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Don't let defendants *Sargon* your experts

"…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."

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It is likely that you have encountered, or will shortly encounter, defense attorneys citing the Supreme Court's holdings in the recent *Sargon* case (*Sargon Enterprises, Inc. v. University of Southern Cal.* (2012) 55 Cal.4th 747) in order to attack your experts. In *Sargon,* the Supreme Court encouraged trial courts to examine the experts' use of foundational materials to see whether the experts' conclusions are logically supported by the materials used, and to preclude any expert's testimony where it is speculative or otherwise improper. (*Id.* at 770-771)

Defense attorneys can be expected to argue that the *Sargon* case imposes new legal requirements for the admissibility of expert testimony. Such suggestions are incorrect, and should be strongly resisted by plaintiff's counsel. *Sargon* does not change California law on the admissibility of expert testimony**.** *Sargon* simply reinforces existing case law that judges should review the expert's qualifications and foundation, and should act as a gatekeeper to insure improper opinions are not offered – particularly speculative opinions. (*Id.* at 771-772). Some attorneys may take the position that this "gatekeeper" role is new or expanded for California, but that is not the case. This is the same role California trial courts have always had, whether or not they called it a "gatekeeper."

It is important to understand the holdings of the *Sargon* case – and its limitations – in order to rebuff improper attempts to use this case to eliminate your experts' opinions. These materials should aid you in preparing your experts for defendants' examinations in deposition, opposing motions in limine, and attacking defendants' own experts.

The facts in *Sargon*

Sargon was a breach of contract/lost profits case. Plaintiff Sargon was a small dental implant manufacturer who had contracted with USC to conduct research into Sargon's new dental implant technique. Sargon sued USC for breach of contract. Sargon alleged that, due to USC's failure to conduct the contracted testing, Sargon was unable to use the technique and lost future profits from the use of the technique.

Sargon's expert on loss of profits opined that Sargon, a small company (0.5 percent market share) would have grown to the size of the largest implant companies (the "Big Six"). Using the "market share" theory, plaintiff's expert opined that Sargon would have achieved a 3 to 20 percent market share. The expert based his opinion on Sargon's "innovation" as the main driver of market share and business success. (*Sargon* at 755-761) In the expert's most optimistic scenario (20 percent eventual market share), Sargon would have increased its profits 157,000 percent over ten years. (*Id.* at 762).

The trial court conducted an extensive evidentiary hearing and found the expert's market share opinion to be speculative and lacking in foundation. Among other problems, the trial court found:

- Sargon's expert had assumed that if a company had a significant innovation, no matter how small it was, it would soon join the industry leaders. The trial court found that this assumption had no factual basis and did not look at other factors affecting company success.
- There was no reasonable basis for the expert to compare Sargon to the "Big Six" implant companies, which were much larger and had more resources.
- The estimate of future profits had no relation to Sargon's past profits. This was contrary to case law requiring consideration of the company's past performance.
- The expert assumed without foundation that Sargon would have become a market leader within 10 years, replacing one of the "Bix Six" manufacturers. (*Sargon, supra* at 774-776).

The trial court concluded Sargon's expert's opinions were "not based on any actual historical financial results or comparisons to similar companies and, therefore, is not based on matter of a type [on which] an expert may reasonably rely." (*Id.* at 761).

After this exclusion and a stipulated entry of judgment, Sargon appealed. The Court of Appeal reversed, holding the trial court erred in excluding Sargon's expert. The Supreme Court reversed the Court of Appeal's opinion and approved the trial court's exclusion of the expert's opinions as speculative.

Excluding improper expert testimony

The Supreme Court discussed the admissibility of expert testimony and the judge's role in precluding improper

testimony. The Court noted that under Evidence Code section 801, the foundational matter relied on must provide a reasonable basis for the particular opinion offered, and irrelevant or speculative matters are not a proper basis for an expert's opinion. (*Sargon* at 770.) Under Evidence Code section 802 the Court may inquire into the reasons for the expert's opinion, and may exclude opinions based on matters precluded "by law" – including case decisions. (*Id.* at 771.)

The *Sargon* Court cited to a line of California cases excluding speculative expert opinions, particularly *In Lockheed Litigation Cases* (2004) 115 Cal.App.4th 558. In *Lockheed*, the plaintiffs had argued that trial courts should limit their inquiry to whether an expert's foundations were properly used in the field, and that it was improper for a trial court to determine that a particular scientific study did not support the expert's conclusions. The *Lockheed* court disagreed: "'We construe this to mean that the matter relied on must provide a reasonable basis for the particular opinion offered, and that an expert opinion based on speculation or conjecture is inadmissible.'" (*Sargon, supra* at 770, *citing, Lockheed, supra at* 564).

For its analysis of Evidence Code section 802, the Court adopted the reasoning of a recent treatise, Imwinkelried & Faigman, Evidence Code Section 802: The Neglected Key to Rationalizing the California Law of Expert Testimony (2009) 42 Loyola L.A. L.Rev. 427. The authors cite Evidence Code section 802 as authority for a judge's inquiry into whether the expert's logic or reasoning is sound – not just whether the foundation's materials are proper for that field of expertise. Citing this article, the *Sargon* Court noted:

> The *reasons* for the experts' opinions are part of the matter on which they are based just as is the *type* of matter. . . . .This 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...A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.

(*Sargon, supra* at 771.)

The *Sargon* Court also cited a U.S. Supreme Court case, *General Electric Co. v. Joiner* (1997) 522 U.S. 136. In *General Electric,* a toxic exposure/risk of cancer case, plaintiffs' expert cited studies linking PCB exposure to increased cancer risk. The trial court had excluded this expert, noting that the cited studies did not in fact show cancer risk for PCBs in particular. The U.S. Supreme Court affirmed, noting that, while it would be improper for a judge to make judgments about expert's conclusions (invading the trier of fact's role), a judge could properly exclude opinions where the cited materials simply did not support the conclusion. (*General Electric, supra,* 522 U.S. at p. 146.)

Using this rationale, the *Sargon* Court approved the trial court's exclusion of the plaintiff's expert's testimony on lost profits as speculative. The Supreme Court found that the plaintiff's expert's primary assumption – that Sargon's superior innovation would automatically catapult the company to the top of its field – was simply too speculative, and ignored the company's past performance. (In fact, existing case law required the consideration of a company's past performance in calculating future profits. (*Id.* at 774) Plaintiff's expert had mostly disregarded the company's past performance.)

Sargon cautioned judges

While the *Sargon* Court emphasized the trial court's gatekeeper role, the Court also cautioned judges not to be too zealous about excluding expert opinions. *"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 772). Further, "The court does not resolve scientific controversies." (*Ibid.*) Under *Sargon,* the trial judge has a limited role:

> [T]he 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. . . . [The court] conducts 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.' (citation) The goal of trial court gatekeeping is simply to exclude 'clearly invalid and unreliable' expert opinion. (citation.)

(*Id*. at 772, emphasis added.)

By way of summary, the *Sargon* Court had the following advice for trial judges:

Judges should:

Focus solely on the expert's principles and methodology.

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.

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.

Exclude "clearly invalid and unreliable" expert opinion.

Judges should not:

Focus on expert's conclusions.

Choose between competing expert opinions.

Weigh an opinion's probative value.

Substitute its own opinion for the expert's opinion.

Resolve scientific controversies.

(*Id.* at 771-72.)

Old ground in *Sargon*

The *Sargon* Court reaffirmed existing California case law regarding the exclusion of speculative opinions lacking adequate foundational support. (See, *Sargon,*

supra at 770, citing, *In Lockheed Litigation Cases, supra,* 115 Cal.App.4th 558 at 563-564; *Roscoe Moss Co. v. Jenkins* (1942) 55 Cal.App.2d 369 [expert may not base opinion upon a comparison if the matters compared are not reasonably comparable]; *Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108; *People v. Richardson* (2008) 43 Cal.4th 959, 1008; and *People v. Moore* (2011) 51 Cal.4th 386, 405). There is a large body of California cases holding it is improper for experts to offer opinions based on conjecture or speculation, or not supported by the cited materials. (See, e.g., *People v. Venegas* (1998) 18 Cal.4th 47 at 78 [courts have authority under the third prong of the *Kelly* test to determine "whether the procedures actually utilized [by the expert] in the case were in compliance with that methodology and technique, as generally accepted by the scientific community"]; see also, cases cited in Jefferson, California Evidence Benchbook ch. 29, "Opinion Testimony," §29.40.)

Sargon emphasized the judge's power to exclude speculation under existing law, and offered Evidence Code section 802 as additional justification for excluding opinions that are not logically supported by the cited materials. (*Sargon, supra* at 771, citing Imwinkelried & Faigman, *supra,* 42 Loyola L.A. L.Rev. 427.) *Sargon* did not overturn any California decisions other than the one appealed.

Under Evidence Code section 801, experts may base opinions on matters reasonably relied upon by other experts in that field. Case law on the admissibility of foundational materials is thus specific to a particular field of the expert. While it is generally true that speculative opinions are inadmissible, the determination of whether a particular expert's logic is speculative is likely to turn on cases specific to that field. For example, in product liability cases, it is not speculative for an engineering expert to use circumstantial evidence to prove the existence of a product defect. (See, e.g., *Soule v. General Motors Corp*. (1994) 8 Cal.4th 548, 562, citing, *Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 430.) There are many other cases holding that particular expert testimony was *not* speculative. (See, e.g., *People v. Guerra* (2006) 37 Cal.4th 1067 [improper to require 100 percent certainty from an expert].) Again, *Sargon* did not overturn any of these cases.

All experts reach conclusions by making inferences from other facts. Whether an expert's inferences are logical or proper can be a difficult question. As one treatise notes, "The question of whether an expert's opinion is conjectural or speculative . . . in a particular case or type of case is not always an easy one to decide." (*Ibid.*, Jefferson, Cal. Evid. Benchbook.) Because of this gray area, it is common to call the opposing expert's opinion "speculative." The *Sargon* case provides a general directive to avoid speculative or illogical opinions, but since these determinations are area-specific, *Sargon* is unlikely to clarify whether a particular expert's opinion is speculative.

Further, while the *Sargon* Court cited a federal case on expert admissibility (*General Electric, supra*), the Court did not adopt the Federal *Daubert* standard for expert testimony (*Daubert v. Merrell Dow Pharms.* 509 U.S. 579, 595, 113.) *Sargon* expressly denied it was adopting a *Daubert* standard, or modifying California's "general acceptance" test for admissibility of expert testimony in "new" areas. (*Sargon, supra* at 772 fn 6.)

Finally, *Sargon* offers little clarification about the requirements for expert qualifications. While the trial court had criticized the plaintiff's expert's qualifications, the Supreme Court made no specific comments on the requirements for expert qualifications. In general, experts may be qualified by the expert's "special knowledge, skill, experience, training, or education." (Evid. Code, § 720; see CACI 219.) "Expertness is relative to the subject and any person who has special knowledge, skill or experience in any occupation, trade or craft may be qualified as an expert in his field." (*People v. King* (1968) 266 Cal.App.2d 437, 445.)

How to prepare for a "*Sargon* attack"

Despite the limitations of the *Sargon* case, it is likely that you will see defense attorneys citing *Sargon* in motions in order to attack your experts, even where the facts are not on point. Knowing that such attacks are likely, it is important to review your expert's opinions to ensure that proper foundational materials are used and that any facts, studies, or other materials cited by the expert logically support the conclusions that your expert will offer.

In responding to motions against your expert, the following points may be useful:

- Remind the court that *Sargon* cautions judges to conduct a circumscribed inquiry, not to decide which expert is right, but to determine if the information cited by experts adequately supports their conclusions, and exclude [only] clearly invalid opinions.
- Resist any attempt by defense counsel to characterize *Sargon* as "new law" on expert admissibility. Point out the long line of California cases cited by *Sargon* regarding exclusion of speculative opinions.
- The expert criticized in *Sargon* had made a long leap of conjecture, opining that the company's profits would increase 157,000 percent. Point out that your expert's inferences are more modest and are well supported by the evidence.
- *Sargon* concerned the admissibility of expert opinion on lost profits. While *Sargon's* general proscription against speculation has validity in all cases, *Sargon* is unlikely to be on point with regard to the specific requirements to admit expert testimony in your case. Cite to case law that is more pertinent to the admission of your expert's opinions.
- In *Sargon,* case law required the expert to consider a type of evidence (past company performance) which he ignored. Point out that, unlike the *Sargon* expert, your expert has considered all evidence

he is required to consider under the case law.

• In *Sargon,* the Supreme Court did not discuss the proper legal standard for admitting or excluding experts based on their qualifications. Criticize any opponent who cites *Sargon* as authority regarding proper expert qualifications.

Conclusion

A proper reading of *Sargon* will provide the structure for how you should prepare for trial. This case provides counsel with a structure on how to work with your own experts to insure that they have opinions with proper foundations and scientific analysis; a structure for defending against Motion In Limines attacking your experts, as well as a structure for attacking the defendants experts. Remember, what is good for the Goose is good for the Gander.


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