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Expert's Refusal to Testify May Warrant Use of Former Testimony

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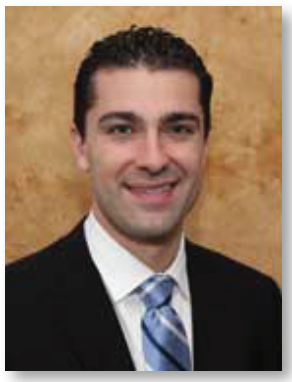

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In Carroll v. Philip Morris USA, C.A. No. 03C-08-167 (January 2, 2014), the Delaware Superior Court reminded litigants of the need to be prepared to confront the testimony of unavailable witnesses, not just witnesses expected to testify live. Generally, a witness's out-of-court statements would constitute hearsay, defined as out-of-court statements offered in evidence to prove the truth of the matter asserted, and would be inadmissible. However, the numerous exceptions to the exclusion of hearsay are well established, including situations when a witness is unavailable. As Carroll shows, the application of the unavailability exception can be unpredictable and, sometimes, surprising.

Unavailability can take many forms, including the "former testimony" exception, which is a subcategory of the unavailability exception to the hearsay rule. The former-testimony exception applies to the testimony of an unavailable witness who had previously been available and had testified in other matters. In order for such testimony to be admissible at another hearing of the same or a different proceeding, "the party against whom the testimony is now offered, or ... a predecessor in interest" must have had a prior "opportunity and similar motive to develop the testimony by direct, cross or redirect examination," per D.R.E. 804. This exception was held to apply in Carroll, where an expert witness, who was beyond the process of the court, refused to testify on behalf of the plaintiffs.

Carroll involved a class action brought against Philip Morris USA Inc. for allegedly violating the Delaware Consumer Fraud Act by using the descriptors "lights" and "lowered tar and nicotine" in advertising and promoting Marlboro Lights cigarettes. The plaintiffs designated William A. Farone as an expert on class-certification issues. Farone, however, refused to be retained as an expert witness or testify in this case on behalf of the plaintiffs, fearing that testifying on behalf of the plaintiffs would be a conflict of interest with his current work for the U.S. Food and Drug Administration. Moreover, Farone was outside the process of the court. The plaintiffs, therefore, proposed instead to offer into evidence former sworn testimony that Farone provided in a 2003 Marlboro Lights consumer fraud class action in Illinois, also against Philip Morris, Miles v. Philip Morris, No. 00 L 0112 (3d Jud. Cir. Il.. Jan. 22-24, 2003).

Philip Morris challenged this and moved to strike Farone's testimony, claiming that he was not "unavailable," that his former testimony was inadmissible hearsay, and that admitting the testimony would deny Philip Morris its right to expert discovery and cross-examination. The plaintiffs argued that Farone's former testimony satisfied each element of the former-testimony exception to the hearsay rule and that Farone's unique

knowledge and expertise related to the specific subject matter at issue in the case. The defendants insisted that Farone's designation as an expert witness would violate the court's scheduling order, which required the plaintiffs to make experts available for depositions by certain dates. In response, the court explained that the scheduling order does not apply to former testimony admissible under Rule 804, and agreed with the plaintiffs, denying Philip Morris' motion to strike.

By way of background, Farone had previously worked for Philip Morris and had extensive personal experience with Philip Morris' cigarette design efforts and objectives. Farone also had expertise and unique training in relevant fields, including the chemistry and biochemistry of alkaloids and addictive drugs, the chemistry of physics and cigarette smoke, cigarette design and technology, and the chemistry and biochemistry of toxic substances and their interactions with living systems. At the heart of this dispute was Farone's trial testimony in Miles, one of many consumer fraud cases seeking to hold tobacco companies liable for deceiving consumers (rather than for personal injuries). Farone's testimony, both as a fact witness and as an expert witness on cigarette design, established that Philip Morris knew its "light" brand did not reduce the delivery of tar or nicotine and that alternative cigarette design options were available to actually reduce the tar delivery to consumers without raising the level of toxins in cigarette smoke.

As evident from Carroll, when considering whether to admit the testimony of an expert who refuses to testify, courts will consider the uniqueness of the expert, the availability of other similarly qualified experts, the expert's connections to the case, the scope of the expert's former testimony, the nature of the prior action and the claims involved, and the opposing party's opportunity to previously develop the expert's testimony. In the absence of a hard rule for admitting former testimony, the facts are considered on a case-by-case basis. In Carroll, the court noted Farone's unique qualifications, employment experience and wealth of knowledge of the issues at hand. Moreover, the court noted that Farone is the only former employee of Philip Morris who has been willing to testify on behalf of plaintiff class-action lawsuits.

This application of the former-testimony exception to unavailable experts can serve as a strategic advantage to litigants in positions similar to those of the plaintiffs in Carroll, who can avail themselves of the former testimony of an expert unwilling to testify, without having to deal with the unpredictability of live testimony or cross-examination. On the other hand, it can also be a huge disadvantage for litigants who may not have fully developed the expert's testimony when they had an opportunity to do so in a previous deposition or trial. These rules are a cautionary tale for attorneys and their clients involved in litigation with recurring experts with unique expertise, who frequently testify and may be unwilling to testify later in their careers. Thus, the reminder for all sides is that as long as there has been a prior opportunity and similar motive to develop an expert's testimony through cross-examination, that testimony may be admissible in a later or different proceeding, irrespective of jurisdiction, provided that the expert is now unavailable.

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