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Sargon Augments Trial Judge's Gatekeeping Role in California Courts

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When it comes to evaluating the admissibility of expert witness testimony, ''trial courts have a substantial 'gatekeeping' responsibility.''

So announced the California Supreme Court recently in *Sargon Enterprises v. University of Southern California*,[1] an important decision affirming that trial judges must take a hard look at the basis for expert testimony, and which emboldens these judges to exclude those opinions that are foundationally infirm.

In this unanimous opinion upholding a trial court's decision to exclude expert testimony that was not based upon reasonable assumptions or ''matters upon which a reasonable expert would rely,''[2] the supreme court construes Sections 801(b) and 802 of the California Evidence Code and relevant decisional law to authorize—and even require—California's trial courts to conduct a substantive review of the foundation, methods and reasoning underlying ordinary expert opinions, i.e., that which is not based upon novel scientific techniques.

At first glance, *Sargon* appears to strike a low profile: The court engages in an arguably straightforward construction of the Evidence Code that is consistent with established California case law, while leaving the *Kelly/Frye* ''general acceptance'' test governing evidence based upon new scientific methods separate and unscathed. But the choice of words and tone should not be overlooked. By deputizing the trial courts as ''gatekeepers,'' and emphasizing the importance of a judge's preliminary admissibility review, while simultaneously relying on *Daubert* cases to provide guideposts delineating this gatekeeping responsibility, *Sargon* provides ammunition to those seeking to exclude flawed expert testimony in California courts.

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California's Approach to Expert Testimony

It is said that California is a *Kelly-Frye* state, while federal courts follow the *Daubert* standard. The sub-

[1] *Sargon Enterprises, Inc. v. University of Southern California*, 55 Cal. 4th 747 (2012).

[2] *Sargon*, at 766-7.

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stance and scope of this distinction sometimes remains elusive, however, and could use some unpacking.

When considering whether to admit expert testimony, California courts distinguish between ''ordinary'' expert testimony, on the one hand, and expert testimony deduced from novel scientific principles or methods, on the other.[3] Since 1976, when in *People v. Kelly*, the California Supreme Court first embraced the ''general acceptance'' standard that had been established decades before in *Frye v. United States*,[4] a party that seeks to introduce scientific expert opinion testimony in California courts must show that the underlying scientific theory has been generally accepted as valid and reliable in the relevant scientific field. Although this demanding ''general acceptance'' (or ''*Kelly*'') standard may prove difficult to overcome once it has been triggered, the stringency of the test is mitigated by its limited application: *Kelly* does not apply to *non-scientific* (or ''ordinary'') expert opinion testimony—therefore, it does not apply to the vast majority of expert testimony proffered in California courts.[5] As discussed more fully below, ordinary expert opinions have always been subject to basic evidentiary principles as well as the Evidence Code provisions that govern opinion testimony.

Federal courts, by contrast, evaluate the reliability of *all* expert opinion evidence that is based on scientific, technical or specialized knowledge by uniformly applying the *Daubert* standard.[6] Amended in response to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[7] and to the many cases applying *Daubert*,[8] Rule 702 of the Federal Rules of Evidence confides a ''gatekeeping responsibility'' to federal judges, who must exclude irrelevant or unreliable expert testimony that does not ''help the trier of fact to understand the evidence or to determine a fact in issue,'' is not ''based on sufficient facts or data,'' or is not ''the product of reliable principles and methods'' or the application of such ''principles and methods to the facts of the case.''[9] Under *Daubert*, *all* types of expert testimony present questions of admissibility for the trial court in deciding whether the evidence is reliable and helpful.[10]

As a case involving expert testimony on damages, *Sargon* sets its sights on ordinary expert testimony while leaving *Kelly* alone. In a footnote, the court clarifies that this case does not disturb the ''general acceptance'' test for admissibility of expert testimony based on new scientific techniques.[11] In directing trial courts to ''vigilantly exercise their gatekeeping function'' for ordinary expert opinion testimony,[12] *Sargon* focuses on Sections 801(b) and 802 of the California Evidence Code, and the preliminary screening that California trial judges must undertake pursuant to these sections. In so doing, the supreme court describes the proper scope of the trial court's examination of expert testimony in a manner that resembles the federal approach under *Daubert*.

What Happened in *Sargon*?

A small manufacturer of dental implants, Sargon Enterprises, Inc. (''Sargon'') sued the University of Southern California (''USC'') for breaching an agreement to conduct a clinical study of a new implant that Sargon had patented.[13] Sargon had high hopes for the commercial success of this implant, whose innovative design, Sargon claimed, would have revolutionized the dental implant industry and catapulted the company to the top of the dental implant market. After prevailing at trial in 2003, despite the exclusion of its damages expert, Sargon embarked on a long and ill-fated appellate journey to recover the lost profits that it contended were its due.

Sargon sought to introduce the testimony of its damages expert, Mr. James Skorheim, who had concluded that Sargon's lost profits ''ranged from $220 million to $1.18 billion.''[14] USC moved to exclude this opinion.[15] After an eight-day evidentiary hearing, the trial court sustained USC's motion in limine in a 33-page written ruling that identified fundamental flaws in the basis and reasoning underlying Skorheim's opinion—foundational flaws that the court concluded were fatal to the relevance and admissibility of his expert testimony.[16]

Skorheim based his opinion on a ''market share'' approach.[17] He sought to determine what share of the worldwide dental implant market Sargon would have gained if USC had completed a favorable clinical study, and then to calculate Sargon's future profits based on that market share.[18] While the trial court judge acknowledged that as a general matter, ''a 'market share' analysis is appropriate and warranted under California

[3] *People v. Kelly*, 17 Cal. 3d 24, 30 (1976) (''We have expressly adopted the foregoing *Frye* test and California courts, when faced with a novel method of proof, have required a preliminary showing of general acceptance of the new technique in the relevant scientific community.''). *See also* Wegner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2012) ¶ 8:563-565) (collecting cases to distinguish scientific evidence involving ''novel devices or processes'' from ''ordinary expert testimony'').

[4] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

[5] Wegner et al., *id. See also People v. Rowland*, 4 Cal. 4th 238 (1992) (holding that the *Kelly-Frye* Rule is inapplicable to expert medical testimony); *People v. Stoll*, 49 Cal.3d 1136 (1989) (''*Kelly/Frye* only applies to that limited class of expert testimony which is based, in whole or part, on a technique, process, or theory which is new to science and, even more so, the law.''); David E. Bernstein, *Frye, Frye, Again: The Past, Present, and Future of the General Acceptance Test*, 41 JURIMETRICS J. 385, 395 (2000-2001) (''In California, the largest *Frye* jurisdiction, there are no reported cases applying *Frye* to toxic tort or products liability cases, and pre-*Daubert* opinions suggest that *Frye* would rarely if ever be applicable to personal injury cases.'').

[6] Rule 702, Federal Rules of Evidence, Notes of Advisory Committee on 2000 amendments (citing *Kumho Tire Co. v. Carmichael*, 119 S. Ct. 1167 (1999), for the proposition that the *Daubert* ''gatekeeper function applies to all expert testimony, not just testimony based in science.'').

[7] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

[8] Rule 702, Federal Rules of Evidence, Notes of Advisory Committee on 2000 amendments.

[9] Rule 702, Federal Rules of Evidence.

[10] *See, e.g., Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-149 (1999) (holding that the basic gatekeeping obligation outlined in *Daubert* applies to all expert matters described in Fed. Rule of Evidence 702).

[11] *Sargon*, at 772, n. 6.

[12] *Sargon*, at 781.

[13] *Sargon*, at 753-5.

[14] *Sargon*, at 755.

[15] *Sargon*, at 754.

[16] *Sargon*, at 761.

[17] *Sargon*, at 755.

[18] *Id.*

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law,''[19] the judge found Skorheim's application of the market share model to the particulars of the case to be unreliable.

Among other flaws, the trial judge focused on the fact that Skorheim's market projections were not derived from Sargon's historical performance or comparisons to similar companies.[20] Instead, his projections were based on optimistic future revenue assumptions that were without factual basis and ''wildly beyond, by degrees of magnitude, anything Sargon had ever experienced in the past.''[21] Accordingly, Skorheim's opinion was not ''based on matter of a type [on which] an expert may reasonably rely,'' and thereby violated Section 801(b).[22]

The court also took issue with a syllogism that Skorheim developed to support his projections. As his major premise, Skorheim posited that the more innovative a company was, the larger the market share it would achieve.[23] As his minor premise, Skorheim assumed that Sargon's patented implant was the most innovative in the marketplace, or that it ranked somewhere near the top of what the trial court described as the '' 'innovativeness' pecking order.''[24] Under Skorheim's proposed approach, the jury would infer the company's market share based on its relative innovativeness, and then use this finding as an evidentiary basis for assessing damages.[25]

The trial court's decision granting the defendant's motion *in limine* illustrates the level of scrutiny that trial judges might apply when evaluating the reliability of expert opinions. In addition to faulting Skorheim for failing to account for Sargon's actual historical financial results, the court highlighted problems with his reasoning. According to the court: Skorheim's innovativeness argument was ''entirely circular''[26]; by comparing degrees of innovation, he failed to give the jury standards from which it could make a rational decision and was thus inherently subjective.[27] The major premise (i.e., re the existence of an innovativeness pecking order) lacked any rational basis and rested on ''nothing more than a tautology.''[28] Based on these and other findings, the court ruled the testimony inadmissible on the grounds that no damage award can be based on speculation and evidence that cannot assist the trier of fact in the resolution of an issue is not relevant.[29]

By a two-to-one vote, the Court of Appeal reversed the judgment, finding that the trial court abused its discretion in excluding Skorheim's testimony.[30] After reviewing the trial court's criticisms of Skorheim's proffered testimony, it concluded that these considerations ''were better left for the jury's assessment.''[31] The dissenting judge expressed concern that the appellate court's reversal threatened to wreak damage upon ''the trial judge's reasonable and prudently exercised judgment on an evidentiary issue over which he and he alone should have decisional authority, absent arbitrariness and capriciousness.''[32] Thus, the issue before the supreme court was whether or to what extent trial courts should conduct a preliminary screening of ordinary expert opinions—an issue that raises questions as to where trial judges must draw the line between allowing the trier of fact to be the final arbiter of the weight given to expert testimony while also playing a gatekeeper role to evaluate the foundation and reliability of this testimony.

Sargon Contemplates Review of Foundation Underlying Ordinary Expert Testimony

Had it been left alone, the appellate decision might have opened the gates to shaky expert opinions by signaling to trial judges that they have no duty or authority to police the reliability of expert testimony. By reversing the appellate court and endorsing the trial court's analysis, however, the supreme court effectively achieves the opposite result, encouraging trial courts to meaningfully screen expert opinions as gatekeepers. At the same time, *Sargon* provides some illustration as to how a trial court should conduct a preliminary admissibility review under Sections 801(b) and 802 when exercising its gatekeeping responsibility.

Sargon interprets Sections 801(b)[33] and 802[34] of the California Evidence Code to require a trial judge to act 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.''[35] These Evidence Code sections establish requirements and limitations that govern opinion testimony, and the trial court's role in determining its admissibility.

1. *Sargon* Upholds *Lockheed's* Construction of Evidence Code Section 801(b)

Sargon champions the trial court's gatekeeping role and demonstrates how to execute this responsibility, thereby rejecting a contrary approach that would leave juries on their own to sort out perceived foundational weaknesses in unfiltered expert testimony. In particular, the court focuses on arguments raised by plaintiffs in the *Lockheed Litigation Cases* [36]—coordinated toxic

[19] *Sargon*, at 761.
[20] *Sargon*, at 761-2.
[21] *Sargon*, at 762.
[22] Sargon, at 761.
[23] *Sargon*, at 756-7.
[24] *Sargon*, at 763.
[25] *Sargon*, at 763.
[26] *Sargon*, at 762.
[27] *Sargon* at 765 (''Because there are no standards or guidelines to determine 'degrees of innovation,' it relegates the question of determining potentially more than a billion dollars in damages to pure speculation.'').
[28] *Sargon*, at 763-4.
[29] *Sargon*, at 765.
[30] *Sargon*, at 766-7.
[31] *Sargon*, at 768.
[32] *Sargon*, at 768.
[33] In relevant part, Section 801(b) provides that an expert witness opinion must be ''[b]ased on matter . . . 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.'' Historically, Section 802 has received far less attention than Section 801(b).
[34] In relevant part, Section 802 provides that an opinion witness ''may state on direct examination the reasons for his opinion and the matter . . . upon which it is based, unless he is precluded from using such reasons or matter as a basis for his opinion.''
[35] *Sargon*, at 771-2.
[36] *Lockheed Litigation Cases*, 115 Cal. App. 4th 558 (2004). It is interesting to note that although *Lockheed* was central to the Supreme Court's analysis in *Sargon*, neither party cited

tort cases that turned on the admissibility of the plaintiffs' expert causation opinion in a non-*Kelly* context.

At trial, the *Lockheed* plaintiffs attempted to prove causation by introducing an expert declaration that relied exclusively on a single survey of epidemiological studies to link the plaintiffs' cancer to their exposure to certain chemicals in the workplace.[37] While the *Kelly* standard was not applicable to this non-scientific expert opinion testimony, the trial court still excluded the expert causation opinion after concluding that the study did not provide a reasonable basis to support the conclusion that the chemicals at issue in *Lockheed* can cause cancer.[38]

On appeal, the plaintiffs argued that the trial court misapplied Section 801(b), claiming that ''a court should determine only whether *the type* of matter that an expert relies on in forming his or her opinion is the type of matter that an expert reasonably can rely on in forming an opinion, without regard to whether the matter relied on reasonably does support the particular opinion offered.''[39] According to the plaintiffs, ''since an expert can rely on an epidemiological study in forming an opinion, the trial court must admit any expert opinion testimony based on an epidemiological study'' as this is the ''type of matter'' upon which an expert may reasonably rely.[40]

Sargon affirms *Lockheed's* rejection of this facile construction, which would effectively gut Section 801(b) and eliminate a trial court's gatekeeping role. In fact, *Sargon* wholly adopts *Lockheed's* reasoning as its own:

> An expert opinion has no value if its basis is unsound. [Citations omitted.] Matter that provides a reasonable basis for one opinion does not necessarily provide a reasonable basis for another opinion. Evidence Code section 801, subdivision (b), states that a court must determine whether the matter that the expert relies on is of a type that an expert reasonably can rely on in 'forming an opinion *upon the subject to which his testimony relates*.' [Italics added.] We construe this to mean that the matter must provide a reasonable basis for the particular opinion offered, and that an expert opinion based on speculation is conjecture is inadmissible.[41]

Just as it was not sufficient for Sargon to show that its expert's opinion was based on a ''market share'' approach, in a general sense, the *Lockheed* court found that it was not enough for the *Lockheed* plaintiffs to show that their expert's opinion was based on ''an epidemiological study.'' As interpreted by the *Lockheed* and *Sargon* courts, Section 801(b) required the plaintiffs to satisfy the court that *this particular study* could support this particular causation opinion. Yet because the cited survey reviewed epidemiological studies of painters who were exposed to more than 130 different chemicals and other substances (*i.e.*, many more than the five that were at issue in the *Lockheed* case), and because the survey did not indicate whether any single chemical contributed to an increased risk of cancer, the plaintiffs could not establish the necessary foundation.[42] As a result, the survey provided ''no reasonable basis'' for the expert's opinion and was excluded under Section 801(b).[43]

2. *Sargon* Rejects *Roberti's* Refusal to Apply Preliminary Admissibility Test to Expert Proof

Sargon also threatens whatever remaining viability might attach to *Roberti v. Andy's Termite & Pest Control, Inc.*[44]—an outlier case that is sometimes cited to minimize the trial court's role in evaluating the reliability of an expert's opinion.

In *Roberti*, the defendant filed a motion *in limine* to exclude expert testimony from the causation experts who opined that the plaintiff's autism and/or brain damage was caused by his exposure to Dursban, a pesticide that the defendant had applied to the plaintiff's home.[45]

In addition to arguing that the expert opinions offered by plaintiffs were based on novel methodologies of scientific proof that did not meet the admissibility test set forth in *People v. Kelly*, the defendant challenged the adequacy of the foundation underlying the causation opinions by claiming that the animal studies relied upon by plaintiff's expert toxicologists ''provided merely speculative support for the assertion that Dursban can cause autism in humans.''[46] According to the defendant, the plaintiff's experts had no basis to extrapolate from selected animal studies, and the opinions were unreliable because no differential diagnosis had been conducted to eliminate other potential causes of the plaintiff's condition.[47]

After the trial court granted the defendant's motion *in limine* on the grounds that the plaintiff's experts' opinions did not satisfy *Kelly*, the plaintiff successfully appealed.[48] In addition to holding that the expert opinions did not trigger the *Kelly* test because they were not based on novel scientific evidence, the appellate court rejected the defendant's alternative argument that ''the expert opinions were properly excluded because they were based on unreliable foundational matters, or upon no foundation at all.''[49] The *Roberti* court interpreted this argument as an invitation to consider whether California courts must apply ''the foundational analysis employed in the federal courts to all expert testimony,''[50] and it characterized the defendant's challenge to the expert opinion as a mere ''guise'' designed to trick the court into conducting ''a *Daubert*-style analysis,'' which it refused to do:

> Use of the *Daubert* threshold reliability test is not, however, in keeping with the law of California . . . . [T]here is no au-

this case in its briefing to the court. *See* Defendant's Opening Brief on the Merits, No. S191550 (Cal. June 24, 2011); Plaintiff's Answer Brief on the Merits, No. S191550 (Cal. Sept. 26, 2011); Defendant's Reply Brief on the Merits, No. S191550 (Cal. Nov. 16, 2011).

[37] *Lockheed Litigation Cases*, at 558, 562.

[38] *Id.*

[39] *Lockheed Litigation Cases*, at 558, 563 (emphasis added).

[40] *Lockheed Litigation Cases*, at 558, 564.

[41] *Sargon*, at 770 (*citing Lockheed Litigation Cases*, at 564).

[42] *Lockheed Litigation Cases*, at 558, 564-5.

[43] *Lockheed Litigation Cases*, at 558, 565 (''Evidence that experts reasonably rely on epidemiological studies in forming opinions on causation is of no assistance to Plaintiffs when the study on which Dr. Teitelbaum relies provided no reasonable basis for his opinion.'').

[44] *Roberti v. Andy's Termite & Pest Control, Inc.,* 113 Cal. App. 4th 893 (2003).

[45] *Roberti,* at 893, 897.

[46] *Roberti,* at 893, 897-8.

[47] *Roberti,* at 893, 898.

[48] *Roberti,* at 893, 899.

[49] *Id.*

[50] *Roberti,* at 893, 904.

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> thority or rationale to support the notion impliedly promoted by defendant that on the one hand, the *Kelly* rule retains viability as to new scientific methodology, techniques, or devices, but on the other hand California courts may apply a *Daubert* threshold reliability analysis to everything else . . . . Unless and until our Supreme Court determines that the *Daubert* analysis is applicable in California, we will adhere to the rule of *People v. Kelley* and its progeny, and refuse to apply a more extensive preliminary admissibility test as in *Daubert* to expert medical opinion concerning causation.[51]

Sargon provides the Supreme Court direction the *Roberti* court found lacking. It retains the *Kelly* test for novel scientific evidence while, at the same time, commanding trial courts to conduct what the *Roberti* court might have described as a ''*Daubert*-style'' threshold reliability analysis to everything else. After *Sargon*, California trial courts are now secure in the knowledge that Section 801 empowers them to apply a preliminary admissibility test to ordinary expert opinion testimony.

3. Evidence Code Section 802 Governs Judicial Review of Reasons for Expert's Opinion

In *Sargon*, the California Supreme Court also recognizes that Section 802 provides an additional basis for the trial court's gatekeeping role. Much as *Sargon* endorses *Lockheed's* interpretation of Section 801(b), and its view that trial courts must substantively review expert testimony to confirm that it has a reasonable basis, the *Sargon* court also holds that Section 802 authorizes a court to ''inquire into, not only the type of material on which an expert relies, but also whether that material actually supports the expert's *reasoning*.''[52]

According to *Sargon*, Section 802 ''expressly permits the court to examine experts concerning the matter on which they base their opinion before admitting their testimony. The *reasons* for the experts' opinion are part of the matter on which they are based just as is the *type* of matter.''[53] Where the expert's reasoning breaks down—for instance, where ''there is simply too great an analytical gap between the data and the opinion proffered''—the trial judge may exclude the expert opinion testimony under Section 802.[54]

As discussed above, the trial court partly supported its decision to exclude Sargon's expert's testimony on the grounds that his reasoning was unsound. Among other things, the court identified the ''fatal flaw in Mr. Skorheim's reasoning'' to be that he ''starts off assuming, without foundation, its conclusion.''[55] By assuming that Sargon would have achieved market share comparable to the largest and most successful companies in the dental implant industry by virtue of Sargon's innovative product design, Skorheim ''relie[d] on data that in no way [was] analogous to Plaintiff.''[56] Even though the trial judge did not rely on Section 802 to exclude Skorheim's opinion, after *Sargon*, Section 802 would provide a significant and independent basis for doing so.[57]

Gatekeeping: So Much in a Name

In its briefing before the supreme court, the *Sargon* defendant asked ''the Court to affirm the traditional gatekeeping function contemplated in the Evidence Code and recognized in the decisions of the Court,'' and rejected the plaintiff's contention that it was seeking ''an expanded 'gatekeeping' role,'' ''[i]ncreased judicial activism,'' and ''wholesale revision of our judicial system.''[58] In response, the Court found that ''trial courts have a substantial 'gatekeeping' responsibility,''[59] while citing *People v. Prince* for the proposition that *Sargon* merely reaffirms that trial courts have a meaningful gatekeeping function.[60]

The term ''gatekeeper'' is quintessentially *Daubertian*. The United States Supreme Court first coined it in *Daubert* to describe the trial court's obligation to ''ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.''[61] Although Sections 801(b) and 802 of the California Evidence Code and relevant decisional authority support the notion that California trial courts must conduct a meaningful preliminary analysis of foundational reliability before allowing an expert to offer an opinion based on non-novel scientific evidence, it appears that the *Sargon* court may actually be the first one to use the term ''gatekeeper'' to describe this role.[62]

Despite its apparent attempts to downplay the novelty and significance of this decision, by finding that trial courts have ''a substantial gatekeeping responsibility,'' the *Sargon* court employs language that is now commonly used in federal courts to describe the role that federal judges play when evaluating expert testimony. This expression signals to California's trial judges that they too must weed out unreliable expert testimony, while it also suggests that they may rely on federal case law to see how to go about wielding this important authority.

Gatekeeping Do's and Don'ts: Bridge to *Daubert?*

While *Sargon* is bullish on the trial judge's gatekeeping role, the court remains mindful of the 7th Amendment right to a jury trial as well as Judge Friendly's warning that judges ''must be exceedingly careful not to set the threshold to the jury room too high.''[63] *Sargon*

[51] *Roberti,* at 893, 905.
[52] *Sargon*, at 771 (emphasis added).
[53] *Sargon*, at 771 (emphasis in original).
[54] *Sargon*, at 771 (*citing General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997)).
[55] *Sargon*, at 761.
[56] *Sargon*, at 761.
[57] *Sargon*, at 771 (holding that ''Evidence Code section 802 governs judicial review of the reasons for an opinion'').
[58] Defendant's Reply Brief on the Merits, No. S191550 (Cal. Nov. 16, 2011), at *30.
[59] *Sargon*, at 769.
[60] *Sargon*, at 769, n. 5 (citing *People v. Prince*, 40 Cal. 4th 1179, 1225, n. 8 (2007)) (''We have used the term 'gatekeeping responsibility.' '').
[61] *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 589 (U.S. 1993).
[62] In *Prince*, for instance, the court used the term ''gatekeeping responsibility'' to describe how *federal* trial courts review the reliability of expert testimony. *People v. Prince*, 40 Cal. 4th 1179, 1225, n. 8 (2007)
[63] *Sargon*, at 769 (*citing* 1 Wigmore, Evidence (3d ed. 1940), pp. 409–410).

acknowledges that determining where to draw the line between ''evidence worthy of consideration by a jury, although subject to heavy counter-attack, [and] evidence that is not'' can sometimes prove a daunting task.[64]

To assist with this process, the court sets forth some general principles and standards for trial courts to apply when performing the gatekeeping function. As it turns out, these touchstones closely resemble those that have been advanced by *Daubert* and its progeny—a fact which suggests that California practitioners might begin to borrow from this extensive and well-developed federal authority when drafting their state court motions *in limine*.

Sargon begins by warning that ''[t]he trial court's gatekeeping role does not involve choosing between competing expert opinions.''[65] It cites *Daubert* itself for the proposition that ''the gatekeeper's focus 'must be solely on principles and methodologies, not on the conclusions that they generate.' ''[66] According to *Sargon*, a trial court's ''preliminary determination'' turns on ''whether the expert opinion is founded on sound logic.''[67] A court should not make this decision based on the opinion's persuasiveness.[68] Experts might advance competing principles or methods and reach opposite conclusions; the court does not ''choose the most reliable of the offered opinions and exclude the others.''[69]

Sargon notes that the court's inquiry is a limited one. The judge ''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.''[70] The court determines ''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.''[71] ''The goal of trial court gatekeeping is simply to exclude 'clearly invalid and unreliable' expert opinion.''[72] *Sargon* cites *Kumho's* instruction that ''the gatekeeper's role 'is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.''[73]

Although the *Sargon* trial court did not explicitly apply these touchstones to the facts of the case, it appears that the trial court's analysis largely anticipated these directives from the California Supreme Court. For instance, the trial court did not focus on the spectacular amount or range in the lost profits estimate that Sargon's expert provided (*i.e.*, from $200 million to over $1 billion). Instead, the court's inquiry was properly limited to its examination of the ''principles and methodologies'' that generated these ''conclusions.'' Similarly, the trial court ultimately determined that there was ''no evidentiary basis that equates the degree of innovativeness with the degree of difference in market share,''[74] and this ''*sine quo non* of Mr. Skorheim's opinion'' rested ''on nothing more than a tautology.''[75] These findings go to ''whether the expert opinion is founded on sound logic'' and adequate foundation; they do not turn on the court's evaluation of the opinion's persuasiveness. Furthermore, the trial court did not engage in some comparison of competing experts so that it might ''choose the most reliable of the offered opinions and exclude the others.''

While *Sargon* never goes go so far as to say that *Daubert* applies to ordinary expert opinion testimony in California, by relying so heavily on the do's and don'ts of *Daubert*, the court suggests that California's trial courts should look to their federal counterparts to see how to execute their gatekeeping responsibility. And by doing so, practitioners now have a basis for relying on the extensive federal case law applying *Daubert* to challenge the admissibility of all expert opinions.

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[64] *Id*.
[65] *Sargon*, at 772.
[66] *Sargon*, at 772 (citing *Daubert* 509 U.S. at 595).
[67] *Sargon*, at 772.
[68] *Sargon*, at 772.
[69] *Sargon*, at 772 (*citing* ''the advisory committee on the 2000 amendments to Federal Rules of evidence, rule 702 (28 U.S.C.), which codified the rule established in *Daubert*'').
[70] *Sargon*, at 772.
[71] *Sargon*, at 772 (*citing* Imwinkelried & Faigman, supra, 42 Loyola L.A. L. Rev. at p. 449).
[72] *Sargon*, at 772 (*citing* Black et al., *Science and the Law in the Wake of Daubert: A New Search for Scientific Knowledge* (1994) 72 Tex. L. Rev. 715, 788).
[73] *Sargon*, at 772 (citing *Kumho Tire Co. v. Carmichael*, *supra*, 526 U.S. at p. 152.)
[74] *Sargon*, at 777-8.
[75] *Sargon*, at 777-8.

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