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How Are the Recent Rule 702 Amendments Faring in Court?

By Bexis on May 13, 2024

Over the last month, Bexis attended both the Hollingsworth Firm's annual toxic tort litigation defense seminar and the Lawyers for Civil Justice spring meeting. Both meetings featured discussions on how the new amendments to Fed. R. Evid. 702 were faring in court. We've also written several blogposts (links below) about favorable applications of the new rule, which became effective December 1, 2024. The amendments having been in effect now for several months, we decided to see whether they were having the Rules Committee's desired effect of toughening up judicial consideration of expert testimony under Rule 702. So we're taking a more systematic look at the judicial response to the 2023 amendments.

We'll start with those decisions that we've already blogged about. The only appellate decision to date is *In re Onglyza (Saxagliptin) & Kombiglyze (Saxagliptin & Metformin) Products Liability Litigation*, 93 F.4th 339 (6th Cir. 2024), which we discussed here. But *Onglyza*, while noting the intervening amendment, *id.* at 345 n.4, did not apply it, since "old rule . . . was still in force at the time of the district court's decision. *Id.*

Next, we turn to *In re Paraquat Products Liability Litigation*, ___ F. Supp.3d ___, 2024 WL 1659687 (S.D. Ill. April 17, 2024), which (as we discussed in detail here) excluded the MDL plaintiffs' general causation expert. *Paraquat* relied on the 2023 amendments, which became effective in the midst of the MDL's Rule 702 motion practice − after the motion had been briefed, but before it was decided. 2024 WL 1659687, at *4 n.8. The 2023 amendments:

> **emphasized that the proponent bears the burden of demonstrating compliance with Rule 702 by a preponderance of the evidence, and that each expert opinion must stay within the bounds of what can be concluded from a reliable application of the expert's basis and methodology.**

Id. (citation and quotation marks omitted). *Paraquat* interpreted the 2023 amendments as requiring "that expert testimony ***may not be admitted*** unless the proponent demonstrates to the court that it is more likely than not that the proffered testimony meets the admissibility requirements set forth." *Id.* at 4 n.9 (quoting Advisory Committee Notes to 2023 amendments) (emphasis added by the court).

Paraquat understood that the 2023 amendments were necessary because "courts had erroneously admitted unreliable expert testimony based on the assumption that the jury would properly judge reliability." *Id.* Specifically, "some courts had 'incorrect[ly]' held that an expert's basis of opinion and application of her methodology were questions of weight, not admissibility. *Id.* (again quoting Advisory Committee Notes). Thus:

> **Mindful of its role as the witness stand's "vigorous gatekeeper," the Court will closely scrutinize the reliability of proffered expert testimony before permitting an expert to share her opinion with the jury. Expert testimony that is not scientifically reliable should not be admitted. The gatekeeping function, after all, requires more than simply taking the expert's word for it.**

Id. (citations and quotation marks omitted).

In applying the 2023 Rule 702 amendments, *Paraquat* followed another major MDL ruling that we discussed here, which likewise should end all of the cases to which it applies: *In re Acetaminophen ASD-ADHD Products Liability Litigation*, ___ F. Supp.3d ___, 2023 WL 8711617 (S.D.N.Y. Dec. 18, 2023). *Acetaminophen* had this to say about the 2023 amendments:

> **Rule 702 was amended effective December 1, 2023. "Nothing in the amendment imposes any new, specific procedures." Fed. R. Evid. 702, Advisory Committee**

> **Notes, 2023 Amendments. Instead, one purpose of the amendment was to emphasize that**
>
> > **[j]udicial gatekeeping is essential because just as jurors may be unable, due to lack of specialized knowledge, to evaluate meaningfully the reliability of scientific and other methods underlying expert opinion, jurors may also lack the specialized knowledge to determine whether the conclusions of an expert go beyond what the expert's basis and methodology may reliably support.**
>
> ***Id.***

2023 WL 8711617, at *16 n.27.

We've also discussed *Sprafka v. Medical Device Business Services, Inc.*, 2024 WL 1269226 (D. Minn. March 26, 2024), an individual (not MDL) decision excluding another plaintiff's causation expert. *Sprafka* found another part of the Advisory Committee Notes important enough to quote – the part stating that prior Eighth Circuit precedent was wrongly decided:

> **[M]any courts have held that the critical questions of the sufficiency of an expert's basis, and the application of the expert's methodology, are questions of weight and not admissibility. These rulings are an incorrect application of Rules 702 and 104(a).**

2024 WL 1269226, at *2 (quoting Advisory Committee Notes to 2023 Amendment).

Most recently, we reported on *In re Johnson & Johnson Talcum Powder Products Marketing, Sales Practices & Products Liability Litigation*, 2024 WL 1914881 (D.N.J. April 30, 2024), where the court agreed that earlier Rule 702 decisions should be reassessed in light of both new science (such as this) and the "recent changes to Federal Rule of Evidence 702." *Id.* at *1. Plaintiffs' argument that the court should "ignore Rule 702's most recent clarifications" was soundly rejected. *Id.* at *2. This "clarification is precisely ***why*** it would be inappropriate for this Court to preclude Defendants from challenging this Court's previous *Daubert* holdings." *Id.* at *3 (emphasis original).

The 2023 amendments provide that Rule 702:

> **'clarif[ied] and emphasize[d] that expert testimony may not be admitted unless the proponent demonstrates to the court that it is more likely than not that the proffered testimony meets the admissibility requirements set forth in the rule.' The amendment was motivated by the Advisory Committee's 'observation that in "a number of federal cases … judges did not apply the preponderance standard of admissibility to Rule 702's requirements of sufficiency of basis and reliable application of principles and methods, instead holding that such issues were ones of weight for the jury."' The Committee emphasized that rulings which have held 'the critical questions of the sufficiency of an expert's basis for his testimony. and the application of the expert's methodology, are generally questions of weight and not admissibility' 'are an incorrect application of Rules 702 and 104(a).'**

Id. (quoting *Allen v. Foxway Transportation, Inc.*, 2024 WL 388133, at *3 (M.D. Pa. Feb. 1, 2024) (footnotes omitted)) (which, in turn, quoted the Rules Advisory Committee Notes). The Advisory Committee Notes "outline[d] a consistent and concerning misapplication of Rule 702 by federal courts in the ***past***." *Id.* (emphasis original). Thus, "it is self-evident that Defendants should be allowed to contest previous [Rule 702] holdings" in the MDL if they could "identify any incorrect application of Rule 702 in the [previous] 2020 Opinion." *Id.*

To see what else was out there, we searched for cases after the December 1, 2023 effective date that had "2023," "702," and "amend!" all in the same paragraph. There were quite a few results. Here's what we found.

Perhaps the most extensive discussion of the 2023 Rule 702 amendment and the reasoning behind it is found in *State Automobile Mutual. Insurance Co. v. Freehold Management, Inc.*, 2023 WL 8606773 (N.D. Tex. Dec. 12, 2023), which involved (like *Talcum*) a post-amendment reconsideration of an earlier Rule 702 decision. *State Auto* qualified adverse pre-*Daubert* language from *Viterbo v. Dow Chemical Co.*, 826 F.2d 420, 422 (5th Cir. 1987), that only "generally" could "issues regarding the bases and sources of an expert's

opinion that affect the weight of an opinion rather than [its] admissibility" be for juries to resolve because *Viterbo* had been superseded by the 2023 amendments. 2023 WL 8606773, at *10. The broad statement from *Viterbo* was "incorrect" under Rule 702:

> **The court previously emphasized the word *generally* because the 2023 amendments to Rule 702 explain that issues pertaining to the sufficiency of facts or data relied upon by an expert and the sufficiency of an expert's bases do not always concern questions of weight that should be left to the jury:**
>
> > **[M]any courts have held that the critical questions of the sufficiency of an expert's basis, and the application of the expert's methodology, are questions of weight and not admissibility. These rulings are an incorrect application of Rules 702 and 104(a).**
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> > *** * * ***
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> > **The amendment clarifies that the preponderance standard applies to the three reliability-based requirements added in 2000 − requirements that many courts have incorrectly determined to be governed by the more permissive Rule 104(b) standard. But it remains the case that other admissibility requirements in the rule (such as that the expert must be qualified[,] and the expert's. . . .**
>
> > **Some challenges to expert testimony will raise matters of weight rather than admissibility even under the Rule 104(a) standard. . . . But this does not mean, as certain courts have held, that arguments about the sufficiency of an expert's basis always go to weight and not admissibility.**

Id. at *10 (emphasis original).

State Auto also recognized and applied the amendment to the Rule 702(d) reliable application prong:

> **Additionally, the 2023 amendments to Rule 702 "emphasize that each expert opinion must stay within the bounds of what can be concluded from a reliable application of the expert's basis and methodology". . .:**
>
> > **Rule 702(d) has also been amended to emphasize that each expert opinion must stay within the bounds of what can be concluded from a reliable application of the expert's basis and methodology. Judicial gatekeeping is essential because just as jurors may be unable, due to lack of specialized knowledge, to evaluate meaningfully the reliability of scientific and other methods underlying expert opinion, jurors may also lack the specialized knowledge to determine whether the conclusions of an expert go beyond what the expert's basis and methodology may reliably support. . . . The [admissibility] standard does not require perfection. On the other hand, it does not permit the expert to make claims that are unsupported by the expert's basis and methodology.**

Id. at *11 (emphasis original).

State Auto primarily involved so-called "forensic experts" (concerning property damage), which are less prevalent in prescription medical product liability litigation than in crashworthiness (accident reconstructionists) or fire (cause and origin) litigation. But the same principles have applied in all Rule 702 cases since December 2023. Indeed, the verbatim discussion in *State Auto* is also found in *Dewolff, Boberg & Associates, Inc. v. Pethick*, 2024 WL 1396267, at *5-6 (N.D. Tex. March 31, 2024), which resulted in the exclusion of a damages expert.

Probably the most important aspect of the Rule 702 amendments, at least in the near term, is the recognition that a large number of previous expert admissibility decisions are "incorrect" or "incorrectly determined," as the Advisory Committee notes quoted in *State Auto* state.

> **The amendment was aimed at courts that had erroneously held that "the critical questions of the**

> **sufficiency of an expert's basis, and the application of the expert's methodology, are questions of weight and not admissibility."**

Johnson v. United States, 2024 WL 1246503, at *3 n.7 (E.D.N.Y. Jan. 16, 2024) (quoting Advisory Committee Notes) (excluding causation opinions). Here are other decisions that: (1) have quoted the Advisory Committee's determination that numerous prior Rule 702 decisions under the previous rule were "incorrect," (2) in the course excluding the opinions of purported experts. *West v. Home Depot U.S.A., Inc.*, 2024 WL 1834112, at *2, 4 (N.D. Ill. April 26, 2024) (excluding multiple medical causation opinions); *Maney v. Oregon*, 2024 WL 1695083, at *2 (D. Or. April 19, 2024) (excluding prison procedures expert); *Davidson Surface/Air, Inc. v. Zurich American Insurance Co.*, 2024 WL 1674519, at *2 n.3 (E.D. Mo. April 18, 2024) (excluding weather opinion); *Coblin v. Depuy Orthopaedics, Inc.*, 2024 WL 1588752, at *2 (E.D. Ky. April 11, 2024) (plaintiff required to supplement cause-of-death report); *Lane v. American Airlines, Inc.*, 2024 WL 1200074, at *4 n.3 (E.D.N.Y. March 20, 2024) (excluding causation experts on both sides); *Burdess v. Cottrell, Inc.*, 2024 WL 864127, at *3 (E.D. Mo. Feb. 29, 2024) (excluding human factors expert "notwithstanding" the prior "liberal standard," given 2023 amendments); *Austin v. Brown*, 2024 WL 1602968, at *10 (D. Colo. Feb. 22, 2024) (emphasizing the "incorrect" language) (excluding police procedures expert); *Boyer v. City of Simi Valley*, 2024 WL 993316, at *1 (C.D. Cal. Feb. 13, 2024) (excluding damages experts); *Allen*, 2024 WL 388133, at *3 (excluding industry standards expert); *Cleaver v. Transnation Title & Escrow, Inc.*, 2024 WL 326848, at *2 (D. Idaho Jan. 29, 2024) ("The amendments are intended to correct some courts' prior, inaccurate application of Rule 702.") (excluding industry standards opinion); *Mann v. QuikTrip Corp.*, 2023 WL 9023262, at *2 n.2 (E.D. Mo. Dec. 29, 2023) (excluding premises liability expert); *Greene v. Ledvance LLC*, 2023 WL 8636962, at *3 n.1 (E.D. Tenn. Dec. 13, 2023) (excluding causation expert).

The next most important aspect of the 2023 Rule 702 amendments has to do with the toughening up of Rule 702(d), so as to emphasize that an expert "must stay within the bounds of what can be concluded from a reliable application of the expert's basis and methodology" – also quoted in *State Auto*.

> **"I cannot find that [plaintiff] met its burden of establishing by a preponderance of the evidence that [the expert's] opinions are reliable, that is, that they have a sufficient factual basis and that he reliably**

> **applied an accepted methodology in reaching his conclusions. *Because those questions go to the admissibility and not the weight of [the] opinions, they are for me to resolve instead of a jury.***

Davidson Surface, 2024 WL 1674519, at *6 (emphasis added).

> **[T]he reason for the amendment to the longstanding rule was to "clarify and emphasize that expert testimony may not be admitted unless the proponent demonstrates to the court that it is more likely than not that the proffered testimony meets the admissibility requirements set forth in the rule.". . . . The recent amendment is . . . a refocusing of the Supreme Court's instruction for district court judges to act as a gatekeeper to ensure proposed expert testimony 'is not only relevant, but reliable when testimony is challenged.**

West, 2024 WL 1834112, at *2 (quoting Advisory Committee Notes; other citations and quotation marks omitted).

Thus, "the 2023 amendments to Rule 702 make clear that reliability, both in theory and application, is the hallmark of admissible expert testimony." *Post v. Hanchett*, 2024 WL 474484, at *2 (D. Kan. Feb. 7, 2024) (excluding tire expert) (citation and quotation marks omitted). Under the amended rule, "[c]ourts must probe more deeply" and

> **[o]nly after the proponent has proved it more likely than not that the opinion is based in the evidence on which it purports to rely and represents a reliable application of the expert's methodology do challenges to the bases of an expert's opinion go to weight alone.**

Hellen v. American Family Insurance Co., 2024 WL 1832451, at *1 (D. Colo. March 19, 2024) (excluding opinions of insurance practices expert). "Such is the point which the recent amendments to Rule 702 emphasize – an expert's opinions must be shown by a preponderance of the evidence to be supported by the evidence on which they ostensibly are based." *Id.* at *3. An opinion that "is not clearly supported by the evidence on which it purports to rely . . . is inadmissible." *Id.* at *5. "[T]he language of the amendment more clearly empowers the court to pass judgment on the conclusion that the expert has

drawn from the methodology." *United States v. Diaz*, 2024 WL 758395, at *4 (D.N.M. Feb. 23, 2024) (quoting Advisory Committee notes) (limiting police officer expert testimony).

A couple of other decisions have explicitly relied on new Rule 702(d) while excluding expert witnesses. *Coblin*, 2024 WL 1588752, at *4 (expert failed to "rule out" other causes in differential diagnosis); *Thomas v. State Farm Mutual Automobile Insurance Co.*, ___ F. Supp.3d ___, 2024 WL 195752, at *2 n.1 (E.D. Mo. Jan. 18, 2024) (excluding insurance practices expert).

Another judicial error that the Rule 702 amendment corrected was the notion that expert testimony was presumed admissible. That's no longer so, if it ever was. *Diaz* explained the demise of such presumptions in depth.

> **"In the past, courts have held that the Federal Rules of Evidence encourage the admission of expert testimony. Thus, courts have operated on the presumption is that expert testimony is admissible. However, amendments to Rule 702 recently took effect on December 1, 2023. The Advisory Committee amended the language in Rules 702(b) and (d) so that a proponent of expert testimony must demonstrate that it is "more likely than not" that "the expert's opinion reflects a reliable application of the principles and methods to the facts of the case." In support of this change, the Committee noted that the changes "respond to the fact that many courts have declared the requirements set forth in Rule 702(b) and (d) . . . are questions of weight and not admissibility, and more broadly that expert testimony is presumed to be admissible." The Committee found that "these statements misstate Rule 702, because its admissibility requirements must be established to a court by a preponderance of the evidence."**

2024 WL 758395, at *4 (quoting Advisory Committee Notes; other citations and quotation marks omitted).

All the above is not to say, however, that courts have uniformly mended their "incorrect" ways and are uniformly doing what amended Rule 702 requires. There are adverse cases

out there, but, since we don't do the other side's research for them, we're not compiling them.

We cannot, however, remain silent about the atrocity of an opinion in *Blue Buffalo Co. v. Wilbur-Ellis Co. LLC*, 2024 WL 111712 (E.D. Mo. Jan. 10, 2024), which includes in its low-lights a disguised quote from *Loudermill v. Dow Chemical Co.*, 863 F.2d 566 (8th Cir. 1988) – one of the decisions identified by the Advisory Committee as being "incorrect" – that *Blue Buffalo* laundered through an intervening Eighth Circuit decision. *See* 2024 WL 111712, at *4 ("exclusion of expert testimony is proper 'only if it is so fundamentally unsupported that it can offer no assistance to the jury'") (quoting *Wood v. Minnesota Mining & Manufacturing Co.*, 112 F.3d 306, 309 (8th Cir. 1997), but "cleaned up" to remove *Wood* quoting *Loudermill*).