Alert
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Subrogation & Recovery Alert
News Concerning Recent Subrogation and Recovery Issues

COZEN O'CONNOR

Federal Judges "Weigh In" on Expert Testimony

As counsel pursuing your subrogation claims, we have to deal with fact witnesses and experts in every case placed in suit. Cases filed in, or removed to, federal court face frequent challenges under *Daubert* and Federal Rule of Civil Procedure 702 to our experts' qualifications, opinions or both. Attacking the expert testimony, or the fact testimony upon which an expert bases his opinions, can result in an adverse ruling. Defendants usually have nothing to lose in filing such motions. Some judges have applied *Daubert* aggressively to preclude experts in subrogation cases. Summary judgment was then granted because the plaintiff could not prove his or her case. Two recent decisions by district court judges in Philadelphia and one by the 4h Circuit in Richmond are encouraging to subrogation professionals because the challenges went to the weight rather than admissibility of the testimony.

In *Lewis v. Lycoming*, 2015 U.S. Dist. Lexis 175967 (E.D. Pa. Dec. 22, 2014), the court dealt with a *Daubert* challenge to experts in a product defect claim involving a helicopter crash. The defendant contended two experts were not qualified because they were mechanics, not engineers, they lacked experience designing aircraft parts, and did not perform sufficient testing.

In *Dalton v. McCourt Electric LLC*, 2015 WL4086668 (E.D. Pa. July 7, 2015), the challenge to plaintiff's electrical expert occurred in a fire case that caused substantial losses to real and personal property. The defendant contended that the testimony of the experienced electrical expert should be stricken, and summary judgment granted, because the methodology he followed was severely flawed. In particular, the defense claimed that the expert performed no testing of any hypothesis as required by NFPA 921.

In the third opinion, *Hodges v. Federal-Mogul Corp.*, No. 14-1333, 2015 U.S. App. Lexis 11765 (4th Cir. July 8, 2015), the U.S. Court of Appeals for the 4th Circuit, in an unpublished opinion, vacated a grant of summary judgment to a defendant in a claim involving an explosion and fire that caused severe personal injuries in addition to property damage. The district court in Virginia had granted the defendant's *Daubert* motions and granted summary judgment primarily because it found the testimony of a critical eye witness to be "physically impossible."

The 4th Circuit held that the trial judge improperly decided the credibility of testimony that should have been left to the jury. As such, the grant of summary judgment was vacated. The court noted in a footnote that, in light of its ruling, the exclusion of the fire cause and origin opinions "may well warrant a full reassessment."

The district court judges in *Lewis* and *Dalton* both rejected attempts to impose rigid standards on experts for physical testing. Judge Bartle in *Lewis* also observed that any gap regarding qualifications of the experts as mechanics went to the weight and not the admissibility based upon their training and experience. Defendant was certainly entitled to point out to the jury at trial that they were not engineers. The defendant also challenged the testimony of the experts because they did not reach a single cause theory. Judge Bartle rejected that attack because further testing to isolate a cause may have damaged the evidence and such specificity was not required in any event under the law.

In *Dalton*, Judge Rebreno likewise rejected the attacks on the plaintiff's expert. The court recognized that the expert's ability to test his own defect hypothesis was limited by the destruction of the very evidence that might have supported it; he could also support his conclusion by ruling out the only other available theory of potential cause. Contrary to the defendant's claims, the expert did develop a testable hypothesis, albeit one understandably limited by the destruction of the evidence, and he applied the generally accepted method of using deductive reasoning to narrow down alternative explanations. Judge Rebreno noted that even if conducting a particular physical

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test may have rendered the expert's opinion "more" reliable, that does not mean that without such testing the opinion is unreliable. Again, the defendant's criticisms went to the weight rather than the admissibility of the evidence.

While these three recent decisions by themselves do not signal a trend, they are certainly welcome ammunition to fend off the *Daubert* attacks we face in taking your subrogation claims to trial.

For additional information on expert testimony, please feel free to contact any Subrogation attorney at Cozen O'Connor.