

## **Opposing Experts & Summary Judgment**

It is a common litigation scenario: One side's expert makes an assertion while the opposing expert declares the opposite. In such a scenario, when the two experts disagree, is summary judgment still possible? Summary judgment, after all, requires a judge to conclude that there is no genuine dispute as to any material fact. The question then becomes, if opposing experts assert differing views, is summary judgment ruled out?

### **Conflicting Experts**

In 2007, the Federal Circuit Court of Appeals answered that very question in a case involving a pharmaceutical patent. In ruling that the district court erred when it granted summary judgment, the court revealed that when two conflicting expert opinions are accepted by the court summary judgment is improper. At the heart of the *In re: Gabapentin Patent Litigation* case was drug-maker Warner Lambert's patent covering a process for preparing the active ingredient in the epilepsy drug Neurontin. When several competing drug companies wanted to market generic versions of Neurontin, Warner Lambert filed suit against them. In the district court, Warner Lambert based its opposition to summary judgment on the results of pH tests performed by its analytical expert. Those results, it argued, countered testing done by defendants' expert and created a genuine issue of material fact. The court stated, "Based on the record before us, we conclude that the district court erred in granting summary judgment of noninfringement based on Warner Lambert's purported failure to meet its burden of proof. The record shows that Warner Lambert proffered sufficient evidence to create a genuine issue of material fact regarding whether the accused products met the [claims] of the '482 patent." In this situation, the existence of two experts with conflicting opinions removed the opportunity for a summary judgment.

### **And Then There Was One...**

If, however, the opinion of one expert or the other is removed from the equation, summary judgment is again viable. In such a case earlier this year, the Sixth Circuit upheld the dismissal of a plaintiff's claim that benzene exposure caused her cancer. At issue in *Pluck v. BP Oil Pipeline Co.* was the exclusion of plaintiff's expert opinion. The expert's opinion was based on a differential diagnosis that was unable to either reliably suggest that benzene exposure was the cause of plaintiff's cancer or rule out other potential causes. Therefore, the defendant filed motions in limine to exclude the expert's opinion as it failed to meet Daubert standards. When the court of appeals determined that the expert's testimony had been properly excluded, summary judgment was upheld. The type of strategy utilized by the defendants in this case was analyzed by Andrew T. Berry and Nicole Corona. Their article enumerates the "tactical advantages in challenging an expert's admissibility in a summary judgment motion" and further explains that "those advantages can be increased by coupling a motion for summary judgment with a motion in limine to exclude inadmissible expert evidence." The combination of a motion for summary judgment with a motion in limine to exclude inadmissible expert evidence is a tool often used by defendants to increase the likelihood of a satisfactory summary judgment. As stated earlier, when two qualified and reliable experts disagree on an issue of material fact, summary judgment is precluded.