Keep Your Expert's Testimony In Despite *Sargon*

By **Benjamin T. Ikuta, Esq.** and **Michelle B. Hemesath, Esq.**

Ever since the California Supreme Court decided *Sargon Enterprises, Inc.* v. USC (2012) 55 Cal.4th 747, defendants have constantly twisted and misapplied *Sargon* to convince trial courts to exclude the plaintiffs' experts. Defendants argue that *Sargon* created a new "gatekeeper role" to exclude from evidence any expert opinions that do not have an unassailable foundation.

This is not true and, frankly, *Sargon* did nothing to change existing law. *Sargon* simply held that an expert engaging solely in speculation without *any* foundation for her opinion should be excluded at trial.

It is crucial that counsel is fully aware of *Sargon's* facts and holding, including *Sargon's* caution to trial courts that they should not be overzealous in excluding a party's experts. Moreover, case law since *Sargon*, including *Cooper v. Takeda Pharmaceuticals America, Inc.* (2015) 239 Cal.App.4th 555, has established that doubts as to the foundation for an expert's opinions still mainly go to weight, not admissibility. It is crucial that counsel fully understand *Sargon* and its progeny in preparing their experts for deposition and a potential hearing under Evidence Code section 402.

Sargon Held that an Expert's Testimony Should be Excluded Only if There is No Foundational Basis for that Expert's Opinion

Evidence Code section 801(b) limits an expert on testifying "[b]ased on matter . . . made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates." In applying Evidence Code section 801(b), *Sargon's* holding is simply this: "Expert testimony must not be speculative."

Sargon affirmed the exclusion of a manufacturer's expert's testimony on lost profit damages in a breach of contract action against a university. (*Sargon, supra,* at p. 777.) The expert offered an opinion that the manufacturer's market share would have increased spectacularly if the university had conducted the research it had contracted to do for the manufacturer. (*Ibid.*) The court found that the expert's opinion was not based on matter that was

of a type that reasonably could be relied on by an expert in forming an opinion upon the subject because the expert's opinion was based on circular reasoning and because the expert relied on the speculative assumption that the manufacturer would have developed marketing or research and development departments to permit it to compete with the existing market leaders. (*Id.* at pp. 777-780)

> IT IS CRITICAL THAT THE PLAINTIFF'S ATTORNEY EMPHASIZE THAT *SARGON* ITSELF CAUTIONED TRIAL COURTS NOT TO BE OVERZEALOUS IN EXCLUDING AN EXPERT'S OPINIONS FOR LACK OF FOUNDATION.

In calculating his numbers, the expert did not consider at all *Sargon's* past profits or performance but stated that he believed that *Sargon*, unlike any of the other smaller companies, would have become a market leader as one of the "Big Six", the six largest multinational dental implant companies. (*Id.* at p. 759.) The expert just assumed without foundation that due to the unsupported contention that *Sargon* had significant innovation, that *Sargon* would have been a market leader within 10 years despite being much smaller with far less resources than the Big Six. (*Ibid.*)

The "Expert" in *Sargon* was Excluded Based on a Lack of Any Basis for His Opinions

After conducting an eight-day evidentiary hearing, the trial court excluded the expert. (*Id.* at p. 761.) The court found that the expert's "market share opinion [was] not based on any actual historical financial results or comparisons to similar companies and, therefore, [was] not based on matter of a type [on which] an expert may reasonably rely." (*Ibid.*) The trial court concluded *Sargon's* expert's opinions were inadmissible and made the following findings in support of that conclusion:

"The fatal flaw in [the expert's] reasoning is that it starts off assuming, without foundation, its conclusion. The fatal flaw in his analysis is that he relies on data that in no way is analogous to Plaintiff. [The expert] deems Plaintiff's historical data, such as past business volume, 'not relevant' to his lost profits projections." (*Ibid.*)

The Court of Appeal reversed, holding the trial court erred in excluding the expert. (*Ibid.*) On review, the California Supreme Court explained that Evidence Code section 801(b) requires a reasonable basis for an expert's opinion and emphasized that an expert cannot rely on mere speculation. (*Id.* at p. 770.) In other words, the expert "must provide a reasonable basis for the particular opinion offered, and that an expert opinion based on speculation or conjecture is inadmissible." (Id. at p. 770 [quoting with approval *In Lockheed Litigation* Cases (2004) 115 Cal.App.4th 558, 564].)

As such, "under Evidence Code sections 801(b) and 802, the trial court acts as a gatekeeper to exclude expert opinion testimony that is (1) based on matter of a type on which an expert may not reasonably rely, (2) based on reasons unsupported by the material on which the expert relies, or (3) speculative." (*Sargon, supra*, at pp. 771-772.) In its function as a gatekeeper, a trial court "may conclude that there is simply too great an analytical gap between the data and the opinion proffered." (*Ibid.* [quoting *General Electric Co. v. Joiner* (1997) 522 U.S. 136, 146].)

Using this rationale, the *Sargon* court held that the trial court acted within its discretion to exclude the plaintiff's expert's testimony on lost profits as speculative. (*Sargon, supra*, at p. 774.) Our Supreme Court found that the plaintiff's expert's assumption that *Sargon's* superior innovation while completely ignoring the company's past performance would automatically catapult the company to enormous profits was too speculative. (*Ibid.*) In essence, the California Supreme Court determined that the expert's opinions were based on a series of "what ifs" that were speculative without any reasonable basis for his opinions. (*Ibid.*)

Sargon Cautioned Trial Courts Not to be Overzealous on Excluding an Expert's Opinions and to Only Do So When the Opinion is "Clearly Invalid and Unreliable"

When an expert's opinion is attacked for lacking foundation, it is critical that the plaintiff's attorney emphasize that *Sargon* itself cautioned trial courts not to be overzealous in excluding an expert's opinions for lack of foundation.

As *Sargon* explained: ***"But courts must also be cautious in excluding expert testimony. The court must not weigh an opinion's probative value or substitute its own opinion for the expert's opinion."*** (*Id.* at p. 772 [emphasis added].) Likewise, "the [trial] court does not resolve

scientific controversies." (*Ibid.*)

As such, "[t]he trial court's preliminary determination whether the expert opinion is founded on sound logic is not a decision on its persuasiveness." (Ibid.) The *Sargon* court explained that "[t]he [trial] court must simply determine whether the matter relied on can provide a reasonable basis for the opinion or whether that opinion is based on a leap of logic or conjecture." In doing this, the trial court must "conduct[] a circumscribed inquiry to determine whether, as a matter of logic, the studies and other information cited by experts adequately support the conclusion that the expert's general theory or technique is valid." (Id. [emphasis added].) In other words, "[t]he goal of trial court gatekeeping is simply to exclude clearly invalid and unreliable expert opinion." (Ibid. [emphasis added].) In *Sargon*, an expert without any basis or foundation opining that a small company would have a billion dollars in lost profits while completely ignoring that company's financial history or resources met this narrow standard.

Cooper v. Takeda and other Sargon Progeny Found that Expert Testimony is Admissible Even with Foundational Concerns

The plaintiff's lawyer should not only emphasize that the reach of *Sargon*, by its own language, is limited, but that other Courts of Appeal since *Sargon* have consistently held that it is not the trial court's role to weigh the evidence. Doubts or concerns about foundation still should go to weight, not admissibility. Only the experts without any foundation should be excluded.

Cooper v. Takeda Pharmaceuticals America, Inc. (2015) 239 Cal.App.4th 555, involved issues of medical causation, mathematical ratios, and is instructive here. In Cooper, the plaintiff filed suit against a pharmaceutical company, alleging that a diabetes medication caused him to develop bladder cancer. (Id. at p. 561.) The trial court initially allowed an expert urologic oncologist to testify on behalf of the plaintiff. (Ibid.) The expert testified that he based his opinions on a review of 15 epidemiological studies. (Id. at p. 562.) The expert admitted that any single study could be criticized in isolation, but when viewed in total, it supported his view that the drug caused cancer. (Ibid.)

In doing so, the expert used a "hazard ratio" which compared the number of cases in which a disease actually occurs to the number of cases in which it was expected to occur. (Ibid.) The expert explained that based on the 15 studies, the hazard ratios showed an "uncommonly high" relationship between the drug at issue and the development of bladder cancer. (Ibid.)

The expert reviewed the plaintiff's specific medical records, which included information surrounding the plaintiff's family history, potential occupational exposure, smoking and alcohol history, and the patient's own comorbidities. (Ibid.) Based on the review of the plaintiff's records, the expert ruled out radiation exposure, chemotherapy, infections, immunosuppression, and other areas of potential exposure to heightened risk of cancer. (Id. at p. 567.) The expert opined that it was his opinion "that the most substantial causative factor for [the plaintiff] was his length [and] cumulative dose [of the drug]." (Ibid.)

A jury awarded the plaintiff $5,000,000 and his wife $1,500,000 for the loss of consortium case in a 9-3 verdict on the strict liability failure to warn claim and 10-2 on the negligent failure to warn. (Id. at p. 570.) The pharmaceutical company filed a judgment notwithstanding the verdict and seeking to strike the expert's testimony as speculative. (Ibid.) Relying specifically on *Sargon*, the trial court agreed with the company and determined that the expert's testimony was speculative and unreliable and granted the JNOV. (Id. at p. 571.) The trial court noted that the expert had essentially disregarded the plaintiff's smoking history, prior history of skin cancer, history of chronic kidney disease, and other possible causes of the cancer. (Id. at p. 574.) Indeed, the trial court also noted that the expert ruled out the history of diabetes as a causative factor even though the very epidemiological studies that the expert relied on treated diabetes as a cause of bladder cancer. (Id. at p. 575.) The trial court also noted some serious shortcomings in the underlying studies, including the studies' own admissions of methodological shortcomings. (Id. at p. 588.) The trial court thus believed that the expert "rendered a diagnosis based upon speculation, conjecture and leaps of logic." (Id. at p. 575.) The trial court also "emphasized that it was not ruling on the weight of [the expert's] testimony, but only its admissibility." (Ibid.)

The Court of Appeal reversed and reinstated the jury verdict. (Ibid.) The Court found that "in finding [the expert's] testimony inadmissible, the trial court's reasoning is inconsistent with California law on the acceptable bounds of expert testimony regarding causation, as well as the trial court's gatekeeping function of excluding unreliable expert testimony." (Ibid.)

The Court of Appeal explained that "the trial court's task is not to choose the most reliable of the offered opinions and exclude the others." (Id. at p. 590.) The Court of Appeal went into great detail of the specific

facts of *Sargon* and noted that the "expert" in *Sargon* "had no reasonable basis for his opinion on lost profits, and reached his conclusions only by speculating and making readily discernable leaps of logic." (Ibid.) By contrast, in nitpicking the oncologist's opinions, the trial court actually did "weigh the probative value of [the expert's] opinion, and the studies upon which he relied, and substituted its own opinion for [the expert]." (Id. at p. 592.)

Indeed, the flaws in the studies and application of those studies "were explored in detail through cross-examination and with the defense expert witnesses, and constituted evidence that went to the weight and not the admissibility of [the expert's] opinion testimony based on those studies. Those were matters for the jury to decide." (Id. at p. 593 [emphasis added].) Lastly, the Court of Appeal specifically addressed the "hazard ratio" testimony and showing that the ratios showed, in the expert's view, a statistically significant link between the drug and the cause of cancer. (Ibid.) These were admissible and proper opinions that should not have been stricken at trial. (Ibid.)

Likewise, in *Asahi Kasei Pharma Corp. v. Actelion Ltd.* (2013) 222 Cal.App.4th 945, a pharmaceutical corporation entered into a licensing agreement with a biopharmaceutical company to develop and bring to market a pharmaceutical drug. (Id. at p. 950.) A competitor of the pharmaceutical corporation purchased all of the stock of the biopharmaceutical corporation to thwart bringing the drug to the market. (Ibid.) After filing suit for tortious interference, the corporation was permitted to present expert testimony over the defense's objection that showed that the drug would have been approved by the FDA based on preclinical data as well as a clinical study. (Id. at p. 974.) An expert economist also relied on revenue projections and past data for the type of drug. (Id. at p. 975.)

After a jury verdict of $546,875,000, the Court of Appeal affirmed, noting the limited role of the trial court under *Sargon*. (Ibid.) As such, the Court noted that given that the experts provided a sufficient basis for their opinions, "[u]nlike *Sargon*, this is not a situation in which the trial court's gatekeeper role required exclusion of speculative expert testimony." (Ibid.)

In *Town of Atherton v. California High-Speed Rail Authority* (2014) 228 Cal. App.4th 314, the petitioners objected based on the environmental impact of California's high-speed rail system. In doing so, the petitioner's objected to the consideration of a complex set of mathematical equations that predicted how people would travel. (Id. at p. 345.) The Court of Appeal held that the trial court was correct in determining that the petitioners failed to show their burden, under *Sargon*, of demonstrating that the travel model was "clearly inadequate or unsupported." (Ibid.) The Court of Appeal noted that "the gatekeeper's focus must be solely on principles and methodology, not on the conclusions that they generate." (Ibid.) In short, as a gatekeeper, a court should only exclude an expert's opinion if the opinion is pure conjecture and speculation.

Ensure that Your Experts Have a Sufficient Foundation for Their Opinions

While this may sound obvious, the best way to counter a *Sargon* challenge is to simply ensure that your experts have a proper and thorough foundation for their opinions. Provide your expert with all the materials relevant to the case. At a minimum, your expert should be prepared to testify that she at least considered all

information prior to coming to her conclusion in the case. The Sargon decision repeatedly emphasized that the expert disregarded and ignored past performance of the company when extrapolating future value. As such, if your expert is discounting relevant information, the expert should be prepared to offer a firm reason why the information should be disregarded and why it is reasonably acceptable to disregard this type of information under the circumstances of your case. Your expert's explanation for disregarding the information should not be based on a circular argument such as the one set forth by the expert in *Sargon*.

If your expert relied on studies, literature, or publications for her opinion, ensure that your expert is fully prepared to explain those documents and why they apply to your case. Ideally, the expert will explain that the studies simply verified or buttressed the opinions that the expert already formulated based on that expert's background, education, and training as well as the specific facts of the case. Not only will this help defeat any *Sargon* attack on your experts, but it will bolster any attack that you make in an attempt to exclude opposing experts based on *Sargon*.

If the Court Seems Like its Leaning Toward Excluding Your Expert, Request a 402 Hearing

Usually, challenges to an expert come in the form of a motion in limine. If the Court seems inclined to exclude your expert based on *Sargon*, request a 402 hearing. While it less than ideal to spend additional time and money for an expert to appear at a pre-trial hearing it is better than the devastating alternative of exclusion.

Under Evidence Code section 402, the court may conduct a hearing outside the presence of a jury to determine if an expert has an adequate foundation for his opinion. (See also Evid. Code § 802 [court may require that an expert "be first examined concerning the matter upon which is opinion is based"].)

In *David v. Hernandez* (2017) 13 Cal. App.5th 692, a truck driver pulled in front of a minivan, causing a collision and substantial injuries. Liability was contested as the truck driver contended that the minivan had time to notice the truck and stop. (Id. at p. 695.) A urine test of the plaintiff was positive for THC, though it was unclear if the THC related to any recent usage of marijuana that would impair the plaintiff. (Ibid.) Shortly after the collision, the plaintiff told the ER physician that he occasionally used marijuana but had not consumed it within the past several days. (Id. at p. 696.) The same treating

ER physician testified that the plaintiff showed no evidence of intoxication. (Id. at p. 698.) The defense attempted to introduce an expert toxicologist to testify that the plaintiff's hypertension, high respiratory rate, and rapid heart rate in the emergency room, along with the plaintiff's memory loss, showed that the plaintiff was under the influence of marijuana. (Id. at p. 697.) However, the expert admitted that stress and a traumatic injury could also cause the same symptoms. (Ibid.) Nevertheless, at deposition, the expert testified that "to a reasonable degree of medical certainty, yes, he was under the influence of marijuana." (Ibid.)

Following a seven-figure jury verdict, the Court of Appeal held that the trial court acted within its discretion as the gatekeeper per *Sargon* to keep out the testimony. (Id. at p. 699.) On Appeal, the defendant criticized the trial court for granting the motion in limine without conducting an evidentiary hearing under Evidence Code section 402 to examine the scientific and medical support for the toxicologist's opinion. (Ibid.) The Court of Appeal rejected this argument because the Defendant never asked for a hearing: "The court cannot be faulted because appellant never requested an evidentiary hearing under section 402." (Ibid.)

> IF A MOTION IS FILED TO EXCLUDE YOUR EXPERT'S OPINIONS, EMPHASIZE TO COURT THAT *SARGON* ONLY PERMITS EXCLUDING EXPERTS WHEN THE OPINION IS BASED ON PURE CONJECTURE WITHOUT ANY FOUNDATION.

For the Purposes of Summary Judgment, the *Sargon* Standard is Relaxed Further

Because there are no section 402 hearings in conjunction with summary judgment, the plaintiff's lawyer facing a summary judgment motion should emphasize that the *Sargon* gatekeeper requirements are more relaxed in conjunction with such a motion.

Garrett v. Howmedica Osteonics Corp. (2013) 214 Cal.App.4th 173, involved a products liability action where the plaintiff contended that prosthetic bone to replace a portion of the femur was defective. The defendant manufacturer moved for summary judgment supported by an expert declaration from a mechanical engineer that stated that the device was not defective. (*Id.* at p. 179.) The plaintiff opposed the motion with a declaration from an expert metallurgist, who disagreed with the engineer. (Ibid.) The trial court struck the plaintiff's expert's declaration under *Sargon* because "it lacked a reasoned analysis and an adequate foundation" and granted summary judgment. (Id. at p. 180.)

The Court of Appeal reversed, finding the trial court abused its discretion. The Court of Appeal explained:
"Unlike *Sargon,* this case involves the exclusion of expert testimony presented in opposition to a summary judgment motion. The trial court here did not conduct an evidentiary hearing, and there was no examination of an expert witness pursuant to Evidence Code section 802. Absent more specific information on the testing methods used and the results obtained, the trial court here could not scrutinize the reasons for [plaintiff's expert's] opinion to the same extent as did the trial court in *Sargon*. We do not believe, however, that the absence of such detailed information justified the exclusion of [the] testimony."
(Id. at p. 189.)

The court further explained that "the rule that a trial court must liberally construe the evidence submitted in opposition to a summary judgment motion applies in ruling on both the admissibility of expert testimony and its sufficiency to create a triable issue of fact." (Ibid.) As such, the trial court erred in striking the declaration and granting summary judgment. (See also *Michaels v. Greenberg Traurig, LLP* (2021) 62 Cal.App.5th 512 [trial court erred in granting summary judgment per *Sargon* because "the trial court does not weigh the evidence" and despite concerns, there was a foundation for the expert's opinion].)

Of course, as noted by Garrett, the plaintiff's lawyer should still attack and object to the defendant's expert declarations in support of the motion for summary judgment if they are laconic or lack foundation. (Garrett at p. 189.) The rule of liberality applies only the party opposing summary judgment. The moving party's declarations stand in a different light and must be strictly construed. (*McAlpine v. Norman* (2020) 51 Cal. App.5th 933, 938 [finding that the moving party did not meet its initial burden on summary judgment in submitting a conclusory declaration because "the moving party's evidence is strictly construed, while the opposing party's evidence is liberally construed"].)

Conclusion

Sargon has not changed the landscape relative to admissibility of expert opinions. It merely stands for the

proposition that experts must have some foundation for their opinions. The best way to avoid a *Sargon* challenge from the defense is to prepare your experts before their deposition. This preparation should include a discussion about the basis for their opinions, as well as an explanation for any information they have disregarded. If a motion is filed to exclude your expert's opinions, emphasize to court that *Sargon* only permits excluding expert when the opinion is based on pure conjecture without any foundation. The court is not permitted to weigh testimony or determine credibility and as *Sargon* itself cautioned, courts should not be overzealous in excluding experts at trial.

Benjamin T. Ikuta, Esq.

is a partner at **Hodes Milman Ikuta, LLP** who specializes in medical malpractice actions, particularly in cases involving serious injury or death. He has litigated many birth injury cases, as well as delay in diagnosis cases, and even elder abuse and dependent adult abuse cases based on neglect. He has secured multiple seven-figure recoveries, and continues to work tirelessly to protect those who might be injured by the negligence of medical professionals.

Michelle B. Hemesath, Esq.

is a trial attorney at **Hodes Milman Ikuta, LLP** in Irvine. Her practice focuses on cases of medical malpractice, nursing home negligence, elder abuse, personal injury and product liability. After defending healthcare providers for years, she realized her true calling was to represent those injured by medical negligence. She was named by Southern California Super Lawyers as a Rising Star (reserved for top 2.5% of attorneys under the age of 40) in 2021.