# IP Litigator, *Gatekeeping in Flux (Again?): The Federal Circuit Revisits Expert Admissibility*, (Mar. 1, 2026)

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***Gatekeeping in Flux (Again?): The Federal Circuit Revisits Expert Admissibility***

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The Federal Circuit's ongoing struggle over how aggressively district courts should police expert testimony has once again divided the court, exposing a fundamental disagreement about the proper limits of Rule 702. In *Barry v. DePuy Synthes Companies*,[1] the same judges who clashed in *EcoFactor v. Google*[2] reprise their competing views on where judicial gatekeeping should end and the jury's role should begin. In *EcoFactor*, Judge Prost dissented from the original panel's more permissive approach to expert testimony and later joined the *en banc* majority that strengthened the gatekeeping standard. Judge Stark, by contrast, dissented in the *en banc* decision, warning that the majority risked pushing district courts too far into fact-finding. Now, in *Barry*, Judge Stark authors the majority panel opinion adopting a more deferential approach to admissibility, while Judge Prost dissents, arguing that the majority has once again stepped back from the rigor demanded by Rule 702 and its 2023 amendments.

## The District Court's Mid-Trial Reversal

The case began with the District Court allowing two of Barry's infringement experts to testify under pretrial *Daubert* rulings. But after the experts took the stand, the court reversed course and excluded both experts. With no expert testimony left to support infringement, the court granted judgment as a matter of law.

The District Court concluded that Barry's first infringement expert had contradicted the court's construction of "handle means." The District Court believed that the expert had expanded the court's construction of "handle means," particularly by suggesting that parts that simply must be grasped during assembly could qualify as "designed especially to be grasped."

The District Court also concluded that the survey conducted by Barry's second infringement expert suffered from foundational methodological flaws. The District Court identified multiple methodological issues, including non-probability sampling, representativeness concerns, low response rate, and inconsistent question framing.

With no expert testimony left to support infringement, the court granted judgment as a matter of law to DePuy.

## The Federal Circuit Reverses the Reversal

On appeal, the Federal Circuit reversed all three rulings, holding that the District Court had abused its discretion in excluding both experts and had erred in granting judgment as a matter of law. Judge Stark, writing for the majority, emphasized that Barry's first expert repeatedly recited the court's construction, stated that he applied it, and relied on examples consistent with the patent specification's recognition that linked structures could operate as a single handle means. Any apparent tension that emerged during crossexamination, in the majority's view, was a matter of credibility left to the jury. Judge Prost viewed this differently, concluding that the testimony strayed beyond the construction and that Rule 702 required exclusion.

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Judge Stark acknowledged that the survey involved imperfections, but those imperfections could be explored through cross-examination. He noted that the District Court had not grounded its criticisms in record evidence, such as competing expert testimony, and that Barry's second expert had explained why his approach was appropriate under the circumstances. Judge Prost again disagreed, arguing that the combination of flaws rendered the survey unreliable under Rule 702 and that the majority was improperly shifting reliability determinations to the jury.

## The Shadow of *EcoFactor*: Another Swing of the Pendulum?

This sequence feels like an immediate sequel to *EcoFactor*. There, the original panel appeared to lower the admissibility threshold by emphasizing the jury's role, from which Judge Prost vociferously dissented. The *en banc* majority, which included Judge Prost, corrected course, and did so over Judge Stark's dissent, insisting that district courts must ensure expert reliability before testimony reaches the jury. Yet in *Barry*, the pendulum once again moves toward jury deference. Judge Stark, now in the majority, stresses that disagreements about how an expert applies a claim construction or about the imperfections in a survey design are matters of weight, not admissibility. Judge Prost, writing in dissent, warns that this approach risks repeating the very errors the *en banc* court sought to correct.

## A Subtle but Critical Distinction: Flaws Emerging at Trial

A key thread running through Judge Stark's majority opinion is his repeated emphasis that the supposed defects in the experts' testimony arose during trial, not before it. This distinction allows him to argue that *Barry* does not undermine *EcoFactor* but instead occupies a different doctrinal space.

In *EcoFactor*, the full Federal Circuit confronted an expert whose methodology was fundamentally unreliable from the outset because it relied on a fact that was flatly contradicted by the record. Under those circumstances, the District Court's failure to exclude the testimony before trial was reversible error.

But in *Barry*, Judge Stark highlights that the District Court had already evaluated both experts before trial and found their opinions admissible. The issues that troubled the District Court only emerged during adversarial testing via cross-examination, hypotheticals, and the natural pressures of live testimony. To Judge Stark, these developments are classic jury issues: credibility, emphasis, and framing. They do not retroactively convert admissible testimony into inadmissible testimony. This allowed Judge Stark to frame *Barry* as entirely consistent with *EcoFactor*'s demand for rigorous pre-trial gatekeeping, while still defending his long-standing view (expressed in his *EcoFactor* dissent) that judges should not strike testimony merely because cross-examination exposes tension or ambiguity.

Judge Prost's dissent in *Barry* rejects this distinction entirely. To her, a contradiction of claim construction is a contradiction, whether revealed in a report, at deposition, or under cross-examination. Similarly, a survey methodology that collapses under scrutiny is unreliable regardless of when the flaw becomes apparent. For Prost, Rule 702 demands judicial intervention whenever reliability gives way to inconsistency, not just at the pre-trial stage.

## What *Barry* Signals Going Forward

*Barry* invites a broader question: after the Federal Circuit appeared to tighten expertadmissibility standards in *EcoFactor*, is the precedential decision in *Barry* a sign that the Court is already moving back toward a more permissive approach? Judge Stark's opinion relies heavily on the distinction between admissibility and weight and insists that judges must not confuse reliability with correctness. Yet, Judge Prost warns that this approach blurs exactly the line Rule 702 was revised to clarify.

For litigators, *Barry* emphasizes how fluid the expertadmissibility landscape remains. Depending on the judge and the district, parties may face a stringent front-end reliability review or a more permissive approach that

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reserves close questions for the jury. Until the Federal Circuit reconciles these cross-currents, parties should prepare expert evidence capable of surviving both frameworks.

**Footnotes**

1 2026 WL 137113 (Fed. Circ. Jan. 20, 2026), available at *https://www.cafc.uscourts.gov/opinions-orders/23-2226.OPINION.1-20-2026_2634511.pdf* .

2 137 F.4th 1333 (Fed. Cir. 2025) (en banc).

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