

## California's Evolving Standard On Expert Opinion Evidence

By **Peter Choate and William Dance** (February 21, 2018, 11:34 AM EST)

In *Sargon Enterprises Inc. v. University of Southern California*,<sup>[1]</sup> the California Supreme Court clarified the standards that govern the admissibility of expert opinion testimony under California Evidence Code sections 801(b) and 802. As the Supreme Court explained, a trial court must act as “a gatekeeper” under sections 801(b) and 802 “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 an expert relies or (3) speculative.”<sup>[2]</sup>

This gatekeeping obligation “means that a court may inquire into, not only the type of material on which an expert relies, but also whether that material actually supports the expert’s reasoning.”<sup>[3]</sup> In what was a new development for California admissibility law, the Supreme Court’s decision also made plain that in conducting the foundational assessment required by the Evidence Code, trial courts should draw upon the scientific and technical evidence admissibility principles developed by the federal courts under *Daubert v. Merrell Dow Pharmaceuticals Inc.*<sup>[4]</sup>

On Jan. 29, 2018, the Fourth Appellate District, Division One, decided *Apple Inc. v. Superior Court*.<sup>[5]</sup> The issue in *Apple* was one of first impression — to wit, “whether the *Sargon* standard of admissibility applies to expert opinion evidence submitted in connection with class certification motions.”<sup>[6]</sup> The court answered that question in the affirmative.<sup>[7]</sup>

The plaintiffs in *Apple* alleged that Apple’s iPhone 4, 4S and 5 smartphones were sold with a defective power button that began to work intermittently or fail entirely during the life of the phones.<sup>[8]</sup> They sought to certify two classes of California citizens who purchased the iPhones and whose power button stopped working or worked intermittently.<sup>[9]</sup> The plaintiffs supported their motion with the declaration of an accountant who opined that damages could be calculated on a classwide basis.<sup>[10]</sup>

Following oral argument on the plaintiffs’ motion, the trial court found that the plaintiffs had not shown that common questions predominate and declined to certify the proposed classes.<sup>[11]</sup> The court, however, allowed the plaintiffs to file supplemental briefing.<sup>[12]</sup>

In connection with two rounds of supplemental briefing, the plaintiffs submitted supplemental



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declarations from their accounting expert as well as declarations from three additional experts.[13] In response, Apple challenged the materials and methodologies on which the plaintiffs' experts relied and, at multiple hearings on the plaintiffs' motion, repeatedly urged the trial court to apply Sargon.[14] The court refused Apple's invitation, however, and expressed concern that "applying Sargon would 'turn class certification] motions into these massive hearings.'"[15]

Ultimately, the trial court issued an order granting the plaintiffs' motion to certify their proposed classes. The order confirmed the court's belief that Sargon did not apply. According to the court, the issues raised by Apple "with respect to the materials Plaintiffs' experts will rely upon in forming their opinions and whether Plaintiffs' experts analyses rely on accepted methodologies ... are issues for trial." [16]

Apple challenged the trial court's class certification order via a petition for writ of mandate, arguing that the court erred in refusing to apply Sargon.[17] In a straightforward and logical opinion, the Court of Appeal reversed.

The court began its analysis by noting the obvious — that a trial court "may consider only admissible expert opinion evidence at class certification" and that "[t]he Evidence Code provides the framework for the admissibility" of such evidence. After quoting Evidence Code sections 801(b) and 802, the court explained that the Supreme Court interpreted these statutes in Sargon and "provided definitive guidance to courts considering the admissibility of expert opinion evidence." [18]

Although Sargon involved expert opinion evidence presented at trial, the Court of Appeal rejected the argument that the admissibility principles discussed in Sargon were limited to that context. Instead, the court confirmed that because Sargon interpreted the relevant provisions of the Evidence Code, the Supreme Court's interpretation of those provisions "applies wherever the Evidence Code does." As the court explained, "[t]here is only one standard for admissibility of expert opinion evidence in California, and Sargon describes that standard." [19]

While Apple arose in the class certification context, the decision may have a significant impact in the summary judgment context. For over 70 years, courts in California have applied the rule that a party's evidence in opposition to a summary judgment motion must be liberally construed when assessing whether the evidence is sufficient to create a triable issue of fact.[20] But following the Supreme Court's decision in Sargon, the Second Appellate District, Division Three, held that this rule of liberal construction also applies to admissibility determinations.[21]

The plaintiff in *Garrett v. Howmedica Osteonics Corp.* asserted product liability claims, alleging that he was injured following the fracture of a femoral prosthetic implant.[22] At issue on appeal was whether the trial court erred in granting summary judgment for the defendant after excluding a declaration submitted by the plaintiff's metallurgist expert in opposition to the defendant's motion.

In that declaration, the expert stated that he had conducted extensive examinations of portions of the prosthesis that had been removed from the plaintiff's body. Based on these examinations, the expert concluded that the fractured portion of the device was softer than the minimum required hardness in two of three ASTM specifications covering the alloy for use in an implant, and was less than the expected hardness of the third specification.

The expert, however, failed to describe the particular testing processes that he used to arrive at his conclusions and to more particularly describe the results of that testing. In addition, he failed to identify the particular ASTM specifications that he had considered.[23]

On appeal, the defendant in Garrett argued that these omissions made it impossible for the trial court to determine whether the material on which the expert relied supported his opinion. Because the trial court could not conduct the analysis required by Sargon, the defendant argued that the court properly excluded the expert's declaration.[24]

The Court of Appeal rejected this argument. Although the court did not dispute that Sargon applies in the summary judgment context, the court emphasized why, in its view, Sargon was distinguishable.

Specifically, the court explained that "Sargon involved the exclusion of expert testimony at trial" following a multiday evidentiary hearing pursuant to Evidence Code section 802. The court then explained that "[u]nlike Sargon," Garrett involved the exclusion of expert testimony presented in opposition to a summary judgment motion without a section 802 evidentiary hearing.[25]

After distinguishing Sargon, the court stated that based on the rule of liberal construction, "a reasoned explanation required in an expert declaration filed in opposition to a summary judgment motion need not be as detailed or extensive as that required in expert testimony presented in support of a summary judgment motion or at trial." Applying this principle, the court held that the expert's declaration was admissible even though the trial court could not scrutinize the reasons for his opinion to the same extent as did the trial court in Sargon.[26]

In holding that the rule of liberal construction applies to certain admissibility determinations in the summary judgment context, Garrett created a conflict with other authority holding that the rule of liberal construction applies only to sufficiency determinations, not admissibility determinations.[27]

The conflict between Garrett and Bozzi has been emphasized in two petitions for review to the Supreme Court.[28] The Supreme Court has not yet resolved that conflict, however. That said, the court has cited approvingly to Bozzi for the proposition that an expert declaration submitted in support of or opposition to a motion for summary judgment cannot be considered unless the evidence in it would be admissible at trial.[29]

Perry thus calls into question the Garrett court's distinction between the admissibility of expert opinion evidence submitted in opposition to a summary judgment motion and the admissibility of expert opinion evidence offered at trial.

Like the Perry court, the Apple court did not purport to address the conflict between Garrett and Bozzi. But the Apple court did suggest that it may view Garrett with disfavor.[30]

More importantly, the reasoning in Apple is fundamentally at odds with that in Garrett. By concluding that the rule of liberal construction applies to admissibility determinations involving the expert opinion evidence of a party opposing summary judgment, the Garrett court effectively created a different and lower standard for admission of certain expert testimony than that described in Sargon.

But Apple confirms that following Sargon, "there is only one standard for admissibility of expert opinion evidence in California." [31] Apple also confirms that this singular standard applies regardless of the procedural context in which expert opinion evidence is proffered.[32] Thus, although the Apple court did not expressly disapprove of Garrett, the court's reasoning does undermine the Garrett court's analysis.

Moreover, the Apple court explicitly rejected the rationale that led the Garrett court to distinguish

Sargon. As explained, the Garrett court distinguished Sargon on the grounds that the trial court there had conducted a section 802 evidentiary hearing to assess the admissibility of expert opinion testimony at trial. But the Apple court reasoned that Sargon is not distinguishable on that basis.

Indeed, the court confirmed that the Sargon admissibility analysis is “not limited” to the trial context and “nothing in that opinion mandates or even encourages holding such a hearing for every expert, at trial or otherwise.”[33] In addition, the Apple court recognized that the policy imperative underlying a trial court’s gatekeeping role applies with equal force regardless of the procedural context in which expert opinion evidence is proffered.[34]

Further, Apple casts doubt on whether the Garrett court appropriately linked the concepts of admissibility and sufficiency. In rejecting the plaintiffs’ argument that the trial court’s ruling would not have changed even if Sargon were applied, the Apple court recognized that “[t]hese issues, while related, are distinct.”[35]

In short, Apple represents a significant development in California admissibility law because it explicitly holds that the Sargon standard applies whenever a party seeks to admit expert opinion evidence. Moreover, although Apple is not a summary judgment case, it does provide support for the proposition that the admissibility of a party’s expert opinion evidence in opposition to a motion for summary judgment should not be subject to a rule of liberal construction as described in Garrett.

Practitioners in California should seek to preserve this issue for appeal and continue urging the California Supreme Court to resolve it.

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[1] 55 Cal. 4th 747 (2012).

[2] *Id.* at 771-72.

[3] *Id.* at 771.

[4] 509 U.S. 579 (1993). See *id.* at 771-72. See also generally P. Choate & K. Larson, *Sargon Enterprises v. USC: A Step Toward Daubert*, Law360 (Mar. 20, 2014).

[5] --- Cal. Rptr. 3d ---, 2018 WL 579858 (Cal. App. Jan. 29, 2018).

[6] *Id.* at \*8.

[7] See *id.* at \*1 (“[W]e conclude Sargon applies to expert opinion evidence submitted in connection with a motion for class certification.”).

[8] See *id.* at \*1.

[9] See id. at \*2.

[10] See id. at \*2.

[11] See id. at \*3.

[12] See id.

[13] See id. at \*3-\*4.

[14] See id. at \*4-\*5.

[15] Id. at \*4, \*6.

[16] See id. at \*6.

[17] See id.

[18] Id. at \*8.

[19] See id. at \*9.

[20] See *Eagle Oil & Refining Co. v. B.H. Prentice*, 19 Cal. 2d 553, 556 (1942).

[21] See *Garrett v. Howmedica Osteonics Corp.*, 214 Cal. App. 4th 173, 189 (2013) (“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”).

[22] See id. at 178-79.

[23] See id. at 187.

[24] See id. at 188.

[25] Id. at 189.

[26] See id.

[27] See *Bozzi v. Nordstrom Inc.*, 186 Cal. App. 4th 755, 761 (2010) (“The declarations in support of a motion for summary judgment should be strictly construed, while the opposing declarations should be liberally construed. This does not mean that courts may relax the rules of evidence in determining the admissibility of an opposing declaration. Only admissible evidence is liberally construed in deciding whether there is a triable issue.” (internal citation omitted)).

[28] See *Garrett v. Howmedica Osteonics Corp.*, Petition for Review, No. S210018 (Cal. Apr. 16, 2013); *Liu v. Superior Ct.*, Petition for Review, No. S211042 (Cal. May 30, 2013).

[29] See *Perry v. Bakewell Hawthorne, LLC*, 2 Cal. 5th 536, 541 (2017) (confirming that the summary

judgment statute “requires the evidence provided in declarations to be admissible at trial”).

[30] See 2018 WL 579858, at \*9 n.3 (noting that Garrett applied a rule of liberal construction to hold that “an expert declaration in opposition to summary judgment should not have been excluded even though the expert’s description of his methodology was relatively thin,” and explaining that “[e]ven accepting Garrett’s analysis, no such rule applies at class certification”).

[31] *Id.* at \*9.

[32] See *id.* at \*13 (confirming that “Sargon now provides the applicable standard for admissibility at the trial court level, at class certification and otherwise”).

[33] See 2018 WL 579858 at \*9-\*10.

[34] See *id.* at \*9 (“The corrosive effects of improper expert opinion testimony may be felt with substantial force at class certification, just as at summary judgment and trial. The trial court’s gatekeeping role serves a similar salutary purpose in each of these contexts”).

[35] *Id.* at \*12 (“Admissibility is governed by the Evidence Code, as interpreted by Sargon and other authorities. Substantiality [of expert opinion evidence at the appellate court level] is a rule of appellate review, with specific criteria for expert opinion evidence.”); see also *Yates v. Smith*, 40 Cal. 662, 669 (1871) (“The question of the admissibility of evidence is quite different from the question of its value, weight or effect.”); *People v. Graves*, 137 Cal. App. 1, 10 (1934) (referring to “a confusion in the minds of some courts between the admissibility of a circumstance in evidence and its weight when admitted,” and explaining that evidence that may be admissible will not necessarily be of sufficient strength to sustain a judgment).