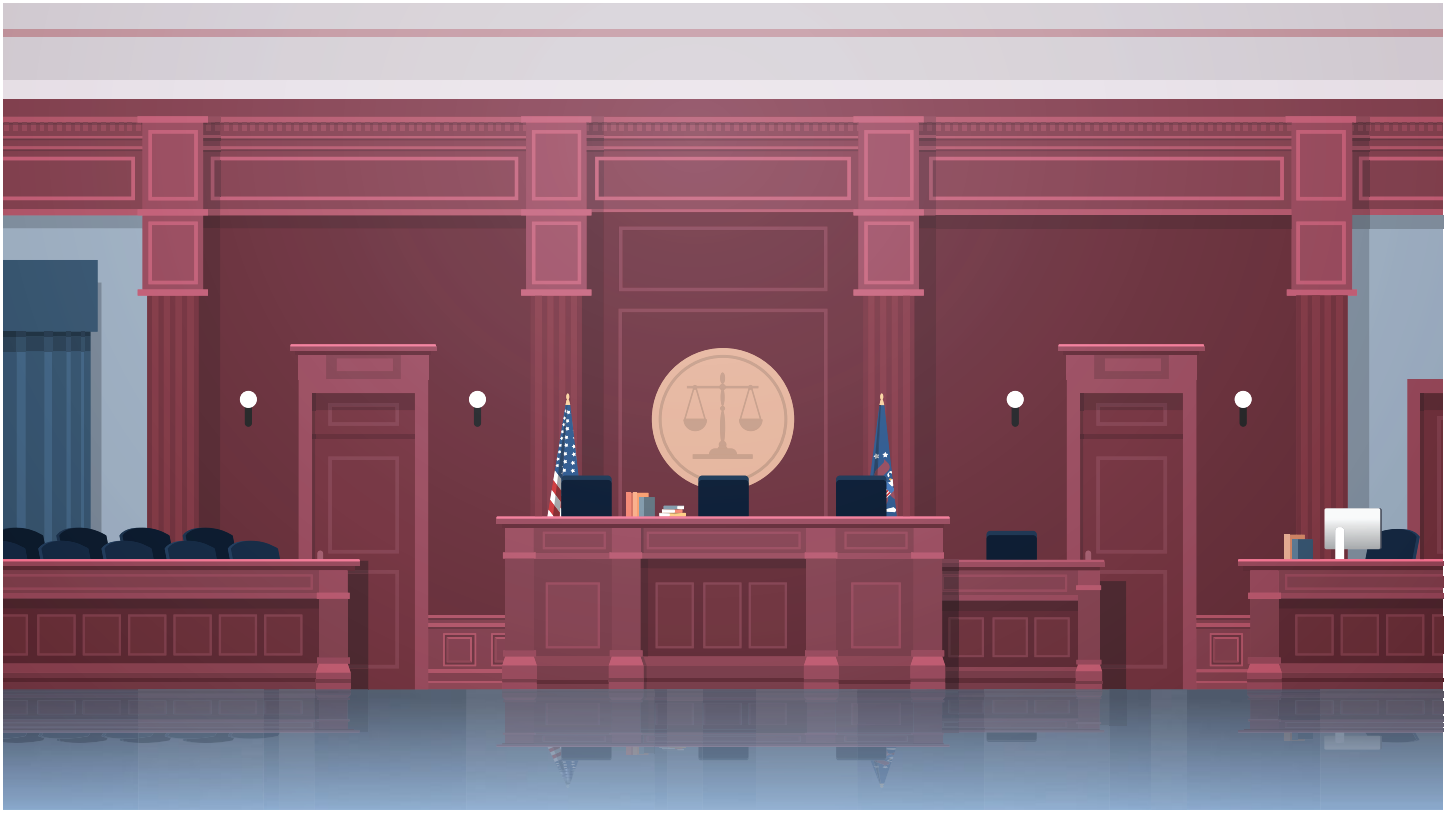
By Abbie Eliasberg Fuchs, Bradley M. Wanner, and Daniel R. Strecker

2022 Year in Review



Harris Beach attorneys Abbie Eliasberg Fuchs, Bradley M. Wanner, and Daniel R. Strecker review and analyze key judicial holdings and legal developments in New York, the federal arena and across the country that have affected the industry and may shape the years ahead. To assist clients and lawyers to prepare the best defense strategies in these suits, they share potential implications for future cases pertaining to:

- Personal jurisdiction – limitation on scope of general personal jurisdiction in tort hotspot Pennsylvania and pending appeal to SCOTUS
- Discovery – new scheme for disclosure of insurance coverage in New York
- Evidence – limitation on use of prior deposition testimony in tort hotspot California
- Causation and expert evidence – causation standard in New York and Federal Rule 702 amendments
- COVID-19 – "take-home" liability
- COVID-19 – nursing homes

Personal Jurisdiction

Mallory v. Norfolk Southern Ry., 266 A.3d 542 (Pa. 2021), *cert. granted* 142 S. Ct. 2646 (2022)

In December 2021, the Supreme Court of Pennsylvania issued its decision in *Mallory v. Norfolk Southern Railway Co.*, declaring that Pennsylvania courts do not have general personal jurisdiction over foreign

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corporations based exclusively upon the corporation's registration to do business in Pennsylvania. In *Mallory*, a resident of Virginia filed an action against a Virginia corporation, with a principal place of business in Virginia, alleging workplace exposure to carcinogens in Ohio and Virginia. The plaintiff argued the defendant consented to general personal jurisdiction by registering to do business in Pennsylvania under the state's mandatory registration statute.

However, the Court found Pennsylvania's statutory scheme affording Pennsylvania courts general personal jurisdiction based on registration, regardless of the corporation's contacts with the state, violates the Constitution's Due Process Clause as interpreted by recent United States Supreme Court precedent. That interpretation held a corporation is only subject to general personal jurisdiction where it is "at home" (i.e., the state of incorporation and the state of the principal place of business), or where there are "exceptional" facts to render the corporation "at home" in some other forum. With respect to specific jurisdiction, the Court noted there must be some connection between the forum and the underlying case for the exercise of such jurisdiction to comport with Due Process. In reaching this conclusion, the Court adopted reasoning from the United States Supreme Court that the "stream of commerce" theory may be relevant to the specific jurisdiction inquiry, but that it is not relevant to the general jurisdiction analysis. Further, the Court acknowledged that a corporation's consent to jurisdiction through registration was not actually voluntary, as it was imposed as a consequence of registration.

In April 2022, the United States Supreme Court granted *certiorari* on the question of whether Pennsylvania's statute (and potentially similar statutes) comport with the Fourteenth Amendment's Due Process Clause. A flurry of filings on behalf of *amici* followed the Court granting the petition for *certiorari* on behalf of both petitioner and respondent, as well as *amici*, who appeared but not in support of either petitioner or respondent.

Petitioner and the supporting *amici* generally argue that respondent made a voluntary and knowing choice to register as a foreign corporation and conduct business in Pennsylvania. Avoiding the argument that it is not feasible for an interstate railway to entirely avoid operating in Pennsylvania, they argue respondent has extensive operations in Pennsylvania and has benefitted from its registration as a foreign corporation, in particular having the right to use Pennsylvania courts to bring lawsuits. They also argue the Supreme Court's rationale for finding a corporation consents to general personal jurisdiction in its state of incorporation and principal place of business should also be applied to a corporation where it registers to conduct business and conducts substantial business, consistent with pre-*Daimler* decisions such as *International Shoe*. In support, they argue there is no valid rationale to distinguish the place of incorporation/principal place of business with the foreign corporation's registrations, in particular where many corporations have little actual connection with their state of incorporation but substantial connections and operations in the jurisdictions in which they register as foreign corporations. Further, petitioner and the supporting *amici* note there is an "anomaly" in the Supreme Court's current jurisprudence that affords greater general personal jurisdiction over individuals than corporations, since individuals may be subject to general personal jurisdiction wherever they are found, but this is not true for corporations. Finally, they contend a corporation has an alternate means to address issues where a case is brought in an improper jurisdiction by seeking dismissal and transfer under the doctrine of *forum non conveniens*.

Respondent and the supporting *amici* argued registration under Pennsylvania's statute did not involve consent, either express or implied. In particular, with respect to the notion of implied consent, respondent argued that accepting petitioner's interpretation of implied consent would cause the exception to swallow the rule. Further, respondent argued petitioner's construction of Pennsylvania's statute would negate the Supreme Court's recent articulation of general personal jurisdiction in Goodyear and Daimler, which restricts general jurisdiction to a corporation's state of incorporation and the location of its principal place of business. Respondent and its supporting *amici* also argue Pennsylvania's statute imposes an unconstitutional condition on foreign corporations.

Various amici contend the Pennsylvania Supreme Court's decision, to the extent it suggests registration is never a constitutional basis for jurisdiction, is incorrect; rather, they maintain that registration, combined with a "substantial connection" to the forum, is a traditional and constitutional basis for the exercise of general personal jurisdiction. Certain amici also argue the Dormant Commerce Clause is the more appropriate legal framework to analyze the exercise of jurisdiction over respondent. Of note, the Dormant Commerce Clause was not addressed before the Pennsylvania Supreme Court, suggesting the United States Supreme Court may remand the issue for the lower courts to consider this analysis.

The Supreme Court heard oral argument on November 8, 2022. Its decision is pending.

Personal Jurisdiction | Potential Implications for Future Cases

Where the Supreme Court is likely to come down on this issue is unclear, as its most recent decisions suggest support for the expansion of general personal jurisdiction over corporations beyond their place of incorporation and principal place of business. It does seem likely the Supreme Court will not adopt the extreme positions of petitioner (that registration as a foreign corporation always equals consent to general personal jurisdiction) or respondent (that registration as a foreign corporation can never amount to consent to general personal jurisdiction). The most likely outcome – at least the outcome that will garner the necessary five votes for a majority – seems to be the middle ground analysis proposed by neutral *amici*, which is somewhat of a combination of general and specific jurisdiction and a recognition the interests of individual states are limited when there is no nexus to the state, a hallmark of the Supreme Court's jurisprudence on jurisdiction dating back to I*nternational Shoe*.

Discovery

Comprehensive Insurance Disclosure Act, CPLR 3101(f)

The start of 2022 saw New York enacting the Comprehensive Insurance Disclosure Act ("CIDA"). Months later, New York amended the rule, scaling back some of the rule's burdens, but leaving several new obligations in place that defendants, carriers and defense practitioners must navigate.

CIDA amended CPLR 3101(f), governing disclosure of insurance policy information by defendants in civil litigation and applied it retroactively. Originally, CIDA made disclosure of insurance policies automatic, imposed a client certification requirement, and included "applications for insurance," which may detail a defendant's litigation history, in the definition of insurance policies. CIDA also would have opened the door for plaintiffs to obtain: copies of potentially unrelated excess and umbrella policies; the contact information for all associated insurance and third-party administrator representatives; any lawsuits that have reduced/eroded, or that may reduce/erode the limits, including the caption, date of filing and identity/contact information of the parties; and the amount of attorney fees that have reduced/eroded the limits, and the identity/address of any attorney receiving such fees.

CIDA imposed an ongoing obligation to disclose updated information that continued for 60 days after settlement or entry of final judgment; updated disclosure had to occur within 30 days of receipt of new information. CIDA added new CPLR section 3122-b, which requires the defendant (i.e., the party) and counsel to certify the information provided pursuant to 3101(f) is accurate and complete.

Amended CIDA scales back these requirements. Under amended CIDA, within 90 days of answering, a defendant must disclose copies of all policies, including primary, excess and umbrella policies, that relate to the claims being litigated; contact information for one claims representative; and the current limits, accounting for erosion. Defendants need not disclose unrelated policies, insurance applications, the identity of prior and pending litigation that has eroded or could erode limits, or information about the amount of attorney fees paid, and to whom. Updated disclosure, if applicable, must occur at predetermined intervals: upon filing of the note of issue, when entering court-supervised settlement negotiations, when entering voluntary mediation and when the case is called for trial. Amended CIDA leaves intact the CPLR section 3122-b certification requirement and obligation to provide updated disclosure for 60 days after settlement or final judgment.

Various *amici* contend the Pennsylvania Supreme Court's decision, to the extent it suggests registration is never a constitutional basis for jurisdiction, is incorrect;

Discovery | Potential Implications for Future Cases

Amended CIDA retains obligations new to defendants in civil litigation in New York: they must automatically disclose copies of related policies (although the law permits plaintiff to consent to receive only declaration pages, plaintiff may revoke that consent at any time) and residual limits within 90 days of answering. Additionally, disclosure must be certified by the client and the obligation to update disclosure continues for 60 days after settlement/judgment. However, amended CIDA dispenses with other burdens that were ripe for abuse and harassing litigation tactics, including an obligation to identify multiple claims personnel and detailed information about other prior and pending litigation, including itemizing the amount and recipient of associated attorney fees.

Evidence

Berroteran v. Superior Court, 12 Cal. 5th 867 (2022)

When defending litigation in one state, mass tort defendants must consider other jurisdictions' rules. For example, while some states generally prohibit a plaintiff from using a defendant's discovery deposition as part of the plaintiff's case in chief, others do not; a discovery deposition may resurface on a plaintiff's case in chief in another jurisdiction, sometimes years or decades later. California is among the states whose rules loom large when litigating elsewhere, and a 2019 appellate ruling made it much easier for California plaintiffs to use a defendant's previous discovery deposition at trial. The recent California Supreme Court decision in *Berroteran v. Superior Court*, 12 Cal. 5th 867 (2022), overturns that ruling, makes it more difficult for California plaintiffs to use a defendant's prior depositions for their case in chief, and clarifies the showing that a plaintiff must make in order to do so.

California Evidence Code section 1291(a)(2) provides an exception to the hearsay rule for prior testimony if, among other things (e.g., witness unavailability), the objecting party had "the right and opportunity to cross-examine the declarant with an interest and motive similar to that which the same party will have "at the [present] hearing." In *Wahlgren v. Coleco Industries, Inc.*, 151 Cal. App. 3d 543 (1984), the Fourth Appellate District, interpreting this provision and associated legislative commentary, excluded prior deposition testimony because a party at a deposition does not have the same interest and motive to cross-examine as at trial. In its 2019 decision in *Berroteran*, the Second Appellate District, encompassing Los Angeles, disagreed with *Wahlgren* to the extent *Wahlgren* espoused a blanket rule. *See Berroteran v. Superior Court*, 41 Cal. App. 5th 518, 534 (2019).

However, the California Supreme Court, in *Berroteran* (2022), overturned the Second Appellate District. The Court noted that, for strategic reasons, counsel are discouraged against, and generally do not, cross-examine their own witness at a discovery deposition. For this and other reasons, a party at a deposition generally does not have the same interest and motive to cross-examine. The Court held it is the proponent's burden to show that this prohibition does not apply. The Court outlined circumstances that, if shown, would warrant an exception. If the parties manifested an intent the deposition would serve as trial

testimony, it creates a rebuttable presumption the interest/motive was similar; likewise, if the parties subsequently agreed the testimony could be used at other trials, the interest/motive was similar (but the Court noted that agreeing to use deposition testimony at trial in another case did not necessarily constitute agreeing to use it at trial in the case at hand).

In less clear-cut circumstances, the Court listed six "practical considerations" for determining if the opposing party's interest/motive to cross-examine at the deposition was similar:

(1) Timing - such as a deposition after the parties have been educated by earlier, similar lawsuits, or a deposition in anticipation of a mediation or settlement conference
(2) Relationship to the deponent - the interest in cross-examining increases as the relationship diminishes (the Court hypothesized that if a party is unlikely to cross-examine a witness at trial, lack of cross-examination at the deposition might still constitute "similar" circumstances)
(3) Availability of the deponent - when the deposition was taken, was the deponent in poor health or not amenable to subpoena?
(4) Conduct at the deposition - references to "testimony for the jury" (especially by opposing counsel) and the degree of cross-examination engaged in
(5) The specific testimony - especially testimony that is confusing or adverse (this should not be considered in isolation, since there may still be reasons not to cross-examine); and
(6) Similarity of the party's substantive positions - while relevant, the Court emphasized that this cannot establish similarity of interest/motive in isolation

The Court stated this analysis should be applied to each deposition from which the plaintiff seeks to introduce testimony.

Evidence | Potential Implications for Future Cases

Mass tort defendants in California, or whose testimony may later resurface in cases pending in California, may be able to capitalize on *Berroteran* and reduce the likelihood of a discovery deposition's being used on a plaintiff's case in chief. When agreeing that a deposition may be used at trial, the risk of opening this door should be considered and, where possible, expressly addressed. Avoiding phrasing like "please tell the jury …" will diminish the argument that the party knew testimony would be used at trial. It may be advisable to state on the record that the deposition is for discovery. Where possible, avoiding extensive cross-examination may reduce the likelihood of a determination there was similar interest/motive. In the case of pre-existing testimony, it may be advisable to move *in limine* to exclude any transcripts plaintiff intends to use on plaintiff's case in chief, and use the existing record to develop evidence that the deposition was conducted for discovery purposes. If other counsel defended the deposition and stakeholders are amenable, a declaration that the deposition was for discovery purposes and addressing the above "considerations" could influence a court.

The California Supreme Court's decision in *Berroteran* affirms the legislative intent behind California Evidence Code section 1291(a)(2). However, the ruling does not provide a categorical ban against the use of deposition testimony at trial, especially where the parties have agreed or seemed to agree to the contrary. Practitioners should be guided by the above considerations if seeking to prevent present and past deposition transcripts from being used on a California plaintiff's trial case in chief.

Causation and Expert Evidence

Nemeth v. Brenntag N. Am., 38 N.Y.3d 336 (2022)

The New York Court of Appeals, in a near unanimous decision, set aside a $16.5 million verdict following trial based on Plaintiff's failure to establish causation as a matter of law.

At trial in *Nemeth*, Plaintiff's experts Sean Fitzgerald (geologist/microscopist) and Dr. Jacqueline Moline (occupational/environmental medicine) testified. Fitzgerald conducted a "glove box" test of the product at issue and concluded the number of released asbestos fibers from the product were several orders of magnitude higher than that found in ambient air. Dr. Moline relied, in part, on Fitzgerald's testimony that the Decedent's mesothelioma was caused by her exposure to asbestos in the product. Dr. Moline referred to her expertise and knowledge of the literature in the field and conceded there were no specific epidemiological studies regarding asbestos-contaminated cosmetic talc and peritoneal mesothelioma or precise quantification of the amount of asbestos to which Decedent was exposed. At trial, the jury returned a verdict against the Defendant, who appealed. The Appellate Division upheld the jury's verdict, finding there was a sufficient basis for Dr. Moline's opinion as to both general and specific causation.

Overturning the lower courts, the Court of Appeals reaffirmed the requirements for causation, as laid out in the seminal case of *Parker v Mobil Oil Corp.*, 7 N.Y.3d 434 (2006), which held that any opinion on causation should set forth (1) a plaintiff's exposure to a toxin, (2) that the toxin is capable of causing a particular illness (general causation) and (3) that plaintiff was exposed to sufficient levels of the toxin to cause the illness (specific causation). The Court reiterated its holding from *Parker* that while precise quantification of exposure is not always required, that does not dispense with a plaintiff's burden to establish sufficient exposure to a substance to cause the claimed adverse health effect, using expert testimony based on "generally accepted methodologies" to establish sufficient exposure to the toxin and that expert testimony is to be excluded when "there is simply too great an analytical gap between the data and the opinion proffered." Referring to its decision in *Matter of N.Y.C. Asbestos Litig. (Juni)*, 32 N.Y.3d 1116 (2018), the Court stated the fact that asbestos has been linked to mesothelioma is not enough for a determination of liability against a particular defendant; a causation expert must still establish the plaintiff was exposed to sufficient levels of the toxin from the specific defendant's product to have caused the disease.

In *Nemeth*, the Court found the basis for Dr. Moline's opinion that Decedent's "exposure to the contaminated talcum powder was a substantial contributing factor" in

causing Decedent's peritoneal mesothelioma, did not meet the Court's requirements for establishing exposure to a toxin in an amount sufficient to cause decedent's peritoneal mesothelioma. Dr. Moline testified that "brief or low-level exposures of asbestos" could cause the disease, but "there are some exposures to asbestos that are trivial and don't increase a person's risk of developing mesothelioma," the exposure to twice the amount of asbestos in ambient air would not cause mesothelioma, and that mesothelioma may develop idiopathically. The Court held this testimony was insufficient to establish causation. Further, the Court held that Dr. Moline's description of mesothelioma as a sentinel health event of asbestos exposure and that virtually all cases of mesothelioma are related to asbestos exposure are no different than conclusory assertions of causation that are insufficient to meet *Parker*.

The Court also held the studies and scientific literature cited/relied upon by Dr. Moline did not provide the necessary support for her conclusion as to proximate causation. Dr. Moline's causation testimony attempted to rely on a "comparison to the exposure levels of subjects of other studies" but failed to provide "a specific comparison sufficient to show how the plaintiff's exposure level related to those of the other subjects." The Court reiterated its statement from *Parker* that "standards promulgated by regulatory agencies as protective measures are inadequate to demonstrate legal causation" and, therefore, Dr. Moline's testimony regarding the "permissible exposure limit" to asbestos promulgated by OSHA could not be used to fill this gap in proof as to the level of exposure sufficient to cause peritoneal mesothelioma. The Court held that Dr. Moline failed to provide any foundational basis for her opinion that exposure to asbestos at a level analogous to Decedent's was shown to be a substantial factor in causing mesothelioma of any kind.

Further, the Court found the glove box test conducted by Fitzgerald did not provide an estimate of the amount of product that would be inhaled, an identification of the number of released fibers and description of those fibers as of "an inhalable size," or establish causation by demonstrating that Decedent's exposure was comparable to similar exposures proven to be causally related to the development of mesothelioma. While a precise numerical value is not required, the Court held Fitzgerald's test simply failed to provide any scientific expression linking Decedent's actual exposure to asbestos to a level known to cause mesothelioma. The Court noted Fitzgerald failed to conduct the testing in an environment and location similar to where Decedent allegedly used the product.

the Court stated the fact that asbestos has been linked to mesothelioma is not enough for a determination of liability against a particular defendant

The Court also noted that Dr. Moline testified industrial hygienists could have estimated Decedent's inhalation levels, and Plaintiff could have introduced evidence regarding the inhalation levels known to cause peritoneal mesothelioma, but failed to do so. Based on the flaws in Fitzgerald's test, and Dr. Moline's reliance on that test to provide her opinions as to causation, her opinion was deemed insufficient. The Court emphasized the need to strike a balance between excluding unreliable or speculative information as to causation and not setting an insurmountable standard, depriving plaintiffs of their day in court. The Court held the requirement that plaintiff establish sufficient exposure to a toxin to cause the claimed illness through expert testimony based on generally accepted methodologies strikes that appropriate balance.

Amendments to Federal Rule of Evidence 702: Testimony of Expert Witnesses

The Committee on Rules of Practice and Procedure unanimously approved several amendments on June 7, 2022, to clarify Federal Rule of Evidence 702 — the federal standard for admissibility of expert testimony. The amendments (1) clarify that the proponent's burden for admissibility is a preponderance of the evidence, and (2) emphasize the court's duty, through trial, to ensure the expert's opinions/conclusions, not just methods, are reliable. These changes are in response to findings that federal courts too often fail to apply the preponderance standard and prevent experts from overstating their conclusions. Pending approval by the Judicial Conference, the Supreme Court and Congress, the amendments will take effect on December 1, 2023.

If amended, the below underlined language will be added to Rule 702's opening statement:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if <u>the proponent has demonstrated by a preponderance of the evidence that</u> . . .

In *Daubert*, the Court noted that questions of admissibility, including expert testimony, should be established by a preponderance of proof. *See Daubert*, 509 U.S. at 592 n.10 (citing Rule 104(a) and *Bourjaily v. United States*, 483 U.S. 171, 175-76 (1987)). But the Federal Advisory Committee on Evidence Rules found judges routinely fail to apply the preponderance standard to Rule 702's admissibility requirements of sufficiency of basis and reliable application of principles and methods. See Advisory Comm. on Evid. Rules, Agenda for Committee Meeting, 17 (Apr. 30, 2021). In fact, between 2015 and 2021, nearly 300 federal decisions claimed questions related to the sources and basis of an expert's testimony go to credibility/weight, not admissibility. See Lawyers for Civil Justice, Comment to the Advisory Committee on Evidence Rules, 2-3 (Sept. 1, 2021)

To prevent further error, this amendment clarifies the proponent must demonstrate by a preponderance of evidence that Rule 702's reliability requirements are met. Whether the expert relied on sufficient facts or data and reliably applied sound methods are questions of admissibility, not credibility/weight of the evidence. See Advisory Comm. on Evid. Rules,

Report of the Advisory Committee on Evidence Rules, 6 (May 15, 2022). Also, by noting the proponent must prove reliability by a preponderance of the evidence, the amendment debunks the "presumption of admissibility" for expert testimony (see Report of the Advisory Committee on Evidence Rules, 6 (May 15, 2022)) that some courts erroneously assert. *See, e.g., Cates v. Trs. of Columbia Univ.*, 16 Civ. 6524, 2020 U.S. Dist. LEXIS 55409, at *18 (S.D.N.Y. Mar. 30, 2020) ("There is a presumption that expert testimony is admissible . . .")

The proposed amendment to Rule 702(d) will focus the court's attention on the expert's opinion, not just their application of principles and methods:

d) the expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

This is also not new law. *See General Electric Co., v. Joiner*, 522 U.S. 136, 146 (1997) ("[C]onclusions and methodology are not entirely distinct from one another . . . nothing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert."). However, the change will help curtail experts from overstating their opinions. Additionally, the change from "has reliably applied" (past tense) to "opinion reflects a reliable application" (ongoing) emphasizes the gatekeeping function continues even after an initial finding of admissibility. *See* Comm. on Rules of Practice and Procedure, June 2022 Agenda Book at 1039.

Causation and Expert Evidence | Potential Implications for Future Cases

While *Nemeth* involved a cosmetic talcum powder product allegedly contaminated with asbestos, the Court of Appeals ruling on the requirements to establish causation are applicable to all toxic tort cases. The *Nemeth* decision provides support for defendants in toxic tort cases seeking to challenge Plaintiff's allegations based on failure to establish causation through testing methods employed or relied upon by Plaintiff's experts. However, the ruling also provides plaintiffs some express guidance on how to satisfy the *Parker* standards in future cases.

Although the Rule 702 amendments may not take effect until December 1, 2023, they have already been cited to correct misapplications of Rule 702. In *Sardis v. Overhead Door Corp.*, 10 F.4th 268 (4th Cir. 2021), the court cited the proposed amendments and quoted the Advisory Committee's findings before reversing an order that denied a defendant's motion to exclude expert testimony. *See id*. at 283-84, 296-300 (holding the trial court abused its discretion and committed reversible legal error by abdicating its gatekeeping function under Rule 702). The court agreed that lower courts' failure to apply the proponent's preponderance standard is a "pervasive problem," in contravention of Rule 702 and *Daubert*, which the amendments will address. *See id*. at 284.

To avoid the misapplications of Rule 702 that caused the instant amendments, parties planning expert challenges should emphasize the following in their arguments:

1. there is no presumption of admissibility for expert testimony;
2. the proponent must satisfy the reliability requirements by a preponderance of the evidence;
3. the sufficiency of an expert's factual basis and reliability of its methods are admissibility, not credibility, questions; and
4. the expert's opinions/conclusions must remain within the bounds of a reliable application of their methods.

By emphasizing these long-recognized aspects of Rule 702, parties will gain credibility, minimize incorrect rulings, and preserve good arguments for appeal.

COVID-19 "Take-home" Liability

Ek v. See's Candies, Inc., 73 Cal. App. 5th 66 (2021)

In *Ek v. See's Candies, Inc.*, plaintiffs allege that in March 2020, plaintiff, defendants' employee, contracted COVID-19 at work. While convalescing at home, plaintiff allegedly transmitted COVID-19 to her non-employee husband, resulting in his death. The family filed a complaint for negligence and premises liability against the employer. The family claims the employer failed to take adequate COVID-19 safety precautions by requiring employees, some of whom were allegedly symptomatic, to work closely together despite the risk of infection and transmission to non-employees.

Defendants moved to dismiss, asserting the suit was barred by the workers' compensation law because decedent's infection was derivative of the employee's. The trial and appellate court rejected defendants' position. The courts distinguished the claims from classic derivative causes of action barred by the workers' compensation law, such as loss of companionship or lost income due to caring for the injured worker. The courts analogized to cases holding that the workers' compensation law does not bar asbestos "take-home" liability, or other injury to third parties from toxic substances on or about the employee's person. The appellate court emphasized it expressed no opinion if the employer had a broader duty of care to decedent, and its ruling is limited to the narrower workers' compensation issue. It observed, however, that the duty "would appear worthy of exploration."

Kuciemba v. Victory Woodworks, Inc., 31 F.4th 1268 (9th Cir. 2022)

In *Kuciemba*, plaintiffs claim the non-employee plaintiff contracted COVID-19 from the employee plaintiff, her spouse. As a result, the non-employee plaintiff allegedly developed severe illness and was hospitalized for one month on a respirator. The employee plaintiff allegedly contracted the virus at work and brought it home. Plaintiffs blame defendant, the employer, for the non-employee plaintiff's resulting infection. Plaintiffs allege the employer violated government health orders and safety rules and was otherwise negligent in failing to protect against the spread of infection. For example, the employer allegedly forced the employee plaintiff to work in close contact with persons the employer allegedly knew were infected with COVID-19. Plaintiffs assert counts for negligence *per se* based on the statutory/rule violations, general negligence and premises liability.

Defendant employer moved to dismiss, arguing the claims are barred by

the workers' compensation law because the non-employee plaintiff's infection was derivative of the employee plaintiff's. In a decision that diverges from the subsequent state court appellate ruling in *Ek* (discussed above), the U.S. District Court for the Northern District of California agreed but granted leave to amend. In their amended complaint, plaintiffs advanced the theory defendant is liable because it was foreseeable that an infected employee would bring the virus home, endangering members of the employee's household. The defendant employer moved to dismiss again, arguing it had no duty to protect against off-premises transmission of diseases like COVID-19. The District Court granted the motion and plaintiffs appealed to the Ninth Circuit.

Evaluating the facts and District Court decision, the Ninth Circuit recognized a possible analogy to the duty to protect employees' families from asbestos fibers brought home on clothing. The Ninth Circuit recognized that the "public policy" question, if such a duty should be extended to COVID-19, remains unanswered. The Ninth Circuit also questioned if the workers' compensation bar applies outside of classic derivative claims, such as loss of consortium. The Ninth Circuit acknowledged the interim California appellate decision in *Ek* (see discussion above) held that the workers' compensation bar did not apply in this context.

To resolve these questions, the Ninth Circuit issued an order certifying two questions to the Supreme Court of California:

(1) If an employee contracts COVID-19 at his workplace and brings the virus home to his spouse, does California's derivative injury doctrine bar the spouse's claim against the employer?
(2) Under California law, does an employer owe a duty to the households of its employees to exercise ordinary care to prevent the spread of COVID-19?

The California Supreme Court has discretion to review, or decline to review, these certified questions. If accepted, the court may answer the questions in a published opinion carrying the same precedential weight as its other decisions.

COVID-19 "Take-home" Liability | Potential Implications for Future CASES

Taken together, the decisions in *Ek* and *Kuciemba* indicate a theory analogous to asbestos "take-home" liability is a potential vehicle for cases for injury from COVID-19 in both state and federal courts. Even if the court rules unfavorably to the defendant employer's position, there remain other potential defenses to claims for alleged COVID-19 "take home" liability. Employers' adherence to safety protocols may disprove negligence allegations. A plaintiff's inability to prove notice of a specific COVID-19 risk at the worksite may allow defendant to prevail. Furthermore, plaintiff may be unable to prove the employee's infection occurred at the workplace, or that the non-employee contracted COVID-19 from the employee.

COVID-19 In Nursing Homes

***In Re COVID-19 Litigation Against Nursing Homes*, State of New York Litigation Coordinating Panel, Index No. LCP 0001/2022, October 19, 2022**

Upon the applications of firms representing plaintiffs suing New York nursing homes for their or their family's alleged injuries and/or death after contracting COVID-19 while residents of the homes, the New York Litigation Coordinating Panel (the "Panel") ruled that such cases will be coordinated pursuant to Uniform Rules for Trial Courts (NYCRR) § 202.69. The decision followed briefing dating back to February 2022, an August 2022 interim ruling finding coordination appropriate, and subsequent motions to renew/reargue the interim ruling. Ultimately, the Panel determined that despite the absence of mutuality of parties (i.e., plaintiffs and defendants are different from case to case), the similarity of the claims, common legal issues, such as the application of immunities (see discussion below), and common factual issues like the standard of care, warranted coordination. The Panel stated that discovery schedules can be established that accommodate the diversity between cases.

The holding applies to cases against nursing homes and residential health care facilities as defined in the Public Health Law (§§ 2801(2) and (3)) alleging failure to comply with government statutes, regulations and guidance for protecting and caring for patients, and/or failure to exercise reasonable care in protecting and caring for patients, "during the COVID-19 pandemic," resulting in injury or death. Arguably, therefore, coordination applies not just to claims overtly alleging injury/death from COVID-19, but also to non-COVID-19 claims arising in nursing homes contemporaneously with the pandemic.

The court reached a compromise decision regarding venue. One plaintiff firm sought coordination in Kings County, likely for its plaintiff-friendly reputation, but citing the proximity of Kings to many airports and the large number of cases venued in New York City and nearby Long Island. Another plaintiff firm sought to split the venue for coordination, requesting downstate cases be coordinated in Kings and upstate cases be coordinated in a more centrally located county. The defense sought coordination in a single centrally located county. The court declined to adopt any of the proposed solutions, instead holding cases will be coordinated in a location central to the appellate department in which they were filed: (1) cases filed in Fourth Department in Erie County, (2) cases filed in First Department in New York County, (3) cases filed in Second Department in Nassau County and (4) cases filed in Third Department in Albany County. In each county, the relevant administrative judges will appoint a coordinating judge.

Each venue's appointed judge will oversee pre-trial proceedings, including pre-answer motions, discovery, and post-discovery dispositive motions. The substantive impact of the Panel's decision will be mitigated by the fact that before trial, coordinated cases will be remanded to their county of origin (unless the parties agree to trial in the county of coordination).

***Ruth v. Elderwood at Amherst, et al.*, 209 A.D. 3d 1281 (4th Dept 2022)**

On April 3, 2020, New York enacted the Emergency or Disaster Treatment Protection Act ("EDTPA"). Retroactive to March 7, 2020, EDTPA granted healthcare providers immunity from civil liability, except in

the instances of gross negligence or more culpable conduct, for injuries or death allegedly sustained directly as a result of providing medical services in response to COVID-19. Immunized services included those provided by nursing homes related to the diagnosis, prevention or treatment of COVID-19; the assessment or care of an individual with a confirmed or suspected case of COVID-19; and the care of any other individual who presented at a healthcare facility or to a healthcare professional during the period of the COVID-19 emergency declaration. On April 6, 2021, New York repealed EDTPA.

In *Ruth*, plaintiff sued defendant nursing home in Supreme Court, Erie County, one week after EDPTA's repeal, asserting negligence, medical malpractice, wrongful death, and other theories relating to the treatment of decedent, who in March/April 2020 contracted COVID-19 at the nursing home. The nursing home moved to dismiss, arguing immunity under EDTPA. Rejecting plaintiff's opposition that repeal was retroactive, the trial court granted dismissal.

On appeal, the Fourth Department upheld dismissal and held that EDTPA's repeal was not retroactive. The court conducted an in-depth retroactivity analysis. The court found a presumption against EDTPA repeal's retroactivity because repeal impacted/expanded defendant's substantive rights (e.g., at the time of the alleged treatment, EDTPA immunized defendant from civil liability). The court found a lack of the therefore-necessary "clear expression" of legislative intent to apply repeal retroactively. Doing so, the court noted a lack of express statement of retroactivity in the statutory language, ambiguity in the legislative sponsors' memoranda, and ambiguity and contradictions in statements during floor debate. The court rejected a post-enactment affidavit from the bill's sponsor stating that repeal was intended to be retroactive, since courts have deemed such statements generally irrelevant to statutory interpretation. Therefore, the court held repeal was not retroactive. Accordingly, the court did not reach the question whether retroactivity violated defendant's constitutional rights.

COVID-19 In Nursing Homes | Potential Implications for Future Cases

Claims by and on behalf of New York nursing home residents allegedly injured by deficiencies in care in relation to their contracting COVID-19, and arguably by/on behalf of nursing home residents whose claims arose during the pandemic, even if not directly involving COVID-19, are now subject to coordination in one of four venues based on appellate department of original filing. Such coordination will shape the substantive decision making and law arising from the cases, since it will encompass pre-answer and post-discovery dispositive motions. However, absent agreement of the parties, cases will be tried in their original venue.

Under *Ruth*, EDTPA immunity remains a viable defense to claims for deficient care in relation to COVID-19 in nursing homes wherever plaintiff cannot show culpability at a level of gross negligence or higher. It remains to be seen if *Ruth* will be appealed to the highest court in New York, the Court of Appeals.