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Federal Courts Draw the Line: Federal Circuit's *EcoFactor* Joins Growing Push Against Unreliable Experts

by Eric G. Lasker and Katherine E. Nolan

Recently, the United States Court of Appeals for the Federal Circuit issued a highly anticipated en banc decision in the patent case *EcoFactor Inc. v. Google LLC,* ___ F.4th ___ 2025 WL 1453149. In addition to its substantive importance for patent litigation, *EcoFactor* is noteworthy in that it is one of only a handful of federal circuit court opinions to date to address the impact of the recent amendments to Federal Rule of Evidence 702.[1] The message from *Ecofactor* is clear: Under the amended Rule 702, the prior judicial tendency to "let the jury sort it out" on matters of expert reliability will no longer be tolerated.

The Rule 702 Amendments

More than thirty years after the landmark case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993), and despite clarifying amendments to Rule 702 in 2000 that were intended to delineate the stringent requirements for expert admissibility, judicial adherence to their gatekeeping responsibility against unreliable expert testimony was spotty. On December 1, 2023, Federal Rule of Evidence 702 was amended once more to address what the Standing Committee's Advisory Committee on Evidence Rules ("Advisory Committee") determined was a failure by many courts "to apply correctly the reliability requirements of that rule."[2]

The latest amendments sought to clarify and unify judges' approach to their gatekeeping role under Rule 702 through three important changes. *First*, the amendments clarify that the proponent of an expert witness must establish by a preponderance of the evidence that the expert's testimony separately satisfies each of the four elements of Rule 702. Indeed, "the [Advisory] Committee concluded that emphasizing the preponderance standard in Rule 702 specifically was made necessary by the courts that have failed to apply correctly the reliability requirements of that rule."[3] *Second*, the amendments expressly state that the court must find that each of the four elements have been satisfied. *Third*, the amendments confirm that the trial court must ensure that an expert's conclusions reflect a reliable application of the principles and methods to the fact of the case, once more answering any lingering confusion over the discussion in *Daubert* about methodologies and conclusion.

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[1] Fed. R. Evid. 702, as amended Dec. 1, 2023, https://tinyurl.com/2azkurv5.

[2] Fed. R. Evid. 702 Advisory Comm.'s Notes to 2023 Amends., https://tinyurl.com/2azkurv5.

[3] Jud. Conf., Comm. on Rules of Practice and Procedure, Comm. Note to Rule 702 at 228 (Oct. 19, 2022) (citing Fed. R. Evid. 104(a)), https://tinyurl.com/2x38778a.

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EcoFactor Exemplifies the Amendments' Impact

Before the Federal Circuit was the issue of whether the district court had properly exercised its gatekeeping function and adhered to the Federal Rule of Evidence ("FRE") 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). In a precedent-setting 8-2 en banc decision, the court reversed a panel decision, reversed the district court for the Western District of Texas, and revisited its prior Rule 702 jurisprudence[4] in vacating a $20 million patent damages award against Google LLC, and remanding the case for a new trial on damages. The court found the district court abused its discretion because it admitted unreliable expert testimony on damages, and notably, omitted any rationale for its ruling that the expert testimony was admissible. *EcoFactor Inc. v. Google LLC, supra* at *6, *23. EcoFactor's expert had offered an opinion utilizing an accepted damages methodology, but the facts and data he used (unsupported testimony of one interested party, the "imprimatur of his expertise," and three lump-sum settlement agreements, despite their lack of explicit per-unit rates) were insufficient and unsupported, and therefore unreliable. *Id.* at *10, *12-13, *16, *20.

The court cited the 2023 amendments to Rule 702 in its reasoning, noting the amendments emphasized that "an expert's opinion must stay within the bounds of a reliable application of the expert's basis and methodology." *Id.* at *8 (citing Fed. R. Evid. 702 advisory committee's note to 2023 amendment). In rejecting its own prior decision that the sufficiency of an expert's testimony is a matter of weight,[5] the court again quoted the language in the advisory committee's 2023 amendment notes: "many courts have held that the critical questions of the sufficiency of an expert's basis, and the application of the expert's methodology, are questions of weight and not admissibility. These rulings are an incorrect application of Rules 702 and 104(a)." *Id.* at *9 (internal quotations omitted).

Implications and Growing Trend

EcoFactor is just the latest in a series of federal appellate court decisions correcting the historical misapplication of Rule 702 and insisting that the district courts fulfill their gatekeeping duty. For instance, in a Sixth Circuit products-liability case, the court relied on the 2023 amendment in finding that the district court properly excluded the plaintiff's only general causation expert. *See In re Onglyza (Saxagliptin) and Kombiglyze (Saxagliptin and Metformin) Prods. Liab. Litig.*, 93 F.4th 339, 350 (6th Cir. 2024). Specifically noting the Rule 702 amendments in its decision, the court recognized they "were drafted to correct some court decisions incorrectly holding 'that the critical questions of the sufficiency of an expert's basis, and the application of the expert's methodology, are questions of weight and not admissibility.'" *Id.* at 348 n.7. The United States Court of Appeals for the Fifth Circuit also recently cited amended Rule 702 in concluding that the district court "abdicated its role as gatekeeper" by allowing expert "to testify without a proper foundation") *See Harris v. FedEx Corp. Svcs., Inc.*, 92 F.4th 286, 303 (5th Cir. 2024). Likewise, the Fourth Circuit invoked the (then draft) 2023 amended Rule in rejecting "incorrect" decisions finding an expert's factual basis and methodological application to be matters of weight and not admissibility. *See Sardis v. Overhead Door Corp.*, 10 F.4th 268, 283-84 (4th Cir. 2021). These decisions—which highlight both the explicit language of the 2023 amendments and the committee notes and deliberations explaining the amendments—provide hope that misapplications of Rule 702 may soon be a thing of the past.

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4 *See Liquid Dynamics Corp. v. Vaughan Co.*, 449 F.3d 1209, 1221 (Fed. Cir. 2006) (*citing* Wilmington v. J.I. Case Co., 793 F.2d 909, 920 (8th Cir. 1986)) (relying on a pre-*Daubert* Eighth Circuit opinion for the rejected proposition that inadequacies in an expert opinion are a matter of weight, not admissibility).

5 *Id.*

