30(b)(6) vs. 702 – is your witness a party or an expert?

***Earnest v. Sanofi U.S. Services et al*, U.S. Circuit Court of Appeals for the Fifth Circuit, No. 20-30184 (Feb. 10, 2022)**

Plaintiff sued Sanofi U.S. Services, Inc. and Sanofi-Aventis U.S., LLC in the Eastern District of Louisiana. This individual lawsuit was a part of the *Taxotere (Docetaxel) Products Liability Litigation* MDL 2740, consisting of consolidated claims of alleged failure to warn users of Taxotere—a chemotherapy medication—of the risk of permanent alopecia or hair loss as a side effect. The U.S. Circuit Court of Appeals for the Fifth Circuit overturned a jury verdict in favor of defendants on the grounds that Sanofi "effectively smuggled inadmissible opinion testimony" into the trial. *Earnest v. Sanofi U.S. Services et al*, No. 20-30184, 1, 17 (5th Cir. Feb. 10, 2022).

At trial, Sanofi called as witnesses two doctors who said the risk of "permanent" hair loss as a result of the use of the medication was actually "vanishingly small." *Id.* at 8. However, the data came from a reanalysis of a 10-year study by a former Sanofi vice president testifying as a corporate fact witness under Fed. R. Civ. P. 30(b)(6). Sanofi also offered testimony from another witness who was tendered and accepted as an expert witness under Fed. R. Evid. 702, and who relied in part on the corporate representative's testimony. *Id.* Plaintiff challenged the admission of the corporate representative testimony arguing that it was actually expert testimony in contravention of Fed. R. Evid. 702 and *Daubert*. And because the qualified expert's testimony relied in part on the corporate representative testimony, it also should not have been admitted. *Id.* at 7.

The trial court reasoned that the testimony was proper because (1) the corporate representative was heavily involved in the study; (2) the expert was personally aware that "ongoing" and "permanent" were not synonymous within the meaning of the study's data regarding side effects; (3) Plaintiff was permitted to cross-examine the expert on why such reliance was warranted; and (4) the jury was shown all the evidence, such that it could decide for itself whether to rely on the expert testimony. *Id.* at 9.

The Court of Appeals disagreed. On appeal, the Court held that since the corporate representative had never been qualified as an expert, the trial court erred in allowing him to offer

a scientific opinion. *Id.* at 2. The court said Sanofi's "cloaking" of the doctor's quasi-expert testimony as "lay witness" opinion testimony and then using the other doctor to repeat it as expert analysis effected a run around Rule 702. *Id.* In turn, Sanofi was able to admit inadmissible opinion testimony into evidence.

While the defendants' expert witness was duly qualified as an expert, he nevertheless neglected his duty to independently "validate or assess" the corporate representative's data. *Id.* at 19. According to the Fifth Circuit panel, Sanofi compounded the error with its "emphatic" insistence in closing arguments that Plaintiff's "whole case fails" because of the corporate witness's testimony which significantly prejudiced Plaintiff's case. The Court reversed the district court's judgment and remanded for a new trial. *Id.* at 9.

While this result is unfortunate for Sanofi, it seems to be a problem with a relatively simple remedy for defendants facing this issue in the future. Taking the necessary steps to disclose a fact witness as having expert opinions as well as fact opinions and having them qualified to render those opinions under Fed. R. Evid. 702 is a burden and will require additional preparation for these witnesses. Nevertheless, this approach would seem to alleviate the worries of "smuggling" undisclosed or qualified opinions expressed by the Fifth Circuit.

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