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Litigation Alert

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Expert Witness Testimony After *Kumho Tire*: The Federal Courts and New York State Courts Diverge

The United States Supreme Court, in a case entitled *Kumho Tire Co. v Carmichael*,[1] on March 23, 1999 issued a decision concerning the admissibility of expert opinion testimony under the Federal Rules of Evidence which will have profound consequences for every type of litigation in federal courts that requires the testimony of experts. Although *Kumho Tire* applies only in the federal courts, the Court's decision has enormous significance for parties involved in New York litigation. While the decision in *Kumho Tire* resolved a split of authorities among the federal circuit courts and brought uniformity to the federal court system, the Court's decision at the same time expanded the profound schism *between* the federal courts and the courts of the State of New York in the ways those court systems treat expert opinion testimony. This disparity between federal courts and the state courts in New York in the admissibility of expert testimony will prove to be so pronounced that in many types of cases the plaintiff's choice between filing in a federal district court or a New York State court – or the defendant's choice whether or not to remove a case to federal court if it can – will determine which side wins or loses the case.

To set the *Kumho Tire* decision in context, we must go back six years. The Supreme Court, in a celebrated decision in 1993, *Daubert v Merrell Dow Pharmaceuticals, Inc.*,[2] had ruled that when *scientific* opinion testimony is offered, a federal district judge must act as a "gatekeeper" and evaluate the reliability of the scientific expert's specialized knowledge and the methodology he employed in forming his opinions before admitting his opinion into evidence. Reliability of the purported scientific knowledge and methodology after

Daubert became the litmus test of admissibility in the federal courts, and the *Daubert* decision listed a number of factors the federal district court could consider in deciding whether the expert's knowledge was in fact reliable. Since the decision in *Daubert*, literally hundreds of decisions have been reported in the federal courts in which a party's proffered expert was not permitted to testify because his scientific or other specialized knowledge and methodology were found to be unreliable by the district judge applying the *Daubert* factors. Many times, the preclusion of the expert's opinion left the party unable to prove its case, and summary judgment or a directed verdict against that party immediately ensued from a *Daubert* finding of unreliability. Thus, *Daubert* motions frequently determined the outcome of a federal case.

But the *Daubert* decision in 1993 could be read to be limited by its facts to scientific opinions only. Indeed, ever since *Daubert*, the federal district courts and circuit courts of appeal had been divided as to whether the same gatekeeping principle should apply to other experts, ranging from technical (but not scientific) experts to economic, accounting, handwriting and a host of other types of experts. Several circuit courts even held that if an expert does not purport to rely on any specialized methodology, but merely bases his opinion on practical experience in his field of expertise, the trial judge should play no role as gatekeeper. As a result, the critical question of whether an expert would be permitted to testify in a federal trial was answered differently in various federal circuits. If a litigant in federal court after *Daubert* needed to rely on expert testimony, geography could be destiny.

Before *Kumho Tire*, the federal district courts located in New York were governed by decisions of the Second Circuit which held that *Daubert* applied only to scientific opinion testimony and not to other kinds of opinion.[3] Thus, federal district court judges in the Second Circuit would not subject the opinions of non-scientific experts to a *Daubert* reliability analysis. In *Kumho Tire*, however, the Supreme Court adopted the contrary views of several other circuits. The Court in *Kumho Tire* clearly held that henceforth all experts of any kind in the federal courts shall be allowed to give opinion testimony only after the district judge performs his role as a gatekeeper to bar the introduction of opinions based on unreliable specialized information or methodology, and determines that the expert's opinion is in fact reliable and trustworthy. But

since the courts of the State of New York are bound to apply its common law rules of evidence and not the Federal Rules of Evidence, the New York State courts do not follow the teachings of *Daubert* or *Kumho Tire*. Thus, for parties who must litigate in either a New York federal or a New York State court, the choice of forum can still determine the litigant's destiny.

The current practice in New York State courts concerning the admissibility of expert testimony could hardly present a starker contrast to the procedures that now prevail in every federal district court throughout the country. In New York, the trial judge, at least in jury trials, does *not* make a determination as to the reliability of the specialized knowledge underlying an opinion to be offered by an expert. Instead, a New York State trial judge focuses on whether the expert is sufficiently *qualified* to be permitted to offer an opinion. Thus, a New York State trial judge, at least in jury trials, merely makes a finding that the supposed expert does or does not possess sufficient education, knowledge or experience of a specialized nature so as to be considered an expert. Unlike a federal district judge, the New York trial judge (in a jury trial) has no authority to evaluate the reliability of the expert's field of specialized knowledge. This profound difference between the federal courts and New York State courts exists because the New York State courts *assume* from the fact that an expert is "qualified" that the opinions he will impart from the witness stand are sufficiently reliable to be presented to a lay jury.[4] In New York State courts, the expert's "admission ticket" to the witness stand is his possession of qualifications, while in federal court the admission ticket is having trustworthy and reliable specialized knowledge and methodology.

In New York State courts, any judgment as to the reliability and trustworthiness of the expert's specialized knowledge is implicitly delegated to the jury, which is merely instructed to decide how much "weight" to give to the expert's opinion. Unlike in federal courts, there is no gatekeeper in New York State courts whose role it is to prevent the jury from receiving unreliable opinion testimony. While New York law implicitly permits the jury to assess the reliability of the expert's body of specialized knowledge, any such assessment, if it is performed at all by the New York jury, will be done in a far less rigorous manner than in the federal courts, where the district judges can and frequently do hold extensive

preliminary hearings in which they take evidence and hear argument on the question of reliability before the jury is permitted to hear opinion testimony. In practice, federal district judges examine proffered expert testimony with vastly deeper scepticism than do lay juries, and the danger of bogus opinions determining the outcome of a case is therefore much greater in New York State courts.

Another profound difference now established between the federal courts and New York State courts in the wake of *Kumho Tire* concerns whether mere "practical experience" can form the basis of admissible expert opinion. Indeed, the tire expert ultimately precluded in *Kumho Tire* explicitly sought to base his opinion on his experience examining tires, rather than on accepted scientific techniques of analyzing tire failures. Since he had extensive experience in examining failed tires, a New York State court would have found him "qualified" and permitted him to give an opinion based on his practical experience. That is because in New York State courts, practical experience, as opposed to formal education or systematic study, can be enough to qualify a person as an expert,[5] and thus confer on his opinions the presumption of reliability, which, in New York State courts, follows from the mere possession of qualifications by the expert. Thus, in New York State courts, so-called experts are routinely permitted to offer opinion testimony based only on practical experience of a specialized nature from which they have drawn a subjective belief concerning an issue in the case. A New York State court expert is not required to justify his subjective belief with any intellectually defensible methodology or analysis before presenting it to the jury. Once he is found "qualified," his beliefs are presumed reliable enough to be presented to the jury, which will determine how much weight to give them.

In contrast, in the federal courts after *Kumho Tire,* practical experience alone will not establish that the expert has specialized knowledge that is sufficiently reliable for his opinion to be admissible. In the federal courts now, knowledge based on practical experience that is systematically organized and rigorously tested as to its validity may yet be found sufficiently reliable and trustworthy to support expert opinion. But after *Kumho Tire*, opinion testimony of a purported expert that is based only on subjective belief will not be admissible, no matter how extensive is the expert's practical experience. The federal district judges will now require experts of every

type in federal cases to base their opinions on methodologies that are sufficiently intellectually rigorous to assure the trial judge that they are reliable. However, while an expert whose opinion smacks of subjectivity will not be heard in federal court, he may well be permitted to offer that same opinion in a New York State court.

The broad distinction between the treatment of expert opinion in the federal courts and New York State courts described above needs one further refinement with respect to a narrow category of expert testimony: *novel* scientific evidence. This type of evidence, such as DNA profiling analysis or voiceprint identification, has particularly troubled the criminal courts of the State of New York, and special rules have been developed for novel scientific evidence that also differ from the federal rules. In New York State, when novel scientific evidence is offered for the first time in the state court system, the trial judge – usually in a criminal case but occasionally also in a civil case[6] – must be satisfied that, in addition to the expert's possessing scientific qualifications, the novel scientific evidence on which his opinion is based has gained general acceptance in the relevant scientific community.[7] This so-called *Frye* test, interestingly, is based upon a 1923 federal case, *Frye v United States*,[8] that the Supreme Court in *Daubert* held to be superseded by the 1974 adoption of the Federal Rules of Evidence. Thus, as they apply an outdated criterion to novel scientific evidence, the New York State courts evaluate the reliability of such evidence by "counting the votes" of the scientific community, rather than by conducting a reasoned analysis of the logical soundness of the scientific methodology, as is now done in federal courts. Moreover, once a New York State court has found that novel scientific evidence passes the *Frye* test of general acceptance, all New York courts in subsequent cases can take judicial notice of its general acceptability.[9] No such doctrine has arisen in the federal court as yet in the wake of *Daubert* and *Kumho Tire*. In each federal case, the litigants can challenge *de novo* whether a given body of specialized knowledge is not sufficiently reliable or trustworthy because it is not based on intellectually rigorous foundations.

The implications of the schism created by *Daubert* and *Kumho Tire* between the state and federal courts for parties engaged in litigation in New York are clear. Today, almost every lawsuit involves expert testimony, if not on

questions of liability, then on damages issues. If a party's position is supported by well-founded expert opinion and the opposing party's position is not, then clearly the party finding support in reliable expert opinion should either seek to commence the litigation itself in federal court or, if named as a defendant in the New York State courts, remove it to federal court, provided some ground for removal jurisdiction exists. Where there are codefendants, the consent of the other defendants to the removal is required, and this must be obtained in writing within 30 days of receiving notice of the claim being filed in a New York State court. Thus, defendants brought into the State courts in New York who desire the protections of the *Kumho Tire* decision will have to act rapidly to take the necessary action to get their cases into the forum where reliable expert opinion will be received and unreliable opinion will be rejected.

In *Kumho Tire*, the Supreme Court gave federal trial judges a strong mandate to exclude "expertise that is fausse and science that is junky."[10] The fact that the New York courts in the past borrowed the *Frye* rule from the federal courts for assessing novel scientific evidence may provide some hope that they will gradually embrace the enlightened approach to expert testimony established for all expert opinions in federal courts in the *Kumho Tire* and *Daubert* decisions. But for now, the New York State courts will regrettably remain an oasis where opinions based upon bogus science and unfounded subjective beliefs are received in evidence, and thus can determine the outcome of substantial litigation.

If you have an questions regarding this or related issues, please feel free to contact any other Vedder Price attorney with whom you have worked.

[1]143 L. Ed. 2d 238.

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[2]509 U.S. 579 (1993).

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[3]*See, Iacobelli Construction, Inc. v County of Monroe*, 32 F.3d 19 (2d Cir. 1994).

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[4]*Matott v Ward*, 48 N.Y.2d 455 (1979).

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[5]*Caprara v Chrysler Corporation*, 52 N.Y.2d 114 (1981).

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[6]*See*, *Castrichini v Rivera*, 669 N.Y.S.2d 140 (Monroe Co. 1997).

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[7]*People v Wesley,* 83 N.Y.2d 417 (1994).

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[8]293 F. 1013 (D.C. Cir. 1923).

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[9]*People v Wesley, supra*.

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[10]143 L. Ed. 2d 238 (concurring opinion of Justice Scalia).

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