SideBAR

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Message from the Chair

I hope everyone is having a great summer and looking forward to the national conference in September. It will undoubtedly be a great national conference and an opportunity to connect with many FBA members.

Speaking of FBA members, I took some time to speak with one of the newest members of the FLS Board, David Stein. Although David is new to the FLS Board, he has a very long and distinguished affiliation with the FBA through his involvement and leadership of the Orange County Chapter. During our interview, I learned that David's involvement reflected a sentiment shared by many FBA members – that the FBA is one of the finest and most meaningful bar associations that members of our profession can be affiliated with. Here are the highlights of our interview:

Q: HOW DID YOU FIRST BECOME INVOLVED IN THE FBA?

A: When I was a young partner at a big firm, nearly 20 years ago, I was looking for opportunities to market my firm and get more involved in the legal community. The FBA in Orange County had a structure where firms would serve as sponsors. Part of being a sponsor firm meant having a seat on the FBA Board. I was lucky enough to be tapped for our "firm seat" in 2006 and never looked back. I started going to meetings and became active on the leadership ladder, culminating in my service as President of the OC Chapter. After serving as president, I transitioned back to a Board position and have remained on the Board since.

Q: WHAT MOTIVATED YOU TO STAY INVOLVED IN THE FBA?

A: The Orange County chapter is made up of a truly great group of people, both judges and local practitioners. I found that the FBA provided an amazing opportunity to contribute to the local federal practice culture though my interactions with other federal practitioners, the educational programs, and through our relationships with the local bench. We are fortunate to have a voice in helping to keep local practice and local rules at the peak of the profession. If you care about the quality of the federal legal practice in your community, being part of the FBA is a great way to make that happen.

Q: WHAT ELSE HAVE YOU LIKED ABOUT THE FBA?

A: It is a very well-managed organization. We have a monthly meeting at 7:45 am in the federal courthouse. The meetings are run efficiently so we are done by 8:30, and participants can get to their next obligation at a reasonable hour. Meeting in the courthouse seems to help Judges participate even with their busy schedules. Our chapter puts on a number of programs/events each year, and each Board member helps with one or two of these. It is a manageable commitment. Being on the Board allows me to be part of an incredible group of lawyers and judges who work hard to make federal practice exceptional.

Q: WHAT LED YOU TO JOIN THE FEDERAL LITIGATION SECTION BOARD?

A: Well, you (Judge Segal) asked me. That is all it took! But, also, I had participated with the national conferences and found them rewarding. Joining a national FBA committee allowed me to meet and interact with federal practitioners and judges from all over the country and learn how different chapters tackle the same issues our chapter faces.

Q: TELL ME ABOUT YOUR CURRENT PRACTICE?

A: I started my own firm about 17 months ago – Olson Stein. It has been a lot of fun to have my own law firm, and it also provides me a great deal of control and flexibility over my life. My current practice is 100% litigation and 100% in federal court. I have an IP focused practice (patents, trademarks, trade secrets, copyrights), which makes up about 80% of what we do. The other 20% consists of complex commercial litigation in federal courts nationwide.

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Q: HOW DID YOU GET INVOLVED IN IP WORK?

A: It was an accident. When I was a young lawyer in Texas, I practiced at a big firm, doing class actions, antitrust work, and general commercial litigation. When I moved to Southern California, I joined a small firm. One partner who did patent litigation asked me to work with him on a patent case that eventually went to trial. The trial went well and he wanted to continue to work with me, so I ended up doing more patent work. Over time, my work diversified into other IP work and some commercial litigation.

Q: WHAT DO YOU DO IN YOUR FREE TIME?

A: I am the parent of three young daughters, so most of my "free" time is running our kids to sports, school, and various other activities. They keep me quite busy.

Q: WHAT IS ONE UNKNOWN AND FUN FACT ABOUT DAVID STEIN?

A: I am a published computer software author – when I was a teenager, I worked for a software company. I created games that taught young kids how to spell and read. One of my games was published, so I am officially a published author.

Q: FINAL QUESTION – WHAT ARE SOME GOALS YOU HAVE FOR THE FLS BOARD?

A: I would like to see the Board become active in some policy or rule changes. For example, the diversity jurisdiction rule about the amount in controversy has been set at $ 75,000 since 1996. It seems overdue to revisit that amount. I would like to see the FLS Board lead the effort to increase the amount to a more appropriate number.

It was a genuine pleasure speaking with David and learning more about his experiences with the FBA. Please do not hesitate to let me or any other member of the FLS Board know your thoughts or suggestions about how the FLS Board can better serve the FBA and its members. Hope to see you in Minnesota!

About the Chair • *After 18 years as a United States Magistrate Judge with the Central District of California, including four years as the Chief Magistrate Judge, Hon. Suzanne H. Segal (Ret.) joined Signature Resolution as a mediator and arbitrator. She is the Chair of the Federal Litigation Section of the FBA and resides in Los Angeles, CA. She previously served as Vice Chair and Secretary-Treasurer of the Federal Litigation Section.*

Welcome to the Summer 2025 edition of SideBAR!

This summer heat has been brutal, even for us here in Florida. But I hope that you have had the opportunity to relax and renew a bit this summer as we all recharge for the new school year and the countdown to year end. Quite by accident, this edition of SideBAR leans heavy on the intellectual property aspects of federal practice. What other areas of federal practice are you involved in? What novel or intriguing cases would you like to see highlighted in our newsletter? The SideBAR is a wonderful opportunity to be published and share your expertise with others. Please consider making a submission for one of our upcoming editions.

About the Editor • *Katherine C. "Kacy" Donlon is a commercial litigator at Johnson, Newlon & DeCort in Tampa, Florida. She specializes in the areas of securities litigation and arbitration, receiverships and commercial litigation. A graduate of Washington & Lee University School, Kacy is originally from Birmingham, Alabama where she clerked for Senior District Court Judge Seybourn Lynne. Kacy can be reached at kdonlon@jnd-law.com or 813-229-3100.*

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SAVE THE DATE—NOVEMBER 15, 2025—WASHINGTON, D.C.

Join the Federal Litigation Section in Washington, D.C. as we host the Federal Litigation Conference at the Hilton Capitol Hill on Saturday, November 15. This one day, in-person event will explore Emerging Trends in Complex Litigation. Programming will bring together federal judges, litigators, and legal experts to discuss pressing issues in technology, ethics, intellectual property litigation, and the enforcement of U.S. law in foreign jurisdictions. Attendees will benefit from the high-level education, timely updates, and invaluable opportunities for federal practitioners. Stay tuned for more details!

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The Federal Circuit Clarifies Genericness and Likelihood Of Confusion in *Bullshine Distillery v. Sazerac Brands, LLC*

Case No. 23-1682 | Decided March 12, 2025

In a notable decision for trademark practitioners, the U.S. Court of Appeals for the Federal Circuit on March 12, 2025, affirmed the Trademark Trial and Appeal Board's (TTAB) decision in *Bullshine Distillery v. Sazerac Brands, LLC,* clarifying several key issues surrounding genericness and likelihood of confusion in the registration of trademarks.

Case Background

Bullshine Distillery sought to register the trademark BULLSHINE FIREBULL for "alcoholic beverages except beers." Sazerac Brands, known for its popular FIREBALL whiskey, opposed the registration, asserting a likelihood of confusion with its well-known brand, for which it had three registrations including the logo depicted on the right for "whiskey," the wordmark FIREBALL for "liqueurs," and the wordmark FIREBALL for "whisky."

Bullshine countered with an aggressive argument: that FIREBALL was generic for "generic name for a whiskey or liqueur/schnapps-based common alcoholic drink containing a spicy flavoring element such as cinnamon or hot sauce" (cleaned up) and had been used generically even before Sazerac's own trademark registrations. Bullshine sought not only to defend its mark but to cancel Sazerac's existing registrations.

TTAB Decision and Dual Appeal

The TTAB disagreed with Bullshine's genericness argument, finding that FIREBALL was not generic at either the time of Sazerac's applications or at the time of the opposition proceedings. However, the Board also rejected Sazerac's opposition, holding that there was no likelihood of confusion between FIREBALL and BULLSHINE FIREBULL because, in part, the FIREBALL brand was conceptually weak. Both parties appealed to the Federal Circuit.

Federal Circuit Holding

The Federal Circuit affirmed the TTAB in full, offering several important takeaways for trademark lawyers:

Genericness is Determined at the Time of Application

One of the most consequential aspects of the decision is the court's clarification that a mark's generic status is determined at the time the applicant seeks registration, not at any earlier point in time. The Federal Circuit acknowledged that a mark that was once generic may no longer be so, thereby opening the door to potential recovery of previously generic terms. This could provide a strategic opportunity for companies looking to rebrand or capitalize on commonly used terms that may have regained distinctiveness over time.

Conceptual Weakness and Likelihood of Confusion

The court affirmed the TTAB's finding that there was no likelihood of confusion between BULLSHINE FIREBULL and FIREBALL. Crucial to that determination was the recognition that FIREBALL is a conceptually weak mark—suggestive at best and widely used to refer to cinnamon whiskey in the marketplace.

Interestingly, the court cited Sazerac's own past statements and admissions—made in prior litigation and filings—as evidence of the mark's limited distinctiveness. This judgment and order thus serves as an important reminder - what you say in one proceeding can (and will) be used against you in another.

Conclusion

The Federal Circuit's decision is a double-edged sword for brand owners. On one hand, the possibility of reclaiming marks that were once generic could reinvigorate dormant or underutilized branding assets—a finding of genericness is not permanent death to trademark rights. On the other, the importance of distinctiveness and consistency in asserting rights is reinforced—especially for marks with descriptive or suggestive qualities.

Bullshine Distillery v. Sazerac Brands is a reminder that trademark rights are fluid, fact-dependent, and often hinge on timing and positioning. With the Federal Circuit reinforcing both the "time of application" standard for genericness and the weight of conceptual weakness in confusion analysis, brand owners and IP counsel alike should proceed with caution—and strategic foresight.

About the Author • *Stuart Leijon is an associate at Lindsay Hart LLP in Portland where he primarily focuses on litigation defense. Stuart otherwise maintains an intellectual property practice with focus on copyright and trademark. He serves on the Board of Directors for Oregon Volunteer Lawyers for the Arts and as the Secretary/Treasurer for the Federal Litigation Section of the Federal Bar Association.*

When IP Meets Product Liability: Navigating Overlapping Risks in Federal Court

For many federal litigators, intellectual property and product liability may seem like distinct domains—one focused on innovation, the other on injury. But in today's increasingly complex marketplace, these two areas are converging more frequently, particularly in disputes involving consumer technologies, medical devices, and digitally embedded products.

In my work across both intellectual property and product liability defense, I've often seen how these two areas collide—especially in cases involving complex technologies and evolving consumer expectations. This article highlights several ways these issues intersect in federal litigation, along with practical considerations for litigators navigating both worlds.

I. Product Design Patents and Safety Disputes: A Tension of Form and Function

Design patents protect the ornamental appearance of a product, but when that same product is alleged to have caused harm, its "look" can quickly become the subject of functional scrutiny. This raises thorny issues: How much of the product's design was protected for aesthetic reasons—and how much might contribute to alleged safety risks?

For example, consider a case involving a consumer product with a patented design feature, such as a uniquely contoured spray nozzle or an ergonomic grip. If a plaintiff alleges that the nozzle caused an injury due to how it directs product flow, defendants may face dual concerns: preserving the value of the IP while also defending against the assertion that the protected feature contributed to a defect.

In these scenarios, courts must carefully distinguish between form and function. While design patents cannot claim functional aspects per se, litigants may still need to parse whether features at issue were driven by aesthetics (and thus within the scope of the patent) or by utility (and potentially vulnerable to attack on safety grounds). *See Sport Dimension, Inc. v. Coleman Co.,* 820 F.3d 1316, 1320 (Fed. Cir. 2016) (design elements dictated by function cannot be protected under design patents).

This interplay can have implications for defenses, indemnification obligations, and expert testimony alike. Federal practitioners should be prepared to defend the intent and scope of design protections in product defect suits—often relying on declarations from inventors, patent prosecutors, or design engineers who can explain the ornamental rationale behind a patented element.

II. IP Discovery in Product Liability Cases: A Two-Way Street

Discovery battles can become especially complicated when IP and product liability issues overlap. Patent litigants are accustomed to disputes over source code, trade secrets, and licensing agreements—but in a parallel or subsequent product liability suit, this information may become discoverable on different legal theories.

Take, for instance, a case involving a smart medical device or wearable technology. The source code or embedded firmware might be central to both infringement claims (e.g., proving functionality) and product liability claims (e.g., showing how the device performed or failed under certain conditions). Plaintiffs in product suits may demand access to technical documentation that would typically be subject to heightened confidentiality protections in IP cases.

This creates tension between a company's need to protect its proprietary information and the plaintiff's need to understand product performance. In such scenarios, federal courts are often asked to craft tailored protective orders or in-camera procedures to balance these concerns.

Moreover, litigants must be alert to privilege issues. Communications with patent counsel, particularly those related to product design, testing, or labeling decisions, may become targets in product liability cases—especially when plaintiffs assert that a defendant "knew or should have known" of a defect. It is critical to evaluate and document the role of legal versus business advice in such communications early, as courts may apply different privilege standards depending on the nature of the underlying dispute. *See In re Grand Jury,* 23 F.4th 1088, 1090-91 (9th Cir. 2022) (discussing privilege in dual-purpose communications involving legal and business advice).

III. Concurrent Proceedings: PTAB, District Court, and Beyond

Another challenge arises when a company is involved in concurrent proceedings—such as a Patent Trial and Appeal Board (PTAB) inter partes review (IPR) and a federal product liability suit—concerning the same product. While the forums differ in scope and standard, strategic decisions in one can influence the other.

For example, arguments made to the PTAB about a product's novelty or non-obviousness might later be cited in district court as admissions about product capabilities, safety, or intended use. Likewise, evidence submitted to the PTAB (e.g., product schematics, testing data, or inventor declarations) may find its way into product liability litigation, even if originally shared in a narrow IP context.

This underscores the importance of cross-disciplinary coordination. Counsel managing PTAB proceedings should be in close communication with trial counsel handling liability defense to avoid inconsistent arguments and ensure a unified litigation strategy. Thoughtful coordination also allows defendants to take advantage of potential efficiencies—such as shared expert reports or overlapping discovery.

Federal litigators should also watch for res judicata and estoppel risks. While agency proceedings may not always satisfy the requirements for issue preclusion, plaintiffs may still seek to leverage rulings or statements from one forum to support their claims in another. *Cf. B & B Hardware, Inc. v. Hargis Indus., Inc.,* 575 U.S. 138, 141-42 (2015) (administrative agency findings may have preclusive effect in later litigation under certain conditions).

Early case assessment and strategic sequencing can help minimize those risks.

IV. Labeling, Branding, and Consumer Expectations

The intersection of IP and product liability is also apparent in false advertising and labeling disputes. Trademarks, slogans, and design elements are often part of a brand's intellectual property portfolio—but in consumer fraud or failure-to-warn suits, those same elements can be cited as misleading or deceptive.

For example, a slogan like "safe by design" or "eco-friendly innovation" might be used to bolster a brand identity (and serve as a registered trademark), but plaintiffs may argue such language created unreasonable consumer expectations when paired with an allegedly harmful product. This can give rise to overlapping claims for trademark use and alleged misrepresentations, subjecting IP counsel and trial counsel to different standards of liability under the Lanham Act, state consumer protection laws, or strict liability theories.

To mitigate these risks, IP lawyers should collaborate closely with litigation teams during the branding process - particularly for products in heavily regulated or litigation-prone industries like food, health, and technology. Consistency between advertising copy, product performance, and regulatory disclosures is key to avoiding exposure on multiple fronts.

V. Best Practices for Federal Litigators

Given these overlapping risks, federal litigators handling hybrid IP–product matters should adopt a coordinated and proactive approach. One important step is to audit design patents early in litigation to assess whether any patented features might be construed as functional, rather than ornamental. Design documentation should clearly reflect the aesthetic intent behind such features to support the validity of the design patent and to limit exposure in product defect claims.

Litigators should also coordinate discovery early, anticipating that technical documents, source code, or communications involving product development may be relevant to both IP and product liability claims. Seeking narrowly tailored protective orders at the outset can help balance the need for transparency with the protection of sensitive proprietary information.

Another best practice is to create cross-functional litigation teams that bring together patent counsel, product liability counsel, and regulatory experts. This ensures a cohesive defense strategy across forums, minimizes the risk of inconsistent positions, and allows teams to capitalize on efficiencies—such as sharing expert resources or streamlining discovery.

In addition, teams should monitor statements made across proceedings, particularly in PTAB filings or regulatory submissions, to ensure consistency with district court positions. A statement made in support of patentability could later be used by a plaintiff in a product suit to support a theory of foreseeability or design intent.

Finally, litigators should encourage their clients to integrate branding and risk management. Marketing teams, legal departments, and product designers should collaborate closely to ensure that product labeling, advertising slogans, and brand messaging are consistent with actual product performance and testing. This can help mitigate the risk of consumer protection or false advertising claims that overlap with IP assets like trademarks or slogans.

VI. Conclusion

As products become smarter, more integrated, and more regulated, the line between intellectual property and product liability continues to blur. For federal litigators, this convergence presents both a challenge and an opportunity: a chance to develop innovative, multidisciplinary strategies that protect not just clients' legal positions—but their technologies and brands as well.

Understanding how these issues intersect—and planning for them early—can mean the difference between coordinated defense and collateral exposure. For litigators ready to meet the moment, the crossroads of IP and product liability is a space of growing strategic importance in federal practice.

About the Author • *Sheila Niaz is a patent attorney and litigation associate at Norton Rose Fulbright. Her practice spans intellectual property law and product liability and consumer disputes. Her dual focus enables her to provide comprehensive counsel to clients, particularly in cases where product liability intersects with intellectual property concerns. Sheila previously served as a law clerk to Hon. Wilhelmina M. Wright and Hon. Patrick J. Schiltz of the U.S. District Court for the District of Minnesota.*

Ecofactor, Inc. v. Google, Inc.: Reasonable Royalty Patent Damages Overturned Based On the Court Of Appeals' Interpretation of Contracts On Which the Expert Based His Analysis

Ecofactor, Inc. v. Google, 137 F 4th 1333 (Fed. Cir., en banc, May 21, 2025)

Emphasizing district courts' "gatekeeping" roles under F. R. Evid. 702, the Federal Circuit, sitting *en banc,* held that a district court abused its discretion by allowing a damages expert to justify his per-unit royalty opinion on lump sum license agreements because the "plain language of the licenses does not provide a basis for" such an opinion. This was not, the Court found, an issue of credibility or weight, but instead, an issue of admissibility that the Court of Appeals could decide based on its ability to interpret contracts as a matter of law.

Even though this is a patent case, it may well have ramifications beyond the field of patent litigation, because the Federal Circuit analyzed this under Rule 702 and *Daubert*. At its heart, the case was about – and trying to draw a line between – the court's "gatekeeping" obligation and its obligation to let the jury decide disputed issues of fact; in other words, the difference between "admissibility" and "weight."

Procedural History

Ecofactor sued Google, LLC in the Western District of Texas, claiming that Google's Nest thermostats infringed U.S. Patent No. 8,738,327 relating to using smart thermostats in computer-networked HVAC systems. At trial, the jury found in favor of Ecofactor and awarded just over $20 million in damages.

Google appealed to the Federal Circuit, challenging the district court's decision to allow plaintiff's expert to testify about a per-unit royalty, arguing that his approach was "unsupported by reliable methodology or sufficient facts." A Federal Circuit panel affirmed the judgment, but the Court granted *en banc* review and reversed (8-2), finding the district court abused its discretion by not excluding plaintiff's expert's opinion, and ordering a new trial on damages.

The Court of Appeals' Reasoning and Decision

The Federal Circuit found an abuse of discretion for two reasons. First, the district court "gave no rationale for ruling that the expert testimony was admissible or denying Google's motion for a new trial on damages." *Id.*, 137 F.4th at 1338. The district court's failure to explain its ruling meant that it did "not create a record suitable for review," and "[a]n absence of reviewable reasoning may be sufficient grounds for this court to conclude the district court abused its discretion." *Id.*[1]

Second, on the merits, the Federal Circuit concluded that denying Google's motion was an abuse of discretion "because [the expert's] opinion that the licenses show industry acceptance of an $X per unit royalty rate is not based on sufficient facts or data." *Id.*

Patent damages are usually based on a "reasonable royalty" that the infringer would pay the patent owner for the right to use the invention. That amount is most often estimated based on a "hypothetical negotiation" between a willing licensor and willing licensee, both assuming the patent is valid and infringed.

There are generally two kinds of royalty structures: one-time lump sum payments and running royalties, i.e., payments – often per-unit sold – over the past and remaining life of the patent. These are considered to "involve significantly different considerations," so "for a jury to use a running-royalty agreement as a basis to award lump-sum damages" requires "some basis for comparison … in the evidence presented to the jury."

One factor in the *Georgia-Pacific* analysis "is the amount that the *alleged infringer* would *agree to pay* as a willing licensee."[2] Evidence of such can be what the patent owner has received from others for a license to its patent, "as proving or tending to approve an established royalty." *Id.* at 1341. Those "actual licenses to patented technology most clearly reflect the economic value of the patented technology in the marketplace," "not only of the proper amount of a reasonable royalty, but also of the proper form of the royalty structure." *Id.*

Ecofactor's expert opined that the damages should be based on a lump sum royalty payment, but that the lump sum should be based on $X amount per allegedly infringing unit – which sounds like a running royalty. He testified that there were three lump-sum settlement licenses between Ecofactor and other licensees and opined that they "reflected" agreements for a royalty rate of $X per unit, which he opined would be the number Google would agree to pay multiplied by the number of thermostats it sold.

This was good enough for the panel, but the court *en banc* held that "the existing licenses…were insufficient, individually or in combination, to support [the expert's] conclusion that prior licensees agreed to the $X royalty rate," and that the district court abused its discretion in allowing the expert to testify to that conclusion. *Id.* at 1341.

This was not, the court held, a matter of "weight." Because the license agreements were contracts, the Court found that

they were subject to interpretation as a matter of law, so the district court should have reviewed them more carefully to determine whether the agreements were susceptible to the expert's interpretation. For example, one license stated that "such a lump sum amount is *not based upon sales* and *does not reflect or constitute a royalty*." *Id.* The second license agreement similarly said, "*nothing* in this clause should be interpreted as agreement by [licensee] that $X per unit is *a reasonable royalty*." *Id.* at 1342.[3]

Thus, the Court held, these licenses "provide no support for the conclusion that [licensee] agreed to pay the $X rate or agreed that $X was a reasonable royalty." *Id.*

Because the issue was resolvable as a matter of law, i.e., contract interpretation, "this analysis does not usurp the province of the jury, nor does it involve this court deciding disputes of fact." Instead, "it involves the gatekeeping function of this court to ensure that there are sufficient facts or data for Mr. Kennedy's testimony that the licensees agreed to the $X royalty rate." *Id.* at 1343.

So, the court concluded, "a fundamental premise of the expert's testimony – that [the licensees] agreed to pay the $X rate – was not based on sufficient facts or data, as required by Rule 702(b)." This deficiency "renders [the expert's] testimony unreliable and therefore inadmissible under Rule 702." *Id.* at 1346.

The dissent (Judges Reyna and Stark) accused the majority of "open[ing] a new theory within its Rule 702 analysis: contract interpretation." *Id.* at 1348. They were particularly incensed that the contract interpretation issue was not addressed at trial or briefed on appeal. The also criticized the majority for rejecting other evidence that may have supported the expert's opinion – which they found weighing the credibility of witnesses. Judge Stark wrote, *id.* at 1354:

> I am concerned that today's opinion will be misinterpreted as constraining damages experts in a manner not called for by either Rule 702 or *Daubert*. I feel, too, that the Majority may be misunderstood as inviting district judges, and future panels of this court, to resolve fact disputes under the guise of evaluating whether experts may testify at trial.

Judge Stark tried to limit the Majority Opinion's reach to its facts. He wrote what he regarded as an "important reality: today's decision only governs where an expert's testimony is *undoubtedly contrary to a critical fact* upon which the expert relies. Thus, in the vast majority of patent cases, where the relevant evidence the experts are considering can support competing conclusions, the Majority Opinion is inapplicable." *Id.* at 1355 (italics by Judge Stark).

The opinion leaves unanswered questions about its scope and breadth. Is the dissent right that this will be narrowly applied? Is it just about patent cases, or do the references to Rule 702 mean it will be applied more broadly? (Probably yes, although so far it has been cited only in patent cases). Is this just about damages or will this standard apply to other issues? (Probably the latter – Judge Williams in the District of Delaware cited *Ecofactor* but denied a motion to exclude experts on invalidity and infringement, *see Laboratory Corp. of America Holdings v. Natera, Inc.*, 2025 WL 1769837 (D. Del., June 26, 2025)). Does it just apply to cases involving contract interpretation or, arguably, other legal issues that are relevant to an expert's opinion? (So far, the latter, *see Natera, supra*). Can an expert still base an opinion on disputed facts? (probably – *e.g., Allergan, Inc. v. Revance Therapeutics, Inc.*, 2025 WL 1795158 (D. Del., June 30, 2025). Will this opinion lead to many more *Daubert* challenges or post-trial/appellate challenges to expert testimony? (almost certainly).

Time will tell.

About the Author • *Russell S. Jones, Jr., is a trial lawyer and shareholder in Polsinelli PC's Commercial and Intellectual Property Litigation practice groups. He has tried or argued more than fifty jury trials, bench trials, arbitrations and appeals in business cases for clients in industries including telecommunications; software and technology; retail; consumer products; banks and financial services; sports licensors; professional services; not-for-profit entities; and product manufacturers. An active leader in the Kansas City legal community, Jones also serves on the Board of the FBA's Federal Litigation Section.*

Endnotes

[1]The Federal Circuit made the same observation and reached the same result in *Jiaxing Super Lighting Elec. Appliance Co., Ltd. v. CH Lighting Tech. Co., Ltd.*, 2025 WL 2100650 (Fed. Cir., July 28, 2025) at * 8 (expressing concerns about how plaintiff's expert in a patent case allocated license fees among the several licensed patents covered by an agreement and remanding for a new trial on damages so the district court could "assess the reliability of [the expert's] testimony consistent with [*Ecofactor*]."

[2]*Georgia-Pacific v. US Plywood*, 318 F.Supp. 1116 (S.D.N.Y. 1970).

[3]The third license agreement contained nothing suggesting that it reflected an *agreement* for a running $X per unit royalty rate.