

# Law Matters

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## Outsmarting Smart Meter Sickness Claims

By Noel Edlin and Fred M. Blum

A growing number of California citizens are fervently opposed to the installation of smart meters in or near their homes due to the perceived health risks of exposure to radio frequency radiation (RFR). Opponents claim the exposure has caused adverse health effects<sup>1</sup> ranging from electrosensitivity<sup>2</sup> to brain cancer.<sup>3</sup> As a result, toxic tort litigation related to smart meter RF exposure is on the rise.

In most toxic tort cases, an initial battle is over the admissibility of expert evidence offered by the plaintiff attempting to prove causation. In cases venued in federal court, the defense will seek to exclude such evidence under Daubert v. Merrell Dow Pharmaceuticals, Inc., 590 U.S. 570 (1993). Using the “Daubert Factors,” the Court will consider:

- Whether and how the theory that RF exposure can cause the particular injuries that plaintiff claims been empirically tested?
- Whether there is valid evidence that RF exposure caused the particular injuries that plaintiff claims?
- Has the theory been subjected to peer review and publication?
- What are the potential rate of error and the maintenance of standards controlling the test or tests used to prove such harm?
- Are the methods and techniques used for such tests generally accepted within the scientific community?

If the case is venued in a California Superior Court, the defense will argue that the plaintiff’s expert’s testimony should be barred under Sargon Enterprises v. USC, 55 Cal.4<sup>th</sup> 747 (2010). In Sargon, the California Supreme Court clarified the interplay between California Evidence Code Sections 801 and 802 and moved close to adopting the federal Daubert admissibility standard.

No court has made a determination as to whether the evidence to support the adverse health effects of RF exposure satisfies either the Sargon or Daubert standard. However, given the current state of the scientific evidence, plaintiffs will have a difficult time. Taking the stance that smart meter RF emissions are not powerful enough to cause harm, the non-profit California Council on Science and Technology conducted an analysis of more than 100 peer-reviewed studies and in-depth interviews with over two dozen experts in

radio and electromagnetic emissions. They determined that: "Health concerns surrounding RF from smart meters are similar to those from many other devices that we use in our daily lives, including cordless and cellular telephones, microwave ovens, wireless routers, hair dryers, and wireless-enabled laptop computers. As detailed in the report, a comparison of electromagnetic frequencies from smart meters and other devices shows that the exposure level is very low."<sup>4</sup>

There are studies that do conclude otherwise, but many of them suffer from the fatal flaw of assuming health effects and then seeking evidence to determine if smart meter RF exposure is safe. This point is perfectly illustrated in a 2012 study by smart meter opponent Dr. Richard Meltzer who stated: ". . . it is important to understand core differences in philosophy and approach that explain much of the back-and-forth arguing that takes place between smart meter proponents and those who object to the technology. That difference can be described as "Prove It Safe" vs. "Prove It Harmful."<sup>5</sup>

Contrary to Dr. Meltzer's viewpoint, courts require that plaintiffs prove that smart meter RF exposure is harmful. For a defendant, having the right experts and clearly understanding the scientific facts about RFR are the one-two punch needed to overcome claims that smart meters cause health problems. The same is true for defending against any other type of toxic tort claim. The defense needs outside counsel educated about the current regulatory, medical, scientific, and technical developments that can identify, recruit, and retain highly skilled experts.

#### CITATIONS

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3. <http://smartmeterdangers.org/index.php/position-statements/206-smart-meters-correcting-gross-misinformation>
4. [Health Impacts of Radio Frequency Exposure from Smart Meters](#)
5. [Smart Meters: A Cautionary Tale](#)