

Kuhmo Tire and the Admissibility of Expert Testimony

By Kenneth M. Dennis
Bankruptcy Analyst
United States Trustee Program
San Diego

The United States Supreme Court's recent ruling in Kuhmo Tire Company, Ltd., v. Carmichael, 119 S.Ct. 1167 (1999), erased lingering doubts about whether "technical" expert testimony and "scientific" expert testimony are subject to the same standards of admissibility in federal court. In Kuhmo Tire the Court ruled that the "gatekeeping obligation" established in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), which requires an inquiry into both relevance and reliability, applies not only to scientific testimony but to all expert testimony. It is now clear that the Daubert test applies to the testimony of accounting experts under the Federal Rules of Evidence.

Expert Testimony

Federal Rule of Evidence 702 authorizes trial judges to allow expert testimony. The rule states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Before the Daubert decision, expert testimony was primarily evaluated for admissibility by using the "general acceptance" test set forth in Frye v. United States, 293 F. 1013 (App. D.C. 1923). Under that test, expert opinion based on scientific technique was inadmissible unless the technique was generally accepted as reliable in the relevant scientific community.

In Daubert, the plaintiffs sued to recover for limb reduction birth defects that were allegedly sustained as a result of the mothers' ingestion of the anti-nausea drug Bendectin. To support their case, the plaintiffs presented eight scientific expert witnesses. After extensive discovery, the defendant pharmaceutical company moved for summary judgment, contending that Bendectin did not cause birth

defects in humans and that the petitioners would be unable to come forward with any admissible evidence that it did. The District Court for the Southern District of California granted summary judgment, concluding that the plaintiffs' evidence did not meet the general acceptance standard for the admission of expert testimony. Daubert v. Merrell Dow Pharmaceuticals, Inc., 727 F. Supp 570 (1989). The Court of Appeals for the Ninth Circuit affirmed, basing its decision in part on Frye. Daubert v. Merrell Dow Pharmaceuticals, Inc., 951 F.2d 1128 (1991).

The Supreme Court vacated and remanded the decision. The Court held that:

(1) "General acceptance" is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence, and

(2) The Federal Rules of Evidence assign to the trial judge the task of ensuring that expert testimony both rests on a reliable foundation and is relevant to the task at hand.

509 U.S. 579, 597.

The Daubert Court suggested the following four factors to be considered in assessing the reliability of expert testimony:

(1) Whether a "theory or technique ... can be (and has been) tested";

(2) Whether the theory or technique "has been subjected to peer review and publication";

(3) Whether, in respect to a particular technique, there is a high "known or potential rate of error" and whether there are "standards controlling the technique's operation"; and

(4) Whether the theory or technique enjoys "general acceptance" within a "relevant scientific community."

Id. at 594.

The Court also emphasized in Daubert that the inquiry envisioned by Rule 702 is a flexible one.

Its overarching subject is the scientific validity--and thus the evidentiary relevance and reliability--of the principles that underlie a proposed submission. The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.

Throughout, a judge assessing a proffer of expert scientific testimony under Rule 702 should also be mindful of other applicable rules.

Id at 594-595.

Expansive Interpretation

Daubert clearly established that "general acceptance" was no longer the standard for the admission of scientific expert testimony. It remained unclear, however, whether Daubert applied to all experts or just to scientific experts. This issue was resolved by the Supreme Court's decision in Kuhmo Tire.

In Kuhmo Tire, the question before the Court was whether the Daubert test applied to a tire failure analyst. Kuhmo Tire involved a tire blow-out that caused a vehicle to overturn, killing one passenger and injuring others. The tire failure analyst intended to testify that the tire failure was the result of a manufacturer's defect. Using the Daubert factors, the trial judge excluded the tire failure analyst's testimony. Carmichael v. Samyang Tire Inc., 923 F.Supp. 1514 (S.D. Ala. 1996).

The plaintiffs filed a motion for reconsideration. On reconsideration, the trial court agreed with the plaintiffs that the four Daubert factors were illustrative and that other factors could argue in favor of admissibility. The trial court affirmed its original decision because it found insufficient indications of the reliability of the tire expert's methodology.

The Court of Appeals for the Eleventh Circuit reversed, noting that the Supreme Court in Daubert explicitly limited its holding to cover only the "scientific context," and that "a Daubert analysis applies only where an expert relies on the application of scientific principles, rather than on skill- or experience-based observation." Carmichael v. Samyang Tire Inc., 131 F.3d 1433 (1997).

The tire manufacturer and distributor appealed to the Supreme Court. Eighteen amicus briefs were filed, reflecting the legal community's concern that the Supreme Court's decision could have a significant effect on litigation. Some amici argued that the Daubert test would limit expert testimony that relies on specialized knowledge derived from experience when such knowledge cannot be corroborated by "objective" tests; conversely, others contended that such testimony should be subjected to the Daubert test to preserve the integrity of the system.

The Kuhmo Tire Court held that Daubert applied to all expert testimony and that the trial court did not abuse its discretion by applying Daubert to exclude the tire failure analyst's testimony. 119 S. Ct. 1167, 1170-78 (1999). The Court also noted that the four factors suggested in Daubert were factors that "may" be used by the trial judge in carrying out its gatekeeping requirement. Id. at 1175. The Kuhmo Court emphasized that the trial judge was not required to use each factor in making its decision.

To say this is not to deny the importance of Daubert's gatekeeping requirement. The objective of that requirement is to ensure the reliability and relevancy of expert testimony. It is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field. Nor do we deny that, as stated in Daubert, the particular questions that it mentioned will often be appropriate for use in determining the reliability of challenged expert testimony. Rather, we conclude that the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable. That is to say, a trial court should consider the specific factors identified in Daubert where they are reasonable measures of the reliability of expert testimony.

Id. at 1176.

Conclusion

It is not yet clear whether Kuhmo Tire, by clarifying Daubert's applicability, has created a higher or lower

standard for non-scientific expert testimony. As a result, attorneys may attempt to use Daubert as a weapon against accountants' expert testimony, especially testimony that falls into the gray areas between accounting and other disciplines such as economics.