Legal Backgrounder

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SCHULTZ v. AKZO NOBEL PAINTS: "THE REST OF THE STORY" REVEALS LIMITED IMPACT OF EXPERT TESTIMONY DECISION

by
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Since mid-summer, toxic tort lawyers have been trying to digest the U.S. Court of Appeals for the Seventh Circuit's decision in *Schultz v. Akzo Nobel Paints*, No. 12-1902, ___ F.3d ___ (7th Cir. June 26, 2013). In *Schultz*, the Seventh Circuit reversed a summary judgment granted against the plaintiff's claims in a benzene exposure case, but some believe the impact of the court's reasoning goes far beyond its result.

The plaintiff's counsel in *Schultz* believes the decision has national implications because it "limits the gate-keeping role of trial courts regarding scientific and medical evidence."[1] Supposedly, the decision opened the gate to allow juries, rather than judges, to decide the difference between "good data and speculation." Slip op. at 11. To more defense-oriented commentators, the legal reasoning in *Schultz* presents an erroneously "narrow view" of *Daubert*. They insist that the Seventh Circuit reversed the district court without conducting a detailed analysis of the scientific evidence—an approach that has already been "rejected by the U.S. Supreme Court." Somewhere in the middle lie those who believe the decision is "thoughtful" and "likely influential in other jurisdictions faced with forging a fair and workable jurisprudence for the admission of expert opinion testimony."

Certainly, a number of lawyers from both sides of the bar believe that the decision is important. A review of the record in *Schultz*, however, reveals a relatively easy explanation for the decision—one that undermines its value as precedent. To understand why this is so, we must go back to the district court's decision to grant Akzo Nobel's motion for summary judgment and, with apologies to Paul Harvey, appreciate the "rest of the story."[2]

The district court in *Schultz* applied a traditional *Daubert* analysis and ruled that the plaintiff's oncologist, who testified regarding medical causation, improperly opined that there was "no safe

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[1] *See* http://www.law360.com/articles/453364/7th-circ-revives-suit-blaming-paint-for-worker-s-death (last visited July 31, 2013) ("For the rest of the country, I think this ruling sheds important light on the fact that there are limits of the gate-keeping role of trial courts with respect to when experts' testimony is admissible.")

[2] Paul Harvey was a famous American radio broadcaster for ABC Radio Networks for over 30 years. He was famous for his segments known as "The Rest of the Story" in which he "would tell a news story and then the story behind the story." *See* Joe Howard, *Paul Harvey: A Legend Looks Back*, (Nov. 2, 2006).

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threshold" for exposure to benzene. The Seventh Circuit reversed, holding that the oncologist's conclusion did not rest solely on a "no threshold" assumption. Instead, the Seventh Circuit found that the opinion was supported by estimates made by plaintiff's industrial hygiene expert, who used an EPA risk assessment model to quantify exposure. For some unspecified reason, the district court did not rule on Akzo Nobel's objection to the industrial hygienist's opinions. Instead, its summary judgment was based entirely on the unreliability of the oncologist's opinions.[3]

From an appellate perspective, the district court's omission placed Akzo Nobel on the "horns of a dilemma." In the absence of a ruling regarding the industrial hygienist's opinions, the Seventh Circuit was forced to accept his conclusions regarding exposure levels. The court then used those conclusions—which could not be challenged on appeal without a ruling below—to justify the oncologist's causation opinions. Accordingly, *Schultz* simply holds that exposure evidence that is not challenged on appeal can "fill in the gaps" and "fix" otherwise defective opinions regarding medical causation.

That holding is interesting, but hardly epochal. Moreover, when the case is remanded to the district court, the judge's first order of business will probably be to rule on the rest of Akzo Nobel's motion, namely, the part that challenged the reliability of the *industrial hygienist's* opinions. In all likelihood, the errors in those opinions will, once again, justify summary judgment for Akzo Nobel.

In the initial district court proceedings in *Schultz,* the industrial hygienist presented evidence regarding the amount of paint used daily and the chemical composition of the paints according to Material Safety Data Sheets. He then employed an EPA risk assessment model known as the "Monte Carlo Analysis" to calculate that the deceased was exposed to 24 ppm-years of benzene (equal to exposure to 1 ppm of benzene each year for 24 years).

Although the Seventh Circuit noted that the EPA endorses the Monte Carlo Analysis as a "reliable" way to analyze "variability and uncertainty in risk assessments," Slip Op. at 3, nothing in the EPA's "guiding principles" regarding this technique endorses its use for calculating exposure in civil litigation. Indeed, by the EPA's own terms, the technique is limited to "risk assessments" used for *regulatory* purposes.[4] Federal courts have long recognized that regulatory risk assessment models do not suffice to prove causation.

There is a vast difference between the reliability of the Monte Carlo Analysis in *prospective* regulatory policy and its use as *retrospective* proof of causation. Risk assessment differs substantially from the methods used by physicians in diagnosing diseases or scientists studying the causes of illnesses. Risk assessments are calculations used for formulating *policy*. They are commonly based, in part, on *economic* considerations.

For example, in the regulatory sphere, a risk may be "acceptable" if:

• it falls below an arbitrarily defined probability;

• it falls below some level that is already tolerated;

• it falls below an arbitrarily defined attributable fraction of total disease burden in the community;

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[3] *See* Schultz v. The Glidden Company, et al., No. 08-C-919 (E.D.Wisc., Mar. 20, 2012) at 5-6.

[4] *See* EPA, Office of the Scientific Advisor, Guiding Principles for Monte Carlo Analysis, ("This report is part of a continuing effort to develop guidance covering the use of probabilistic techniques *in Agency risk assessments*.") (emphasis added).

- the cost of reducing the risk will exceed the costs saved;

- the cost of reducing the risk will exceed the costs saved when the 'costs of suffering' are also factored in;

- the opportunity costs suggest resources will be better spent on other, more pressing, public health problems;

- public health professionals say it is acceptable;

- the general public says it is acceptable (or more likely, does not say it is not);

- politicians say it is acceptable.[5]

Indeed, risk assessments are governed by an entirely separate field of "regulatory toxicology" that profoundly differs from the "truth seeking" goals of science:

> This explanation begins by recognizing a central difference between the goals of science and those of government. Science investigates and attempts to explain natural phenomena; it is cautious, incremental and truth-seeking. Government, in its capacity as regulator, seeks to affect human behavior and settle human disputes; *it is episodic and peremptory and pursues resolution rather than truth.*[6]

Accordingly, risk assessments should not be confused with the causation analysis that applies in tort litigation. They are different exercises pursued for different purposes to achieve different ends. One is framed by statutory authority to promulgate and implement preventive policies. The other is framed by the Federal Rules of Civil Procedure for the purpose of resolving discrete claims regarding particular persons in courtroom proceedings. In cases where persons claim damages for alleged toxic injuries, the twain should never meet.

Other federal circuits have wisely recognized this distinction—and have precluded reliance on regulatory conclusions to prove exposure sufficiency and causation in toxic tort cases. In *Allen v. Pennsylvania Engineering Corp.*, 102 F.3d 194 (5th Cir. 1996), for example, the court held that the "weight of the evidence" analysis used by agencies to determine carcinogenicity of a substance was not an acceptable methodology to show causation in tort litigation. According to the court, the threshold of proof used by regulatory agencies is lower because the agencies are charged with protecting public health—while the tort system imposes a higher burden to show that the exposure actually caused the illness. *See also Mitchell v. Gencorp Inc.*, 165 F.3d 778, 783 n. 3 (10th Cir. 1999) (holding that regulatory methodology "results from the preventive perspective that the agencies adopt in order to reduce public exposure to harmful substances," and that regulatory standards are "reasonably lower" because tort cases "traditionally make more particularized inquiries into cause and effect.").[7]

American courts have reached a broad consensus on what plaintiffs must show to prove causation in a toxic tort case.[8] First, plaintiffs must show that the substance in question is capable of

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[5] *Id.* at 208.

[6] CURTIS D. KLAASSEN, CASARETT & DOULL'S TOXICOLGY: THE BASIC SCIENCE OF POISONS 1141 (6th ed. 2010).

[7] *See also* Knight S. Anderson, *Government Action Does Not Equal Proximate Causation* (American Bar Assn., June 11, 2012).

[8] *See* David E. Bernstein, *Getting to Causation in Toxic Tort Cases,* 74 BROOKLYN L. REV. 51, 52-55 (2008) (reviewing development of the concepts and discussing authorities).

causing the injury in question. This is known as "general causation."[9] Second, the plaintiffs must show that the substance caused *their* injuries. This is known as "specific causation."[10] Even if the record in *Schultz* was sufficient to show that benzene exposure as low as 10 ppm-years *can* cause AML, the record was legally insufficient to show that benzene caused the decedent's *particular* AML. Hence, on remand, summary judgment will be once again proper, irrespective of the Seventh Circuit's decision.

Under these circumstances, plaintiff's only remaining opposing argument is that "the amount of benzene exposure is irrelevant" because, as the oncologist testified, "it is my belief that there is no threshold risk of safe exposure to benzene." Slip op. at 7. But the Seventh Circuit *explicitly disclaimed any reliance on such a theory*, stating that if the oncologist's opinion rested on exposures less than those substantiated by the scientific literature, "we would have a different case, in which the district court's concern about an ill-defined floor for safety *would have been justified*." Slip op. at 12 (emphasis added). Hence, there is no basis for resorting to a "no threshold" justification.

Schultz illustrates the danger of interpreting an appellate decision without full appreciation of the record upon which it was based. It also illustrates how a reviewing court's decision can be skewed when a district court fails to rule on critical issues. Given the narrowness of its holding, *Schultz* presents no reasons for jubilation or despair. Under the circumstances, those who would blow victory's trumpet would be well-advised to hold their breath.

So, after all the hype and alarm, you now know the "rest of the story."

Available online at
http://www.wlf.org/upload/legalstudies/legalbackgrounder/09-27-13Faulk_LB

[9] *Id.*
[10] *Id.*