Dechert LLP

Three Bryant Park
1095 Avenue of the Americas
New York, NY 10036-6797
+1 212 698 3500 Main
+1 212 698 3599 Fax
www.dechert.com

SHEILA L BIRNBAUM

sheila.birnbaum@dechert.com
+1 212 698 3625 Direct
+1 212 698 3599 Fax

MARK CHEFFO

mark.cheffo@dechert.com
+1 212 698 3814 Direct
+1 212 698 3599 Fax

October 2, 2020

Submitted via Email: RulesCommittee_Secretary@ao.uscourts.gov

Rebecca A. Womeldorf, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE Room 7-300
Washington, D.C. 20544

Re: Suggestion on Potential Amendment to Federal Rule of Evidence 702

Dear Ms. Womeldorf:

We respectfully write in support of a potential amendment to Federal Rule of Evidence 702. We are co-chairs of Dechert's products liability and mass torts practice, a group of attorneys who together have decades of experience representing companies who manufacture and sell consumer products, pharmaceuticals, and medical devices.

Many of our clients are life science companies who develop life-saving medicines and devices. It is important to them and the broader pharmaceutical and life sciences industry that courts apply Rule 702 correctly and uniformly. In addition to the impact on individual cases and large multidistrict litigations such as those in which we have been involved, rulings on the admissibility of expert evidence can have significant public policy implications.

As Justice Breyer observed in his concurrence in *General Electric Co. v. Joiner*:

> [M]odern life, including good health as well as economic well-being, depends upon the use of artificial or manufactured substances, such as chemicals. And it may, therefore, prove particularly important to see that judges fulfill their *Daubert* gatekeeping function, so that they help assure that the powerful engine of tort liability, which can generate strong financial incentives to reduce, or to eliminate, production, points toward the right substances and does not destroy the wrong ones. It is, thus, essential in this science-related area that the courts administer the Federal Rules of Evidence in order to achieve the 'end[s]' that the Rules themselves set forth, not only so that proceedings may be 'justly determined,' but also so 'that the truth may be ascertained.'"[1]

In many products liability and toxic tort cases, science is central to decisions on the merits. A judge or jury cannot fairly and effectively evaluate such claims without scientifically reliable expert testimony. We know that judges, the majority of whom are not scientists, are faced with the enormous task of mastering science in various areas in short periods of time. We appreciate that judges endeavor to do their best to apply the Rules and fulfill their role as gatekeepers scrutinizing scientific evidence to ensure juries hear testimony grounded in reliable scientific methods that are reliably applied. Unfortunately, in our experience and as other commenters have catalogued, too often, unreliable expert evidence is allowed to reach juries due to misapprehension of Rule 702 and confusion and unevenness in its application across circuits.

While the practice of law requires us to appreciate nuances in the laws of different jurisdictions, we rely on the Federal Rules of Evidence to provide a level of predictability and uniformity in evidentiary rulings. This is particularly important for evidence subject to Rule 702 because, in our experience, an entire case can turn on expert testimony. In preparing for trial, courts and parties should be focused on ensuring that a jury hears

[1] 522 U.S. 136, 148-49 (1997) (Breyer, J., concurring) (quoting Fed. R. Evid. 102).

reliable scientific evidence, not whether a jury will be able to see through bad science dressed up in a lab coat.

Where the standard or approach a court will apply in evaluating expert evidence under Rule 702 is unpredictable, pretrial resolution considerations and settlement pressures are skewed. They reflect not what a case actually may be worth, but what a jury may award if it is unable to distinguish reliable scientific opinions from what, in a purely scientific context, would be deemed unreliable. Resolution based on the potential for an inflated verdict due to a jury's reliance on unsound scientific evidence does little to further the search for truth or the interests of justice.

Given our extensive experience with expert testimony and these important practical and policy considerations, we believe that an amendment to Rule 702 would help courts apply the correct standards and scrutiny to ensure that only scientifically reliable expert opinions are presented to juries. We support an amendment at the outset of the Rule that instructs courts to find each of the Rule's admissibility requirements fulfilled by a preponderance of the evidence before admitting expert testimony.[2] We also support adding a Committee Note explaining the rationale behind the amendment and clarifying that the court's gatekeeping role includes determining whether the proffering party has established not only the reliability of an expert's methods, but also the reliability of the application of the methods and the sufficiency of the data.

Very truly yours,

/s/ Sheila L. Birnbaum
Sheila L. Birnbaum

/s/ Mark S. Cheffo
Mark S. Cheffo

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[2] *See* Daniel Capra, *Memorandum to Rule 702 Subcommittee re: Rule 702(b) and (d) - Weight and Admissibility Questions* (Oct. 1, 2018) (*Agenda Book, Advisory Committee on Evidence Rules* (Oct. 19, 2018, meeting) at 171) at 26.