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Trimming An MDL Expert's Testimony On Remand

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Law360, New York (August 2, 2017, 2:51 PM EDT) -- There is always a level of uncertainty when a case gets remanded from a multidistrict litigation. New judge; new interpretations of prior rulings; new rulings. It can be the cause of much anxiety on both sides. And the biggest question is — what's left to be done?

That might seem simple. The case was remanded for trial. But cases rarely go back completely trial ready. Legal issues that turn more on state law are often left to the remand court to decide, as are case specific evidentiary decisions.

There are also often questions as to whether a particular issue was raised in the MDL or not. If so, what was the ruling? If not, was it waived? So, there is definitely wiggle room for remand judges to imprint their reasoning and conclusions on a case. And where you've made progress in the MDL, you certainly don't want to lose momentum post-remand.

Which was likely the thinking of defendants in Walker v. Ethicon Inc., 2017 U.S. Dist. LEXIS 112738 (ND IL Jun. 22, 2017) when faced with expert reports that went beyond the scope of what was deemed permissible by the MDL court in the mesh litigation. In this case, the plaintiff served an expert report from Dr. Shull, a gynecologic surgeon.

Dr. Shull had previously been challenged by the defendants in the MDL but certain issues were reserved for the remand court. Certain issues had also been ruled on by the MDL court in the context of other cases and other experts — in the defendants' favor. The defendant here asked the court to apply those rulings. Generally speaking the remand court found the plaintiff offered no justification not to.

First up was the expert's opinion that different surgical procedures — ones not involving the use of the product — were safer alternatives to the defendant's mesh product. Id. at *5. In addition to the vast body of case law holding that non-use is not an "alternative design" for the product, the mesh MDL court had so held in another case. Id. The remand court agreed.

The remand court also considered the impact of Illinois state law, because Illinois does not require plaintiff to prove the existence of a safer alternative design, but such evidence may be relevant. Id. at *7. The plaintiff tried to argue that because a product could be found unreasonably dangerous without evidence of a safer alternative design, it follows that a product could be found unreasonably dangerous

with evidence of a safer alternative regardless of whether that was a different design or a different surgical procedure. Id.

But that disregards that what is relevant but not required under Illinois law is evidence of a safer alternative design. The plaintiffs offered no support for interpreting “safer alternative design” in Illinois any differently than any other state. Nor did they explain how the alternative procedure was relevant to any element of any of the plaintiff’s claims. Without relevance, the testimony was excluded. Id. at *8.

Next were the doctor’s opinion on the duties of medical device manufacturers — testing, pharmacovigilance and training. The court excluded them all. The defendants challenged the opinion on adequacy of research and testing of the product on both the relevance and the doctor’s qualifications and competence. This is one of the topics on which the MDL court provided guidance but ultimately left the decision to the remand court.

On relevance, the MDL court found it doubtful, but was willing to leave the call to the trial court based on nuances in state law. Id. at *10. Pertinent to the defendants’ motion, the MDL court had also ruled that an expert “may not offer testimony that is solely a conduit for corporate information.” Id. On the qualification challenges, the MDL court did not exclude an expert on those grounds if the request for exclusion did not provide “specific content or context.” Id. at *11.

Applying those rulings to the specific case, the remand court found that the defendants had properly challenged Dr. Shull’s qualifications with enough specificity, and so that challenge was not denied, but reserved for the remand court. Id. So, on qualifications, Dr. Shull “is not qualified to testify regarding the standard of care for medical device testing.” Id. at *13.

The plaintiffs, however, argued that they were only offering testimony from Dr. Shull regarding what testing the defendants did or did not do — the extent of the testing rather than its adequacy. Id. at *12. The court took that as a concession, but went on to exclude that testimony as well. That is information found in company documents — the expert isn't needed for that. Id.

The plaintiffs also wanted Dr. Shull to testify about how the defendants monitored adverse events. They claimed he was not offering an opinion as to what systems the defendants should have been using, just that what they were doing was “woefully inadequate.” The court found this was a “distinction without a difference.” Id. at *14-15.

Dr. Shull’s experience as a surgeon does not give him the expertise to testify on the standard of care for adverse event reporting. Id. at *15. And again, if he planned to talk generally about adverse events, that material is in company documents and not an area for expert testimony.

Finally, Dr. Shull’s report included an opinion on whether the defendants appropriately trained physicians. On this point, the MDL court had already ruled that Dr. Shull could not testify about what should or should not be included in the instructions for use for the product — and that covers training of physicians. Dr. Shull could testify to the risks of the product and whether such risks were included in the product materials. Id. at *16. That’s it.

We’re not sure what remains in Dr. Shull’s report, but we certainly agree that the above portions were appropriately trimmed away.

Michelle Hart Yeary is counsel at Dechert LLP with extensive experience in product liability litigation, including the defense of mass torts in federal multidistrict litigation and coordinated state court proceedings. She is a regular contributor to the Drug & Device Law blog.