DAUBERT UPDATE

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A. Background: U.S. Supreme Court Decisions

1. Daubert v. Merrell Dow

The U.S. Supreme Court's opinion in Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993) sought to purge "junk science" from federal courtrooms by holding that federal trial judges were obliged to make a threshold determination as to the admissibility of "scientific" expert testimony. The Daubert decision directed trial judges in the federal courts to evaluate the methodology underlying proposed expert testimony, but also cautioned the lower courts not to usurp the jury's role in evaluating the accuracy of the conclusions derived from that reasoning or methodology. 509 U.S. at 595. The Daubert decision set forth what was supposed to be a non-exhaustive and non-exclusive list of factors that trial judges could consider in evaluating expert testimony, which included:

1. whether the technique or theory used was capable of being proved or disproved through testing;

2. whether the technique or theory had been subject to peer review and publication in the scientific community;

3. the known or potential rate of error of the scientific technique or methodology employed by the expert; and

4. whether the technique or methodology was "generally accepted" in the scientific community.

Before Daubert, most courts focused exclusively on the "general acceptance" factor listed above, based upon a decades old decision of the District of Columbia Circuit in Frye v. U.S., 293 F. 1013 (1923). Thus, an early view was that the Daubert decision would actually liberalize the

standards for admission of expert testimony, by providing alternative arguments for admission of testimony involving novel scientific concepts. For the most part, at least so far as property subrogation litigation is concerned, that has not come to pass, and Daubert is now almost universally regarded exclusively as a weapon for exclusion of expert testimony.

2. General Electric v. Joyner

In General Electric v. Joyner, 522 U.S. 136 (1997), the Supreme Court held that rulings to admit or exclude expert testimony under Daubert were subject to appellate review only for an "abuse of discretion" by the trial court. Thus, appellate judges cannot freely substitute their judgment for that of the trial court. This means that the crucial battle on Daubert issues is won or lost at the trial court level, often long before a jury had been empanelled, and usually with little hope of a second chance on appeal. Before Daubert, the trial judge's role in deciding whether to admit expert testimony was typically confined to evaluating whether the proposed expert had the minimal qualifications required to express their opinions. Issues regarding the basis for the expert's conclusions and the methodology the expert employed in arriving at those conclusions were regarded as matters for the jury to consider in weighing the credibility and persuasiveness of the expert's testimony. Cross-examination and rebuttal evidence were considered adequate means of dealing with "shaky" expert opinions. See Daubert, 509 U.S. at 596. Now, however, juries will often never even have the opportunity to evaluate challenged expert testimony. Daubert gives trial judges considerable latitude to dismiss cases that would otherwise withstand a motion for summary judgment, by simply excluding expert testimony that the plaintiff needs to prove its case.

3. Kumho Tire v. Carmichael

In the years immediately following the Daubert decision, subrogated insurers and other parties to fire litigation often attempted to sidestep the Daubert four-factor analysis by arguing that experts in fire investigation and forensic engineering and related fields were not really giving "scientific" testimony, within the original intent of the Daubert decision. This ploy actually met with varied success (compare Smith v. Ford Motor Co., 882 F. Supp. 770 (N.D. Indiana 1995) with Michigan Millers Mutual Insurance Corporation v. Benfield, 140 F.3d 915 (11th Cir. 1998)), until the Supreme Court's 1999 decision in Kumho Tire Company, Ltd. v. Carmichael, 526 U.S. 137. Kumho Tire held that the trial court's obligation to evaluate the reliability of expert testimony applied to all expert testimony, and not just to "scientific" testimony. However, the Kumho Tire decision reiterated Daubert's caution against mechanistic application of the four "non-definitive" and non-exclusive factors listed in the original Daubert decision. Kumho made it clear that the district courts should adopt a "flexible" approach in evaluating the admissibility of expert testimony, and should only attempt to apply as many or as few of the Daubert factors, if any, as fit a particular situation.

B. Daubert Today

1. The trend is toward increasingly rigid application of the Daubert criteria.

Many recent federal decisions at the trial and appellate levels have ignored the Supreme Court's instruction in Daubert and in Kumho that compliance with the "factors" listed in the original Daubert decision is not mandatory in all cases, and have effectively required that expert testimony comply with some or all of those factors. For example, in Oddi v. Ford Motor Company, 200 U.S. App. LEXIS 25496 (3d Cir. October 13, 2000), the court upheld the

exclusion of an expert's opinion in a crashworthiness case against Ford, primarily because the expert had not conducted any tests of his proposed alternative design for the bumpers on the vehicle at issue.

Similarly, in Pride v. Bic Corporation, 218 F.3d 566, 578 (6th Cir. 2000), the appellate court upheld the trial court's exclusion of expert testimony attributing the cause of an explosion and fire to a manufacturing defect in a cigarette lighter, because the plaintiff's experts "failed timely to conduct replicable laboratory experiments demonstrating that the explosion and residual damage that occurred" was consistent with a manufacturing defect.

Such rulings are particularly problematic for those of us involved in pursuing subrogation recoveries, because the analysis of our experts in such cases, even though logical and even compelling, often simply does not lend itself to evaluation under factors which are oriented towards traditional scientific inquiry. For example, with regard to the "peer review" factor, much of what fire investigators and forensic engineers do simply does not lend itself to academic publication. There is no college in the country that offers a bachelor's degree or graduate degree in fire investigation or forensic engineering. As Daubert itself noted "some propositions, moreover, are too particular, too new, or of too limited interest" to be published. 509 U.S. at 593. See also Smith v. Ford Motor Company, 215 F3d 713, 720-721 (7th Cir. 2000).

The "testability" factor, which decisions like Oddi and Pride suggest may now be mandatory in the eyes of some courts, also presents potential problems. Accidental fires typically involve unusual sequences and combinations of events and conditions that are difficult, if not impossible, to replicate reliably and "scientifically." This presents a "Catch-22" situation. If a proposition cannot be tested, then it is not "testable," which courts will then use as a basis for

exclusion under the Daubert criteria. However, if testing can be performed, but has not been performed, a federal judge may then use that as a basis for exclusion of the expert testimony, on the grounds that the expert's opinion has not been properly substantiated.

Cases such as Oddi and Pride can have particularly negative implications for subrogated insurers and other plaintiffs in product liability cases. Automotive crash testing and other product failure testing is enormously expensive, which is why the product manufacturers themselves do as little of it as possible. However, product manufacturers at least have the resources readily at hand to perform such testing when it serves their interests to do so, while the typical product liability plaintiff, including a subrogated insurer, does not. Moreover, unlike most serious personal injury claims, the maximum amount recoverable on any subrogation claim is not open-ended, but is capped by the amount actually paid the insured. Thus, the cost of performing the testing that may be required by the courts in order to withstand a Daubert challenge may often be wholly disproportionate to the potential recovery on the claim.

The Oddi decision gave lip service to these economic issues when it stated that "the inquiry required under Daubert ought not to become an impenetrable barrier for plaintiffs with limited resources or restricted circumstances." The court also stated that it did not intend to "suggest that every plaintiff must engage in such sophisticated and refined testing (including crash-testing) as to preclude a successful suit for damages for all but the wealthiest of plaintiffs," but defendants far and wide will be citing Oddi and Pride in support of the argument that Daubert has precisely that effect. To the extent that the courts are likely to be sympathetic at all to the economic issues, they are more likely to be receptive to a personal injury plaintiff up

against a large product manufacturer, and less likely to sympathize with a subrogated property insurer.

2. Fire investigators are now under heightened scrutiny.

In Weisgram v. Marley, 169 F.3d 514 (8th Cir. 1999), the appellate court reversed a verdict in favor of the plaintiffs in a fire case, holding that the jury's verdict was unsupportable as a matter of law. Three expert witnesses had testified in support of the plaintiffs' theory that a malfunction of an electric heater manufactured by the defendant had caused the fire. The Eighth Circuit held that each of the experts should have been excluded by the trial court. Because the Weisgram decision was handed down shortly before the Supreme Court's decision in Kumho Tire, the Eighth Circuit did not base its decision on a strict application of the Daubert factors. However, the court did criticize the plaintiffs' technical experts for failing to test their theories.

The Weisgram decision also criticized the supposed lack of sufficient physical evidence to support the experts' opinions as to the cause of the fire. In the absence of such physical evidence, the court felt that expert testimony that a heater malfunction was the only plausible cause for the fire was too speculative.

Putting aside the question whether more could have been done to bolster the plaintiffs' experts' theories in Weisgram, the fact is that a fire will typically destroy much of the physical evidence that would tend to prove its cause. That is why the "process of elimination" methodology is a "generally accepted" method that has long been used by fire investigators in order to establish the cause of a fire. "Where a fire investigator identifies the cause of the fire in terms of probabilities (as opposed to mere possibilities) by eliminating all but one reasonable potential cause, such testimony is highly probative." Breidor v. Sears, Roebuck and Co., 722

F.2d 1134, 1138 (3d Cir. 1983). However, Weisgram, which is currently a controlling precedent in a federal judicial circuit which encompasses Missouri, Iowa, Minnesota, Nebraska, and the Dakotas, will inevitably be cited by defendants in those jurisdictions and elsewhere as authority for exclusion of expert testimony in every case where there is allegedly insufficient physical evidence of the cause of a fire.

The best precaution that fire investigators can take to avoid potential preclusion of their opinions is to follow applicable provisions of NFPA 921, the "Guide for Fire and Explosion Investigations." NFPA 921 is the one publication that approaches "general acceptance" in the field of fire investigation, and it has undergone a "peer review" process in the fire investigation community, even though virtually any fire investigator who is familiar with NFPA 921 likely has reservations about at least certain provisions. NFPA 921 encompasses over 140 pages of dense, two-column text, so it is no small feat to become conversant with all of its provisions. However, opposing attorneys in any case where the cause of a fire is at issue can be expected to seek out clear deviations from the provisions of NFPA 921 as a basis for attempting to exclude a fire investigator's testimony. The key is to anticipate this strategy, and (1) to hire investigators who are familiar with NFPA 921 and who are prepared to explain their investigation and analysis within the context of its provisions; and (2) to discuss the investigator's activities and findings before the fire scene is released for demolition or reconstruction, to verify that the key requirements of NFPA 921 have been considered and addressed.

3. Trial judges do not have unfettered discretion to exclude expert testimony.

In a rare positive development in the field, a recent decision of the Seventh Circuit (which encompasses Illinois, Indiana, and Wisconsin), reversed a trial court ruling excluding

expert testimony under Daubert, demonstrating that there are at least some limits on the trial judge's discretion. Smith v. Ford Motor Company, 215 F.3d 713 (7th Cir. 2000). In Smith, the trial judge had apparently ruled that the testimony of two engineers in a product liability case against Ford was inherently unreliable, because neither expert had had his work published in a peer reviewed journal. The Seventh Circuit held that the trial court had abused its discretion by excluding the expert testimony on this basis alone, since there were many potential reasons why an expert's findings in a particular case would not be subject to peer review, particularly if they involved techniques or methodology that was already generally accepted in the field. 215 F.3d at 720-721.

C. Daubert in the State Courts

Daubert and Kumho involve interpretation of the Federal Rules of Evidence, which are applicable only in the federal courts. Therefore, the U.S. Supreme Court's Daubert and Kumho decisions, and other decisions regarding admission of expert testimony in the federal courts, have no binding effect in the state courts.

However, the state courts do not necessarily provide a refuge from Daubert. Like their counterparts on the U.S. Supreme Court, many state appellate judges have also felt compelled to wrestle with the tangle of social, scientific, and legal issues posed by so-called "junk science" in the courtroom. Thus, the Ohio and Indiana appellate courts have effectively adopted Daubert. Miller v. Bike Athletic Co., 80 Ohio St.3d 607, 687 N.E.2d 735 (1998); Hottinger v. Tru Green, 665 N.E.2d 593 (Ind. App. 1996); Ford Motor Co. v. Ammerman, 705 N.E.2d 539 (Ind. App. 1999).

Illinois, Michigan, and Minnesota all continue to follow the old Frye "generally accepted" standard, but all have also imposed additional requirements in an attempt to ensure that expert testimony is "reliable." People v. Mehlberg, 249 Ill. App.3d 499, 618 N.E.2d 1168 (5th Dist. 1993); Harris v. Cropmate Co., 302 Ill. App.3d 364, 706 N.E.2d 55 (4th. Dist. 1999); Anton v. State Farm Mutual Auto Insurance, 238 Mich. App. 673, 607 N.W.2d 123 (1999); Goeb v. Tharaldson 615 N.W.2d 800 (Minn. 2000). Typical expert testimony in fire litigation, if grounded in a sufficient factual basis, should fare well under such standards.

Finally, the Iowa and Wisconsin courts have explicitly rejected Daubert in favor of a more liberal approach to admission of expert testimony. Johnson v. Knoxville Community School District, 570 N.W.2d 633, 636 (Iowa 1997); Green v. Smith, 617 N.W.2d 881 (Wis. App. 2000).

D. What is the Ultimate Impact of Daubert and Kumho on Subrogation Recoveries?

Because plaintiffs bear the burden of proof, the brunt of the Daubert/Kumho doctrine falls more heavily on plaintiffs than on defendants. Plaintiffs in subrogation cases almost invariably need expert testimony to win, or even to get to the jury. Defendants, on the other hand, have no obligation to prove anything, and can often successfully defend a case without an expert.

Over the past decade or so, those of us who work in the field of subrogation recoveries have hopefully become aware of the increasing demands that are being imposed by virtue of the ever expanding evidence spoliation doctrine and, like it or not, have resigned ourselves to the delays, inconvenience, and expense associated with complying with those demands. Similarly, we must now become familiar with the new demands of the Daubert doctrine and, like it or not,

understand how Daubert is going to affect subrogation recoveries. Many cases that would previously have been regarded as marginal but at least worthy of "taking a shot" should now no longer be pursued, because they simply cannot be pursued successfully or cost-effectively. Some other cases where there previously would have been a high likelihood of securing a significant recovery will instead be dismissed by the court.

Of course, most subrogation cases that would have gotten to the jury before Daubert will still get to the jury in the post-Daubert era, but it will often require considerably more expense and effort to shoehorn our experts' opinions into the requirements imposed by the Daubert decision. Opinions shot from the hips of "jack of all trades" experts will simply no longer carry the day. Many of these experts, who did have a certain useful role to play in the pre-Daubert era, will probably now have to find a new line of work.

E. Is There Any Good News?

Unless you are an expert or own stock in a forensic engineering firm, the prospect of spending more money on experts in order to pursue recoveries on fewer viable cases hardly seems like a cheery scenario. On the other hand, the costs that will now be incurred in order to ensure that worthy cases withstand Daubert scrutiny should make those cases more persuasive and, hopefully, more valuable. While there may be no "reliable" methodology for weighing the cost of Daubert compliance against its benefits, since we have no choice in the matter, we can at least hope that the additional costs involved will ultimately be offset by increased recoveries on meritorious cases.