At Sidebar

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Expert Case Management

Federal district judges are the "gatekeepers" when it comes to expert testimony. They are also "masters" of their own dockets. These two roles have become increasingly important in civil litigation, where summary judgment motions regularly turn on the admissibility of expert testimony. When the opportunity to file a dispositive *Daubert* motion exists, defendants will often simultaneously file pretrial *Daubert* and summary judgment motions. This approach has curb appeal, but it is often inefficient and can be damaging to your client.

Let's start with some background. As most federal litigators know, so-called "*Daubert* motions" challenge the admissibility of expert testimony. These motions hail from the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals*, which together with *Kumho Tire Co. v. Carmichael*, requires that expert testimony be both relevant and reliable.

Daubert challenges have many similarities to other evidentiary challenges—for example, the challenge may be made *in limine* or at trial. But a *Daubert* challenge can also be markedly different—most notably, winning it can be dispositive, if the underlying claim requires expert testimony to prevail. Indeed, many jurisdictions categorically require expert testimony, at least in complicated product, malpractice, and patent cases.

In cases that require expert testimony, pretrial *Daubert* motions are the norm, and they are regularly accompanied by summary judgment motions. This simultaneous motion practice, the thinking goes, is a boon to efficiency without any appreciable costs. So goes the *Daubert* motion, so goes the whole case.

But not so fast. Take, for example, the hypothetical plaintiff injured when her parachute did not deploy. Claiming a defective design, the plaintiff sues the parachute manufacturer and supports her claim with expert testimony, a requirement of the substantive law. Discovery reveals that the manufacturer tests its parachutes on animals (actually, adorable puppies). After discovery closes, the manufacturer moves to exclude the expert's testimony under *Daubert.* The manufacturer simultaneously—but separately—moves for summary judgment, arguing not only a lack of admissible expert evidence, but also that the plaintiff ignored safety warnings and modified the parachute and that her claims are preempted.

The manufacturer marshals record evidence in support of its summary judgment motion and, as the local rules require, files a "statement of undisputed facts." The manufacturer's filings do not discuss the puppy testing program, though the manufacturer states that its testing of the parachute at issue was "more than adequate and consistent with the law."

The plaintiff responds to each motion separately, addressing each of the manufacturer's legal arguments and attacking most of its factual assertions. Additionally, in her summary judgment response, the plaintiff states that the manufacturer tests its products on adorable puppies (and attaches a picture to boot). The manufacturer replies in separate filings, addressing the numerous legal arguments and detailing just how wrong the plaintiff is on the facts. (The court stays its ruling on the motions pending this article .)

This fact pattern offers two takeaways. The first is practical: if a party wants to keep embarrassing facts out of the public record, it is better to proceed with the *Daubert* challenge first. Summary judgment motions are fact-heavy, whereas *Daubert* motions are less so. Though some troubling facts may nevertheless enter the public record, a successful dispositive *Daubert* motion before summary judgment lowers that risk. In the example, the manufacturer overlooked this consideration and charged ahead with summary judgment. But in doing so, the manufacturer put the factual record in play and handed the plaintiff an easy opportunity to highlight the manufacturer's unfortunate program.

Second, simultaneous motion practice can be very *in*efficient. In the example, if the manufacturer prevails on its *Daubert* motion, the plaintiff's claim necessarily fails and summary judgment will be granted—well—summarily. Despite the parties' investment of time and money, the court will not address most of their fully briefed arguments. To add another wrinkle, the court, of course, could grant the *Daubert* motion in part, thus mooting some of the parties' arguments and perhaps resulting in requests to file supplemental briefs.

So what can be done? Every case is different, and the potential for inefficiency admits not of one solution. At minimum, forward thinking is critical, as is an understanding of the special concerns that arise in the pretrial *Daubert* setting.

These two guiding principles may help, too (with the caveat that the trial court has final say on these matters):

Guiding Principle #1: Where a *Daubert* motion can be dispositive, and the movant seeks summary judgment solely on the basis of a lack of admissible expert testimony, request leave to file a

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combined *Daubert*/summary judgment motion. This way, the movant avoids unnecessary repetition and duplication; avoids many of the procedural requirements of summary judgment motions; limits forays into the factual record; and focuses the parties on the narrow legal issues to be decided. All of this saves time and money (and makes life easier for the judge).

Guiding Principle #2: Where a *Daubert* motion can be dispositive, and the movant seeks summary judgment on multiple grounds, including the lack of admissible expert testimony, request leave to proceed with the *Daubert* motion only, and stay briefing on the summary judgment motion pending the outcome of the *Daubert* motion. This way, if the *Daubert* motion is granted, neither party (nor the public) wasted resources on briefs and arguments that would become moot. If the *Daubert* motion is denied, then the motion for summary judgment may proceed in due course. Although another round of briefing would result, the huge potential for cost savings dwarfs any minimal delay and may amount to nothing; indeed, the summary judgment motion may fall away or be shorter than it would have been. In all events, the summary judgment briefing will be cleaner because the parties have clear guidance from the court on the critical issue of admissibility under *Daubert*. ⊙