

Expert on Proxy Statement Disclosures Excluded Under Daubert

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A recent decision by Judge Novak in a securities case provides some helpful reminders on expert witness practice, particularly in commercial litigation, in the EDVA.

Pulzone v. Kaleyra, Inc. involves the merger of a privately held Italian company, Kaleyra, with a publicly traded special purpose acquisition company (SPAC). The plaintiffs, who are former employees of Kaleyra, allege that the defendants violated the Sarbanes-Oxley Act in retaliation for their raising concerns about the accuracy of statements made in proxy statements leading up to the merger.

Defendants identified an expert, Mitchell Gordon, to testify regarding the adequacy and accuracy of the proxy statement disclosures about the merger and the steps that Gordon would expect a CFO to take if she had concerns about the adequacy of the disclosures.

The plaintiffs moved to exclude Gordon's testimony under Fed. R. Evid. 702 and *Daubert v. Merrell Dow Pharms., Inc.*, 5090 U.S. 579 (1993). Judge Novak granted the motion and excluded Gordon's testimony. [Pulzone v. Kaleyra, Inc.](#), No. 1:22cv1363, 2024 U.S. Dist. LEXIS 114275 (E.D. Va. June 27, 2024). Below are several takeaways from Judge Novak's decision for litigants presenting expert witnesses in the EDVA:

Experience Is Not Enough

Gordon had served as CEO of several companies, as CFO of a SPAC and as a board member of two other SPACs. He was highly qualified as an expert, but qualifications alone are not enough for an expert's opinion to be admitted, particularly in the EDVA. The lesson here is that a highly qualified expert is a necessary, but not sufficient, requirement for admissibility under Rule 702. An expert must show how they employed their expertise to reach a reliable opinion based on the facts of the case.

An Expert's Opinion Should Be Clear and Logical

The core requirements of Rule 702 and *Daubert* are that an expert's testimony be based on sufficient facts or data and that the testimony be the product of a reliable method applied in a reliable way. In other words, an expert must show how the underlying facts lead to his conclusions in a way that is logical and understandable.

Gordon's testimony failed to meet these requirements. Judge Novak found that Gordon did not clearly explain how he arrived at his conclusions, and instead based his opinion on the adequacy of the disclosures in the proxy statements on the assertions of the legal and accounting professionals who prepared them.

Gordon's approach illustrates two important points for expert testimony. First, clarity is important. An expert must show how his analysis leads to his ultimate conclusion in an understandable, step-by-step fashion. Second, an expert must independently evaluate the evidence and avoid relying on the conclusions of others. As Judge Novak stated, "the mere fact that disclosures prepared by other professionals are usually complete provides little reliable guidance."

An Expert Must Explain His Reasoning

Judge Novak described Gordon's analysis as "superficial characterizations" and "summarizations and reproductions of documents." As an example, the judge noted that Gordon counted up the number of pages referencing risk factors in the proxy statements to show that the disclosures adequately disclosed the risks of the merger, an analysis that Judge Novak described as "rudimentary arithmetic."

Judge Novak's ruling is a reminder that an expert must do more than recite facts or summarize documents and then jump to an opinion. Rather, an expert should explain how those facts or documents lead to a conclusion, and how the expert ruled out alternative conclusions. If Gordon had simply supported his conclusions by pointing to specific disclosures in the proxy statements and explaining why he felt those disclosures were both adequate and accurate, his opinion may well have been admissible. Where Gordon fell short is that he provided no reasoning that explained the basis for the conclusions he reached.

An Expert Must Go Beyond Subjective Opinion

Gordon's final opinion was that an experienced CFO would not have allowed issuance of the proxy statements if she had concluded that they were inadequate or inaccurate. Again, Gordon provided no explanation of how he reached this conclusion. As a result, Judge Novak found, his opinion was "little more than speculation."

As with his analysis of the disclosures in the proxy statements, Gordon's opinion may well have been admissible if he had avoided speculation or subjective opinions on what a reasonable CFO would or would not have done. If, for example, Gordon had identified factors that a CFO should consider and analyzed how those factors and the facts in evidence would lead to the conclusions he reached, his opinion may have met the requirements of Rule 702.

Conclusion

The overall takeaway from Judge Novak's decision is that experts must not only be well qualified but also take the time to break down their opinions into discrete steps, explain how each step is supported by evidence, and avoid subjective or speculative opinions that do not rely on the available facts. A qualified expert who follows these guidelines can almost always avoid exclusion of their testimony.

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