

# A Recent Federal Circuit Decision Has Clouded the District Court's Gatekeeping Role

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The Federal Circuit's recent decision in *Barry v. DePuy Synthes Companies* reversed a trial court's exclusion of two expert witnesses, further blurring the line for practitioners between the court's gatekeeping role and the jury's role in assessing the weight of the evidence and the credibility of witnesses. The *Barry* decision split the court 2–1, with Judge Stark authoring the majority opinion and Judge Prost dissenting.

By contrast, in its 2025 *en banc* decision in *EcoFactor, Inc. v. Google LLC*, the Federal Circuit reinforced the trial court's gatekeeping function, affirming the exclusion of a damages expert's royalty-rate opinions as inadmissible under Federal Rule of Evidence 702 for lack of sufficient support. *EcoFactor* likewise divided the court, this time 7–2, with Judge Stark in dissent and Judge Prost in the majority—highlighting the court's ongoing divide over the proper scope of the district court's gatekeeping role.

In *Barry*, a patent litigation regarding treatment of spinal deformities, the district court excluded plaintiff's two experts mid-trial: an infringement expert and a damages survey expert. The court excluded one on the ground that his opinions contradicted the court's construction of the term "handle means," defined as "a part designed especially to be grasped by hand," and excluded the other because his survey methodology was unreliable.

On appeal, the Federal Circuit reversed both exclusions and ordered a new trial. Judge Stark's opinion concluded that the district court's concerns went to the credibility of the experts' testimony, not its admissibility. The opinion further explained that the infringement expert did not contradict the court's claim construction but instead applied it in forming his opinions—a permissible approach particularly given his repeated testimony that he was relying on the court's construction. The court applied similar reasoning to the survey testimony, holding that any perceived flaws went to weight, not admissibility, and were therefore matters for the jury to accept or reject.

Judge Prost's strong dissent emphasized the court's gatekeeping obligation under *EcoFactor* and Rule 702 to prevent unsupported expert opinions from reaching the jury, concluding that the majority's decision undermines both that obligation and *EcoFactor's* tightening of admissibility standards. Judge Prost explained that the infringement expert opined that virtually "everything" in

the accused product constituted a “handle means,” that components could not be assembled without “grasping them by hand,” and that even parts not ordinarily grasped by hand nonetheless qualified as “handle means”—positions irreconcilable with the claim construction requiring parts to be “designed especially” for grasping by hand. She further cautioned that an expert cannot evade the court’s gatekeeping function merely by reciting the claim construction before advancing improper opinions. Judge Prost likewise criticized Neal’s survey testimony, characterizing it as “riddled with methodological flaws” insufficient to support his opinions.

While practitioners’ and scholars’ views may differ on the outcome in *Barry*, there is a broad consensus that the Federal Circuit’s guidance on the admissibility of expert testimony remains clouded by opposing views among judges. It is undisputed that the court holds the gatekeeping responsibility; but the court continues to grapple with when a court should exercise that function versus characterizing the dispute as one for the jury’s consideration. Such determination may vary by judge, and litigants must therefore adopt a flexible strategy capable of addressing both rigorous Rule 702 enforcement and more permissive approaches that leave expert testimony to the jury.

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