

NJ Accutane Ruling Raises Bar For Expert Witnesses

By Jeannie O'Sullivan

Law360 (August 2, 2018, 5:26 PM EDT) -- The New Jersey Supreme Court's decision Wednesday to wipe out the Accutane mass tort case imposed stricter guidelines on scientific evidence used to support claims, and it could stem the tide of low-merit claims flowing into Garden State courts as litigants need to be more selective when enlisting expert witnesses, experts say.

In a unanimous decision tossing more than 2,000 cases over the Hoffman-La Roche Ltd. acne drug's alleged connection to Crohn's disease, the justices directed Garden State courts to use the stricter federal standard as a guide when evaluating the reliability of expert testimony before placing it before the jury. Before the decision, New Jersey had been among the few states that hadn't adopted the so-called Daubert standard of evaluating witness testimony, which requires close scrutiny of the methods an expert employs, not just the conclusions it generates.

The justices' endorsement, if not full-on adoption, of the Daubert standard effectively strips the Garden State of its popularity as a venue for expert witness claims based on its relaxed standards, experts say. That lower bar attracted cases to the Garden State, according to Alida Kass, the president and chief counsel of the New Jersey Civil Justice Institute.

"The Accutane litigation is a great example of this phenomenon — these cases cannot be brought in federal court because the plaintiffs' experts' methodology has been rejected as scientifically unsound," Kass said. "So to the extent our standard will no longer permit claims premised on unreliable expert testimony, our courts will no longer be a magnet for low-merit claims. That's a good thing."

In reversing the Appellate Division's revival of the cases, the justices zeroed in on the expert witnesses brought by plaintiffs who claimed Accutane caused their irritable bowel problems. Affirming a trial court's original grant of summary judgment, the high court found that the experts' rejection of epidemiology tests that showed no connection between the drug and the disease, in favor of "novel theories" to the contrary, didn't amount to the scientific support the claims needed to survive.

Roche attorneys and others have long urged New Jersey courts to employ the Daubert standard, set forth in the 1993 U.S. Supreme Court decision in *Daubert v. Merrell Dow Pharmaceuticals*, in order to bring consistency to determinations of the admissibility of expert testimony. The Daubert factors consider whether a scientific theory has been tested and subjected to peer review, whether it has an acceptable rate of error and operational control standards, and whether it's generally accepted within the field.

Now, with that standard in place, attorneys litigating in New Jersey will have to be much more selective in choosing the experts they offer to bolster their clients claims, according to McCarter & English LLP partner Edward Fanning Jr., who is based in his firm's Newark office. The ruling, Fanning said, is a "game changer" in terms of reshaping expert witness standards in New Jersey.

"It will require that an expert apply a reliable methodology and far more scientific rigor in the analysis that supports their opinions," said Fanning, who represented amici curiae Healthcare Institute of New Jersey and the New Jersey Business and Industry Association in the case.

The high court's decision backed the dismissal of the long-running litigation in 2015 by Atlantic County Superior Court Judge Nelson C. Johnson. After multiple hearings evaluating the experts, Judge Nelson granted Roche's motion to bar the testimony after finding the expert opinions had been motivated by preconceived conclusions and that they had cherry-picked evidence. He later granted summary judgment to Roche to end the 2,076 cases.

The Appellate Division later revived the litigation, finding that the scientific methods were reliable. In their reversal on Wednesday, the justices acknowledged that initial animal studies may have shown a possible link between Accutane and Crohn's disease but ultimately relied upon "a uniform body of epidemiological evidence" that debunked that theory.

That an admissibility determination proved fatal to the litigation could whittle the number of cases involving expert testimony in New Jersey — a situation one "can only hope" for, said James M. Beck, senior life sciences policy analyst at Reed Smith LLP's Philadelphia office.

"The ruling may require counsel to focus on more scientifically-supported mass torts, as exclusion of causation experts does have the possibility of ending entire mass torts (as here, I hope) with a single definitive ruling," Beck said.

And mass torts aren't the only cases the new expert testimony standards will affect, according to Michelle M. Bufano, a partner in Patterson Belknap Tyler & Webb LLP's litigation department in New York City. She noted the far-ranging scope of the justices' determination that courts, not juries, are to be the "gatekeepers" tasked with ensuring that only reliable evidence is placed before a jury.

"Accordingly, I would expect the broad applicability of this decision to impact many other civil cases where expert reliability is at issue," Bufano said.

--Editing by Brian Baresch and Kelly Duncan.