the *Burlington Northern* decision "has presented genuine questions of material law." *Id.* at 1012. The court predicted that *Burlington Northern* will be "hotly debated" and that at trial each side will be able to "present evidence relevant to its own and its opponents' different



interpretations of *Burlington Northern*.” *Id.* Because the court permitted both sides to present evidence on the issue, the court denied the plaintiff’s motion seeking to find that the defendant was jointly and severally liable as matter of law. *Id.* In short, the court refrained from holding whether the defendant was jointly and severally liable prior to trial and reserved the defendant’s entitlement to argue that divisibility was appropriate.

The need for a full evidentiary record to support any apportionment ruling was underscored by *ITT Corp. v. Borgwarner Inc.*, 2009 WL 2356263 (W.D. Mich. July 29, 2009). One of the defendants, which had contributed certain metals to two Superfund sites, filed a motion for partial summary judgment seeking an apportionment ruling. The court, citing to *Burlington Northern*, stated that the moving defendant “presented a plausible basis for apportionment” but, “in an abundance of caution,” denied the motion before a fuller evidentiary record could be made. *Id.* at *4. *Burlington Northern* thus had little impact on a defendant seeking a pretrial determination as to apportionment.

One of the few reported CERCLA cases in which a defendant successfully established divisibility following *Burlington Northern* is *Reichhold, Inc. v. United States Metal Refining Co.*, 655 F. Supp. 2d 400 (D.N.J. 2009). In that case, the court sua sponte found that apportionment was appropriate because sufficient evidence was presented that there were two separate contamination causes to the site that and only one of them was attributable to the defendant. Accordingly, the defendant was apportioned only 50 percent responsibility for the contamination. *Id.*

Most cases, however, have distinguished and limited the reach of *Burlington Northern*. For example, in *United States v. Iron Mountain Mines, Inc.*, 2010 WL 1854118 (E.D. Cal. May 6, 2010), the district court held that the defendants had “failed to show that the harm caused by the hazardous waste was divisible.” *Id.* at *1. In flatly denying the defendant’s attempt to establish divisibility, the district court held that *Burlington Northern* did not “constitute a change in [the] law.” *Id.* at *3.

The district court in *United States v. Saporito*, 684 F. Supp. 2d 1043 (N.D. Ill. 2010), did not take such as a restrictive view of *Burlington Northern*, but it added a new hurdle for PRPs that might qualify as joint venturers. The defendant in *Saporito* argued that apportionment was appropriate because its share of hazardous waste was de minimis. The court, however, found that the defendant was a co-owner of certain components that made up a plating process that caused the hazardous waste contamination. *Id.* at 1062. The court consequently found that defendant’s ownership of “equipment necessary to the plating process makes him comparable to a joint venturer,” and because of that, apportionment was not appropriate. *Id.* The court also found a factual problem with the defendant’s case for apportionment: The plating process at issue was the sole cause of the hazardous waste, whereas in *Burlington Northern*, the total site was divisible “among spills that occurred on adjoining parcels of land owned by different parties.” *Id.*



Thus, even if apportionment had been available, the defendant would not have been able to demonstrate divisibility owing to the fact that there was no reliable way to parse each party's contribution to the total contamination.

A similar problem faced the defendant in *Ashley II of Charleston LLC v. PCS Nitrogen, Inc.*, 2010 WL 4025885 (D.S.C. Sept. 20, 2010). The defendant presented evidence to support various methodologies to limit and apportion its liability, such as the volume of hazardous materials sent to the site, the period of time that each defendant operated the site, and which parties were first responsible for disturbing the area. The Southern District Court of South Carolina acknowledged that "the harm at the Site is theoretically divisible based upon: 1) how much contamination each party contributed to the Site, and 2) how much soil each party caused to be included in the remediation area by spreading the contamination throughout the Site." *Id.* at *45. The court nevertheless refused to apportion liability because two obstacles prevented reliable quantification of each defendant's contribution to the total contamination. First, the defendant was unable "to provide the court with a reasonable basis for determining the volume of contaminants introduced to the Site" by each party. Second, even if such figures were available, there was no way to calculate the degree to which each defendant's activities had contributed to "the spread of contamination across the Site." *Id.*

Three months later, in *3000 E. Imperial, LLC v. Robertshaw Controls Co.*, 2010 WL 5464297 (C.D. Cal. Dec. 29, 2010), the District Court for the Central District of California used similar reasoning to deny the defendant's claim for apportionment. The defendant used two of the relevant factors adopted in *Burlington Northern* when it sought to avoid joint and several liability, specifically the relative size of the two areas of contamination and the number of years that the defendant had owned the land. The court was ultimately not persuaded by the defendant's evidence that its share of liability should be divisible. Although the court acknowledged that "[h]arm can be divisible even if the contamination contributed by each defendant is commingled," it nevertheless found that the defendant did not "provide evidence supporting a relationship between the proportion it has proposed and the amount of harm that is attributable to the defendant." *Id.* at *8–9. Whereas in *Burlington Northern*, there was "evidence show[ing] that the defendant's use of the land" contributed to an ascertainable percentage of the contamination of the land, here, there was not enough evidence to distinguish the defendant's contamination of the land from contamination by other parties that used the land during the same period that the defendant owned the land. *Id.* Further, the court found that there was no evidence that the contamination of the land occurred at a steady rate over time. In other words, it was possible that during the time that the defendant owned the land, which was approximately 12 percent of the time that the damaging items (in this case, underground storage tanks) were in the ground, more than 12 percent of the contamination may have occurred. Hence, despite having successfully argued the first two *Burlington Northern* factors, the defendant was unable to adequately quantify its relative contribution of contaminants to the site.



Conclusion

The impact from the Supreme Court's decision as to apportionment has undoubtedly altered the playing field by reviving the divisibility of damages defense. Courts are now much more willing to entertain arguments and review evidence concerning divisibility. It was extremely difficult just to get that issue heard before *Burlington Northern*.

In presenting their arguments to the courts, defendants have generally modeled and focused their evidence on the three main factors presented by the railroads in *Burlington Northern*. The first two factors appear simple to determine. Determinations as to the last factor present much more difficult and complex questions; accordingly, the cases show that defendants typically retain experts to develop scientific modeling of the site at issue, which analyses, among other things, the types of hazardous materials discharged, migration patterns, and their impact on cleanup costs.

Two years following *Burlington Northern*'s landmark holding, however, the cases show that joint and several liability is still the general rule and that defendants have an uphill battle convincing courts that they should be entitled to a divisibility of damages.

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Expert Discovery: Something Old and Something New

By Susan M. Halpern – August 31, 2011

We talk often of preparing expert witnesses for testimony. Too often young lawyers believe that “expert prep” involves meetings and practice sessions that occur in proximity to depositions and trials. The truth is that expert witness prep starts the moment the expert is hired. A critical part of that preparation includes the disclosures relating to the expert's opinion that are mandated by the rules. It is vitally important that young lawyers understand the parameters of those disclosure requirements. A failure to meet those requirements can be fatal to the expert's presentation of his or her opinion at trial.

Recent amendments to Federal Rule of Civil Procedure 26 provide important protections and limitations in connection with expert discovery. Specifically, the amendments end any debate about the discoverability of drafts of reports with respect to any expert required to file a report. Rule 26 now specifically protects drafts of expert reports, providing that they are handled consistently with Rules 26(b)(3)(A) and (B). In other words, expert drafts are now treated as work product. But this does not mean that drafts are immune from being discovered. Rather, they are as discoverable as any other work product, that is, under very limited and exceptional

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circumstances. In particular, draft expert reports are discoverable only if the draft meets the test of discoverability (relevant or reasonably calculated to lead to the discovery of admissible evidence), the requesting party has a substantial need for the information, *and* the requesting party cannot, without undue hardship, obtain the substantial equivalent of the material by other means. Fed. R. Civ. P. 26(b)(3)(A). Beware, though; while the requesting party has a significant burden in seeking disclosure of drafts, the drafts are not immune. Among other things, that means that drafts should not be destroyed. From the perspective of the other side, be mindful that drafts could be discoverable and be sure to consider and explore the circumstances under which you might argue for such disclosure.

Consistent with the philosophy of protecting drafts, the new amendments also provide specific protection for communications between counsel and experts. The best way to understand the scope of this amendment is to consider the communications that remain discoverable. On this point, the rule specifically allows discovery of communications between counsel and experts if they concern compensation, provide facts or data considered by the expert in forming his or her opinions, or provide assumptions relied on by the expert. These three exceptions are intuitively fair, because opposing counsel is entitled to a clear understanding of the sources of information considered by the expert. Consistent with this amendment, Rule 26(a)(2)(B)(ii) now provides that the expert must disclose only the “facts or data” the witness considered, rather than the broader “data or other information” previously required.

The new amendments are designed to allow an easier flow of information between counsel and expert witnesses, without fear of disclosing such communications—and, thus, trial strategy—to the other side. Combined with the protection afforded to drafts, this should result in better and tighter expert reports, because such reports may now focus exclusively on key issues in a manner consistent with trial strategy.

A word of caution is appropriate. The added confidentiality does not mean that counsel can or should try to manipulate experts or the opinions they give beyond appropriate boundaries. To push an expert witness beyond reasonable conclusions or beyond his or her comfort zone or expertise is always a mistake. It is easily exposed by a skilled opponent and can be devastating to otherwise appropriate opinions and analysis found elsewhere in the expert’s work. The necessity of hiring the right expert and seeking appropriate opinions from that expert remains unchanged. Indeed, the new amendments change nothing about the tests that will be applied to the expert’s opinions. Stated simply, expert witness prep starts the moment you hire the expert.

That brings us to something old. Although Rule 26(a)(2)(B)(ii) now requires disclosure of “facts or data,” the standard for production of such information remains the same. Disclosure is required even if the facts or data were only “considered” by the expert. Stated another way, disclosure is required even if the information is not relied on by the expert. This is a trap for the unwary. Experts must be cautioned about the need to keep careful track of all facts and data

“considered” from the moment they are retained. This is particularly important when so much of our information is obtained in a virtual world. Websites are dynamic and change from day to day. And, while historical web data is available, the expert must still pin his or her review to a particular day, which may be difficult. Lawyers must be involved with the information experts consider. From the standpoint of the opposing lawyer, this rule suggests that careful questioning about what the expert considered is both appropriate and imperative.

One last suggestion from the “old” side of this discussion: I make the case here for careful consideration of whether an expert’s opinion is really his or her own, or might in reality be the opinion of undisclosed consulting experts. Years ago, I had a case in which an expert’s damage model measured an amount of silt and sediment, and then multiplied that volumetric calculation by the cost of moving a cubic yard of dirt. The witness was a PhD, clearly capable of calculating volume. But his cost estimate for moving a cubic yard of dirt was astronomical. When questioned about it, the witness finally conceded that the cost estimate came from his discussions with “some contractors,” but he was unable to name them. We knew nothing about their qualifications or what information they had considered. For all we knew, they were asked about the cost of moving nuclear waste to Jupiter. Opposing counsel argued that the contractors in question had merely provided factual information, likening it to the cost of butter at the grocery store. We successfully argued that in fact, the “contractors” provided their own expert opinions to the testifying expert, and because information about them was not provided, the testifying expert’s opinion had to be excluded. This was a simple discovery issue.

I learned several valuable lessons from this episode. For purposes of this discussion, the most important was the issue of the undisclosed consulting expert. They come in all shapes and sizes, and the line between facts and expert testimony is not always bright. In that case, I considered all the information I would have wanted to know about the “contractors” to whom this expert spoke, including what assumptions they were given, their qualifications, and how they calculated their cost estimates. In short, I wanted to know the very things we learn about experts in Rule 26 disclosures. Although I was in state court where such disclosures were mandated, I submit that I would have made a strong case for disclosure under Rule 26. The experience also taught me to be wary of the issue of testifying experts who adopt the opinions of others as their own, despite their own lack of qualifications.

Finally, this whole episode drove home the point that experts cannot and should not be pushed beyond their own expertise and comfort zone. Indeed, after we obtained a directed verdict, the next contact I had was from a defense attorney representing the excluded expert. It seems the plaintiff was now threatening to sue him. It became very apparent during our discussion that the expert had not wanted to testify about cost but had been pushed to do so. Pressing the expert beyond his boundaries was a disaster for the plaintiff, and it is a lesson to all young lawyers.



What we do is complicated and requires study of the rules to ensure compliance. The expert rules in particular require careful planning and attention to detail from the moment we consider retaining an expert.

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NEWS & DEVELOPMENTS

***Mensing* Plaintiffs Seek Rehearing**

The plaintiffs in *PLIVA, Inc. v. Mensing* filed a [petition](#) for rehearing, asking the Supreme Court to revisit its ruling that state-law failure-to-warn claims against generic drug manufacturers are preempted by federal law.

In *Mensing*, the Supreme Court found that a conflict exists between state-law failure-to-warn claims and labeling provisions of the Hatch-Waxman Amendments to the Federal Food, Drug, and Cosmetics Act. Under Hatch-Waxman, a manufacturer seeking approval to produce a generic form for a brand-name drug must show that the drug it wishes to produce is equivalent to an already-produced brand-name drug and that the safety and efficacy labeling it proposes is the same as that already approved for the brand-name drug. Therefore, the Court reasoned, the generic drug manufacturers could not comply with the Hatch-Waxman Amendments and also provide the strengthened warnings that the plaintiffs contended were required, because the generic manufacturers had no unilateral ability to change their labels.

The plaintiffs contend that the Supreme Court overlooked an alternate theory of liability, arguing that “the Petitioner generic drug companies could have ‘independently’ complied with both state and federal law simply by suspending sales of generic metoclopramide with warnings that they knew or should have known were inadequate.” *Mensing* Petition for Rehearing at 1.

Interestingly, the theory upon which plaintiffs seek rehearing has been rejected by the Restatement (Third) of Torts and 28 states, which all conclude that there is no common-law duty to initiate a product recall. *See, e.g.*, Restatement (Third) of Torts, Products Liability § 11 (1998). *Mensing*’s home state of Minnesota is among the 28 states that have expressly rejected a duty to recall. *See Kladivo v. Sportsstuff, Inc.*, 2008 WL 4933951 at *5 (D. Minn. 2008). Moreover, the theory upon which the *Mensing* plaintiffs seek rehearing suffers from the same conflict between state and federal law that formed the basis for the original decision. In essence, for plaintiff’s theory to prevail, the Supreme Court would have to hold that a state may order a product off the market after it has been approved by the Food and Drug Administration.

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Most legal commentators agree that is very unlikely that the *Mensing* plaintiffs' petition for rehearing will be granted.

—David Lester, Jones, Walker, Waechter, Poitevent, Carrère & Denègre LLP, Birmingham, AL

Supreme Court Finds Preemption on Failure to Warn Claims Against Generic Drug Manufacturers

On June 23, 2011, the Supreme Court released its highly anticipated ruling in [*Pliva, Inc. v. Mensing*](#), 564 U.S. (2011). In a 5–4 opinion, the Court held that state-law claims against generic drug manufacturers are preempted by federal law.

The plaintiffs in the underlying cases were prescribed metoclopramide, a generic form of the brand name drug Reglan. At the time the plaintiffs were initially prescribed metoclopramide, the warning label stated that “tardive dyskinesia . . . may develop in patients treated with metoclopramide,” and the drug’s package insert added that “[t]herapy for longer than 12 weeks has not been evaluated and cannot be recommended.” In 2004, the warning label was changed to read “[t]herapy should not exceed 12 weeks in duration.” The label was once again strengthened in 2009 when the United States Food and Drug Administration (FDA) ordered a black box warning stating that “[t]reatment with metoclopramide can cause tardive dyskinesia, a serious movement disorder that is often irreversible. . . . Treatment with metoclopramide for longer than 12 weeks should be avoided in all but rare cases.” After taking the drug as prescribed for several years, they developed tardive dyskinesia. The plaintiffs filed lawsuits against the generic manufacturers and the manufacturers of the brand name equivalents, alleging that the manufacturers failed to warn them of the effects of long-term use of metoclopramide.

[Read the full case note](#)

—David Lester, Jones, Walker, Waechter, Poitevent, Carrère & Denègre LLP, Birmingham, AL

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