

The Sewage of Expert Report Deadlines

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Expert report deadlines are a feature of every patent case's scheduling order, but they nevertheless are the constant source of disputes. For example, battles over whether to have two or three or four rounds of expert reports (reply reports on secondary considerations, anyone?) are common. The scheduling order in *Geomatrix Systems, LLC v. Eljen Corp.*, 3:20-CV-1900 (SVN) (D. Conn. Nov. 8, 2023), a case involving patents covering a wastewater system, provided for two rounds of reports. "Liability expert reports on issues for which the parties bear the burden of proof" would be followed by "[r]ebuttal liability expert reports" 45 days later. What could go wrong?

The answer is, "plenty." A big reason why expert schedules cause problems in patent cases is that the defendant invariably bears the burden of proof on some issue and logically should go first. But that simple logic doesn't necessarily translate into a simple process.

This was the case in *Geomatrix*, where the defendant, Eljen, asserted an inequitable conduct defense and counterclaim. Eljen timely served a single report from a wastewater systems expert. The problem was that its inequitable conduct claim involved misstatements relating to computer metadata, an issue on which Eljen's expert did not opine. Geomatrix responded 45 days later with its own wastewater systems expert *and* a declaration from a computer expert. Eljen moved to strike the declaration as untimely.

The court made two findings as to timeliness. The first was relatively straightforward: Geomatrix was not obligated to disclose the computer expert's declaration at the first deadline because it did not have the burden of proof on Eljen's inequitable conduct claim. But the court also found that the declaration was untimely because it "cannot fairly be characterized as a rebuttal report." Rebuttal reports "contradict or rebut evidence on the same subject matter identified by another party." Fed. R. Civ. P. 26(a)(2)(D)(ii). Eljen's expert did not address the metadata issue, so there was no expert opinion for Geomatrix to "rebut."

As the court acknowledged, its ruling on timeliness "understandably begs the question of when Geomatrix should have disclosed the [metadata] Declaration under the operative scheduling order." The court suggested that Geomatrix should have informed the court of its plan to disclose the computer expert and seek leave to serve the declaration by a particular date. According to the court, this would have made the argument that Geomatrix "was attempting to sandbag Eljen by waiting until [the second deadline] less potent."

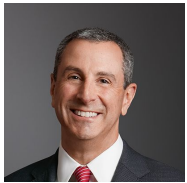
The court resolved the issue by refusing to strike the declaration, allowing Eljen to depose the computer expert, and denying Eljen's request to disclose a rebuttal expert on the metadata issues in view of Eljen's "strategic decision not to disclose its own expert on this topic." What a mess!

This holding, when read in connection with the Court's earlier holding that the Hochman Declaration need not have been disclosed by June 26, 2023, understandably begs the question of when Geomatrix should have disclosed the Hochman Declaration under the operative scheduling order. - Geomatrix Systems, LLC v. Eljen Corp., 3:20-CV-1900 (SVN) (D. Conn. Nov. 8, 2023)

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