

# Due Deference—The Supreme Court Confirms the Post-*Daubert* Discretion of the Trial Judge as the “Gatekeeper”

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In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the Supreme Court established the trial judge as the “gatekeeper” to assure that any and all scientific evidence admitted is both relevant and reliable. The Supreme Court reasoned that this responsibility carried with it a great need for discretion. Thus, judges may allow a broader range of testimony than previously under the *Frye* standard, provided that such decisions are not manifestly erroneous. *Daubert*'s progeny have hotly debated both the breadth of the discretion granted the trial court and the scope of appellate review.

In a ruling that puts to rest at least part of the debate, the Supreme Court reversed a decision of the Eleventh Circuit Court of Appeals that had given heightened scrutiny to a trial judge's exclusion of scientific testimony. *General Electric Co. v. Joiner*, 1997 WL 764563 (Dec. 15, 1997) (to be reported at 118 S.Ct. 512). The high court held that abuse of discretion is the proper standard of review for all evidentiary rulings and that an appellate court may not reverse such a ruling unless it is manifestly erroneous. In a majority opinion, the Court rejected the position taken by the Eleventh Circuit that because the Federal Rules of Evidence governing scientific and expert

opinion testimony display a preference for admissibility, courts sitting in review of district court decisions regarding such evidence should apply “particularly stringent” scrutiny where the rulings proved to be outcome determinative.

In essence, the *Joiner* Court concluded that because the gatekeeping function necessarily requires discretion, any appellate review must begin from the point of view of whether there was an abuse of such discretion, i.e. manifest error. The *Joiner* Court concluded that “a court of appeals applying “abuse of discretion” review to such rulings may not categorically distinguish between rulings allowing expert testimony and rulings which disallow it,” and that in attempting to apply a “particularly stringent” standard of review, the Eleventh Circuit “failed to give the trial court the deference that is the hallmark of abuse of discretion review.” 118 S.Ct. 512, 517.

Although the opinion did not shed any new light on how district courts are to evaluate such evidence, left uncertain in the wake of *Daubert*, the decision reaffirmed the trial judge's “gatekeeping” responsibility to ensure that such evidence is both relevant and reliable. Overall, the Court dealt with the standard of review issue in uncharacteristically brief fashion. Anyone hoping that the complex nature of scientific and technical evidence combined with *Daubert*'s fuzzy gatekeeping mandate would encourage the Court to consider adopting a more searching review of District Court rulings debating the appropriate method of evaluating such evidence will have to await another day. The Court unanimously, and briefly, held that all evidentiary rulings, including those dealing with complex scientific and technical issues, will be reviewed under an abuse of discretion standard. Nothing in *Daubert* addressed, or was meant to address, the standard of appellate review for evidentiary rulings.

However, rather than simply remand the case, the Court analyzed the District Court's ruling and held that its exclusion of

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expert testimony offered by the plaintiff/respondent was not an abuse of discretion. The plaintiff/respondent was a municipal electrical worker from Georgia who claimed that his lung cancer was caused, at least in part, by his exposure to polychlorinated biphenyls (PCBs) and other chemicals. In support of this position, he offered the testimony of two experts who based their testimony on the results of animal and epidemiological studies. The defendant/petitioner countered that the experts' opinions were nothing more than mere speculation and not adequately supported by the studies. The Supreme Court concluded that the trial court's exclusion of the two experts because the exposure to toxins in the animal studies, and the cancers that resulted from it, were too dissimilar to the exposure and cancer of the plaintiff for the experts' conclusions to be useful is precisely the type of determination required by *Daubert*.

In what promises to be the legacy of *Joiner*, the Supreme Court rejected the plaintiff's arguments that *Daubert* required the trial judge to focus solely on the methodology and not the conclusions drawn by the experts. According to the Court, "conclusions and methodology are not entirely distinct from one an-

other." *Id.* at 519. The plaintiff had argued that while no one study could conclusively connect exposure to PCBs with his type of cancer, the methodology relied upon by the experts to form their opinion drew upon a summary of the studies rather than any individual study. However, a court may conclude, as indeed the District Court did, that "there is simply too great an analytical gap between the data and the opinion proffered" for the judge to permit the admission of the evidence. *Id.*

The overall effect that *Joiner* is going to have on the *Daubert* analysis of scientific evidence is yet to be seen. While the opinion does not provide practitioners and trial judges with clear guidance on any but the appellate issues, it does provide them with useful planning tools. Practitioners must be prepared to argue not just the validity of the expert's methodology, but their conclusions as well. This "junk science" makes its presence felt in employment cases, Internet cases, trademark and infringement cases, and other areas. The importance of *Daubert* extends far beyond the products liability suits that were once its sole province.