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Completing the Admissibility Equation

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Completing the Admissibility Equation

Justices may fill the gap in *Daubert* test of scientific evidence

BY RICHARD C. REUBEN

Later this year, the U.S. Supreme Court will take up an evidence dispute from Georgia that promises to be one of the new term's most important nuts-and-bolts cases for litigators.

General Electric Co. v. Joiner,

Federal Rules favoring admission of evidence called for District Court judges to serve as "gatekeepers," admitting well-grounded scientific evidence while screening out "junk" science. The Court outlined a two-part test under which trial courts would first decide whether the proffered evidence was based on solid

the issue so far have adopted an "abuse of discretion" standard, though the language has tended to vary. Three circuits (5th, 9th and 10th) have adopted a traditional abuse of discretion analysis. Three others have embellished that approach somewhat, upholding the trial court's decision unless it was "manifestly erroneous" (6th and 7th) or constituted "a clear abuse of discretion" (8th).

Two circuits, however, have been less permissive, often taking a "hard look" at the trial court's admissibility decision under *Daubert*. The 3rd Circuit based in Philadelphia reserves its hard look analysis for situations in which the trial court's refusal to admit the evidence will result in a summary judgment or directed verdict. The 11th Circuit based in Atlanta, on the other hand, appears to give a hard look at all such cases.

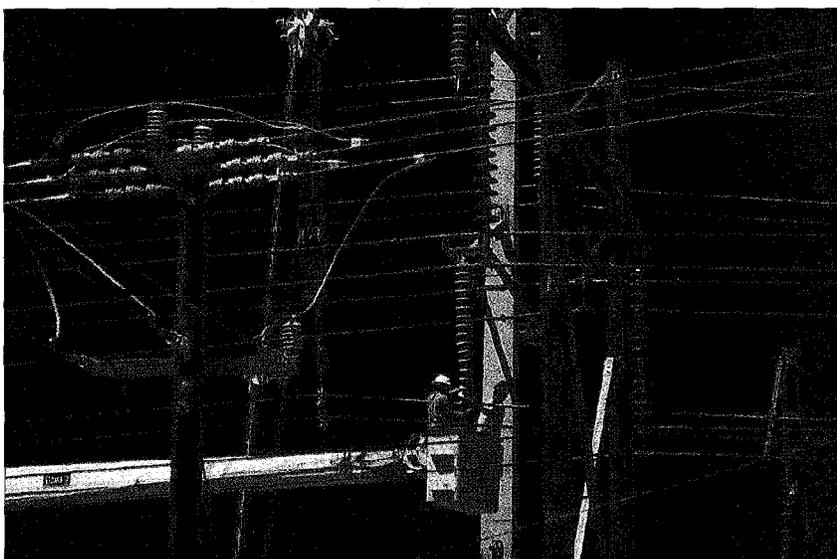
It is a challenge to that approach by the 11th Circuit that reaches the Supreme Court this fall.

The case was triggered by the onset of lung cancer in Thomasville, Ga., electrician Robert Joiner, who cleaned transformers for the city. Joiner, 37, sued the manufacturers in state court, alleging that his cancer was caused by constant exposure to the highly carcinogenic polychlorinated biphenyls, or PCBs, used to cool the transformers.

The defendants removed the case to federal court, where they were granted summary judgment after the trial court refused to admit any of Joiner's expert testimony that would have linked his cancer to his contact with PCBs.

The 11th Circuit reversed, ruling that the scientific testimony should have been admitted under *Daubert*, even though it had not yet been generally accepted in the scientific community.

Supreme Court observers—and more than a few litigators—hope the justices will use *Joiner* to sort out the standard of review for evidence rulings under *Daubert* once and for all. After four years of testing *Daubert*, a decision anytime before the new term ends in mid-1998 will seem like a short time to wait. ■



An electrical worker's cancer has sparked Court review of rules on admitting evidence.

No. 96-188, is expected to determine the standard of review that federal appellate courts must give to lower court decisions on the admissibility of scientific evidence.

The Court's decision in *Joiner* promises to have an important effect on a broad range of cases in which causation often is a pivotal issue.

In 1993 the justices themselves rewrote the rules for the admissibility of scientific evidence under the Federal Rules of Evidence, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579. There, the Court rejected the long-standing requirement, set forth in *Frye v. United States*, 293 F. 1013 (1923), that scientific evidence be "generally accepted" by the scientific community before it could be admitted.

Instead, the Court stated in *Daubert*, the liberal policy in the

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principles of scientific research, and, if so, to admit it if legally relevant to the case.

After 70 years under the *Frye* test, *Daubert* was greeted as a revolutionary decision, and it paved the way for much broader use of new and even controversial scientific testimony in both civil and criminal cases.

But while *Daubert* gave trial courts vast new powers to admit scientific evidence, it was silent on just how those decisions should be treated by reviewing courts.

Picking Up Splinters

Predictably, the U.S. Circuit Courts of Appeal have splintered badly on the question. There is general agreement that *Daubert* calls for deferential review, rather than some form of stricter scrutiny. But just how much deference must appellate courts give on *Daubert* rulings, and on what issues?

Most of the circuits considering