IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

MINE SAFETY APPLIANCES COMPANY,	)	
Plaintiff,	)	C.A. No. N10C-07-241 MMJ
v.	)	
AIU INSURANCE COMPANY, et al.	)	
Defendants.	)	

Submitted: June 4, 2015
Decided: August 4, 2015
Redacted: October 1, 2015

MSA's Motion to Preclude Dr. Neil A. Doherty
from Offering Expert Opinions
GRANTED

Hartford Defendants' Motion to Strike
Expert Opinions of Dennis R. Connolly
GRANTED IN PART, DENIED IN PART

AIG Insurers' Motion to Bar Expert Dennis R. Connolly
from Providing Opinions on Issues of Law
and to Strike Certain Factual Narratives
GRANTED IN PART, DENIED IN PART

MSA's Motion to Strike Portions
of the Expert Reports and Deposition Testimony
of Thomas F. Segalla and to
Preclude Mr. Segalla from Testifying at Trial
Regarding the Stricken Portions of his Opinion
GRANTED

MSA's Motion to Strike Portions
of the Expert Reports and Deposition Testimony
of John Goldwater and to
Preclude Mr. Goldwater from Testifying at Trial
Regarding the Stricken Portions of his Opinion
DENIED AT THIS TIME
AS NOT YET RIPE FOR DETERMINATION

North River's Motion to Strike Reports and Testimony
of MSA's Proposed Expert, Jeffrey Posner
DENIED AT THIS TIME
AS NOT YET RIPE FOR DETERMINATION

Hartford Defendants' Motion to Strike Certain Portions
of the Expert Report of Catherine Mohan
DENIED

North River's Motion to Strike Portions
of Robert A. Haney's Expert Report
and to Preclude Certain Expert Testimony
GRANTED

Hartford Defendant's Motion to Strike
Expert Report of Paul David McKnight
DENIED

MEMORANDUM OPINION

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Peter B. Ladig, Esq., David J. Soldo, Esq., Meghan A. Adams, Esq, Morris James LLP, Alan S. Miller, Esq., Henry M. Sneath, Esq., Bridget M. Gillespie, Esq., Katherine C. Dempsy, Esq., Picadio Sneath Miller & Norton, PC, Dennis O. Brown, Esq., Gordon & Rees LLP, Attorneys for The North River Insurance Company

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* Opinion was originally Filed Under Seal. The Confidential material contained herein has been redacted.

JOHNSTON, J.

On June 4, 2015, the Court heard oral argument on several motions relating to proposed expert testimony. Certain legal principles apply to all of the pending motions.

Delaware Rule of Evidence 702: Admissibility of Expert Testimony

Delaware Rule of Evidence 702 governs the admissibility of expert testimony and permits the presentation of "scientific, technical or other specialized knowledge" if it "will assist the trier of fact to understand the evidence or to determine a fact in issue."[1] To be admissible, the testimony must be: (1) based upon sufficient facts or data; (2) the product of reliable principles and methods; and (3) the witness must have applied the principles and methods reliably to the facts of the case.[2]

D.R.E. 702 is substantially similar to Federal Rule of Evidence 702. In *M.G. Bancorporation v. LeBeau*,[3] the Delaware Supreme Court followed the United States Supreme Court's interpretation of F.R.E. 702 in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[4] In *Daubert*, the United States Supreme Court held that F.R.E. 702 requires trial judges to ensure that all expert testimony is not only

[1] D.R.E. 702.
[2] *Id.*
[3] 737 A.2d 513, 521-22 (Del. 1999).
[4] 509 U.S. 579 (1993).

relevant, but reliable.[5]

To fulfill the role of gatekeeper, the trial judge must determine whether:

1. the witness is qualified as an expert by knowledge, skill, experience, training or education;

2. the evidence is relevant and reliable;[6]

3. the expert's opinion is based upon information reasonably relied upon by experts in the particular field;

4. the expert testimony will assist the trier of fact to understand the evidence or to determine a fact in issue; and

5. the expert testimony will not create unfair prejudice or confuse or mislead the jury.[7]

A trial judge must determine "whether an expert's testimony has a reliable basis in the knowledge and experience of the relevant discipline."[8] Just because an expert is qualified in a field does not automatically make the opinion reliable.[9] Expert knowledge requires more than unsupported speculation.[10] The trial judge must determine whether the expert, though qualified, can produce a sufficiently informed opinion that is testable and verifiable.[11] Only after the trial judge

[5] *Id.* at 589.
[6] *Id.* at 590-94.
[7] *Bowen v. E.I. DuPont de Nemours & Co*., 906 A.2d 787, 795 (Del. 2006).
[8] *Id.* at 794.
[9] *Eskin v. Carden*, 842 A.2d 1222, 1228 (Del. 2004); *see also Goodridge v. Hyster Co.*, 845 A.2d 498, 503 (Del. 2004).
[10] *Daubert*, 509 U.S. at 590.
[11] *Eskin*, 842 A.2d at 1228; *see also Daubert*, 509 U.S. at 593 (noting that whether a theory or

determines that the expert proffers a "relevant, reliable, validated, and therefore, trustworthy" opinion, can the expert offer the opinion to the jury and be subject to cross-examination.[12]

The *Daubert* Court provided a nonexhaustive list of factors for trial judges to consider in determining whether expert testimony is sufficiently reliable:

1. whether a theory or technique can or has been tested;

2. whether it has been subjected to peer review and publication;

3. whether a technique has a high known or potential rate of error and whether there are standards controlling its operation; and

4. whether the theory or technique enjoys general acceptance within a relevant community.[13]

"The party seeking to introduce the expert testimony bears the burden of establishing its admissibility by a preponderance of the evidence."[14]

Delaware case precedent in the last decade has clarified that expert witnesses are prohibited from providing legal opinions. An expert witness' legal interpretation of documents defining the parties' legal obligations "is of no value to

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technique will assist the trier of fact as scientific knowledge will often depend upon whether it can and has been tested).

[12] *Potter v. Blackburn*, 850 A.2d 294, 299 (Del. 2004) (quoting *Mason v. Rizzi*, 2004 WL 439690, at *4 (Del.)).

[13] *Daubert*, 509 U.S. at 590-94; *see also Gen. Motors Corp. v. Grenier*, 981 A.2d 531, 544-45 (Del. 2009).

[14] *Bowen*, 906 A.2d at 795.

the Court."[15] Interpretation of the legal principles that determine the parties' duties and obligations, is a matter exclusively for the Court.[16] Further, legal conclusions cannot be cloaked as industry custom and usage, in order to gain admissibility.[17]

MSA's Motion to Preclude Dr. Neil A. Doherty from Offering Expert Opinions

The AIG Insurers ("AIG")[18] have retained Neil A. Doherty, Ph. D. as an expert on a method by which an "all sums" allocation could be applied to Mine Safety Appliances Company's ("MSA") coverage and claim portfolio. During argument, the parties concurred that the admissibility of such testimony is an issue of first impression in Delaware. Additionally, Dr. Doherty has not testified on "all sums" allocation in any other jurisdiction.

In his rebuttal expert report dated October 20, 2014, Dr. Doherty stated:

[REDACTED]

[15] *See In re Walt Disney Co. Derivative Litigation*, 907 A.2d 693, 740-41 (Del. Ch. 2005), *aff'd*, 906 A.2d 27 (Del. 2006).
[16] *Id. See Forsythe v. ESC Fund Mgmt. Co.*, 2010 WL 1676442, at *2 (Del. Ch.); *United Rentals, Inc. v. RAM Holdings, Inc.*, 2007 WL 4465520, at *1 (Del. Ch.); *Cantor v. Perelman*, 2006 WL 3462596, at *4 (D.Del.).
[17] *Walt Disney*, 907 A.2d at 741.
[18] The AIG Insurers are American Home Assurance Company, Granite State Insurance Company, Insurance Company of the State of Pennsylvania, Lexington Insurance Company, National Union Fire Insurance Company of Pittsburgh, PA, AIU Insurance Company, Chartis Property Casualty Co f/k/a Birmingham Fire Insurance Co.

The Court finds that Dr. Doherty's suggested protocol constitutes a legal opinion as to how the "all sums" provision in the relevant insurance contracts should be interpreted and implemented.

Additionally, the protocol is a suggested methodology that appears to have been formulated for purposes of this litigation. The *Daubert* analysis requires that the opinion be based upon information reasonably relied upon by experts in the particular field.[19] Reliability is determined in part by whether the theory has been subjected to peer review and publication and whether the theory or technique enjoys general acceptance within the relevant expert community.[20] The proffered testimony does not meet these *Daubert* standards.

Therefore, Dr. Doherty's testimony may not be considered by the trier of fact–in this case, the jury.

MSA's Motion to Preclude Dr. Neil S. Doherty from Offering Expert Opinions is hereby GRANTED.

Nevertheless, is it possible that Dr. Doherty's suggested methodology might be of assistance to the Court in considering and determining the legal issue of "all sums" allocation.

[19] *Daubert*, 509 U.S. at 590.
[20] *Id*. at 590-94.

Hartford Defendants' Motion to Strike
Expert Opinions of Dennis R. Connolly

and

AIG Insurers' Motion to Bar Expert Dennis R. Connolly
from Providing Opinions on Issues of Law
and to Strike Certain Factual Narratives

MSA has offered Dennis R. Connolly as an expert witness. Mr. Connolly's proposed testimony is in the field of insurance industry custom, and regarding policy underwriting and drafting, claims-handling, policy language, and the nature of the casualty insurance industry. Mr. Connolly previously has testified as an insurance industry expert.

The proffered expert report sets forth opinions on the following topics: (1) interpretation of "follow form" provisions relating to whether an excess policy incorporates or "follows" the coverage provided by other insurance policies; (2) interpretation of policy provisions regarding whether the insured must obtain the insurer's consent before incurring defense costs; (3) interpretation of the effect of policy clauses requiring the insured to cooperate with the insurer in defense of claims and the right to control the defense; (4) claims handling practices; and (5) characterizations of certain facts.

The Court finds that the following are legal opinions, which are inadmissible and may not be considered by the trier of fact:

[REDACTED]

The Hartford Defendants and AIG Insurers also have argued that Mr. Connolly's opinions contain inadmissible recitations of facts, which should be stricken.

An expert is required to state the facts upon which the expert's opinion is based. Those facts must come into evidence through proper fact witnesses. If predicate facts are not offered and admitted, the expert's opinion likely will be deemed to be without the necessary basis, and thus irrelevant. Written expert reports normally are not admitted into evidence and will not be viewed by the jury. Instead, expert reports are marked as Court Exhibits for record purposes.

Therefore, it is not necessary to strike the factual narrative portions of Mr. Connolly's expert report. They will not be admitted as evidence. The enumerated facts will either come into evidence through fact witnesses or not. If not, the Court will address the admissibility of the expert conclusions at that time.

Hartford Defendants' Motion to Strike Expert Opinions of Dennis R. Connolly and the Motion of AIG Insurers to Bar Expert Dennis R. Connolly from Providing Opinions on Issues of Law and to Strike Certain Factual Narratives are hereby GRANTED IN PART AND DENIED IN PART.

MSA's Motion to Strike Portions of the Expert Reports and Deposition Testimony of Thomas F. Segalla and to Preclude Mr. Segalla from Testifying at Trial Regarding the Stricken Portions of his Opinion

North River has offered the expert testimony of Thomas F. Segalla in the field of custom and practice in the insurance industry. MSA has moved to strike certain portions of Mr. Segalla's opinion as inadmissible legal conclusions. North River responded that Mr. Segalla's references to case law constitute evidentiary support for his opinion – that case law informs custom and practice in the insurance industry. Additionally, Mr. Segalla's opinions are in the same category as Mr. Connolly's opinions purporting to be custom and practice.

During oral argument on June 4, 2015, counsel agreed that if the legal opinions of Mr. Connolly were excluded, there would be no reason for Mr. Segalla to testify to rebut those opinions. Having excluded what the Court finds to be legal

opinions by Mr. Connolly, the Court likewise holds that portions of Mr. Segalla's testimony constitute inadmissable legal conclusions.

Therefore, the testimony identified in MSA's Appendix A to Motion to Strike T. Segalla Testimony, will be excluded.

MSA's Motion to Strike Portions of the Expert Reports and Deposition Testimony of Thomas F. Segalla and to Preclude Mr. Segalla from Testifying at Trial Regarding the Stricken Portions of his Opinion is hereby GRANTED.

MSA's Motion to Strike Portions of the Expert Reports and Deposition Testimony of John Goldwater and to Preclude Mr. Goldwater from Testifying at Trial Regarding the Stricken Portions of his Opinion

The AIG Insurers have submitted John Goldwater as an audit/exhaustion expert. Mr. Goldwater performed an audit to determine whether MSA properly allocated certain claims to policies underneath two American Home Insurance Company policies. Mr. Goldwater examined MSA documents to evaluate whether a factual predicate existed to establish the date for each claimant's first toxic exposure while using an MSA product. This audit was deemed necessary to determine proper claim allocation under the continuous trigger theory.

Mr. Goldwater concluded that documentation was insufficient in 391 of the 585 claims paid. Thus, MSA could not prove exhaustion because its claims lack

complete documentation. MSA moved to strike Mr. Goldwater's opinions because he audited claims documentation outside of the sample production ordered by the Court. Only forty-five of the claims were within the sample claims produced.

The Court finds that the issues presented by this motion are inextricably intertwined with questions to be addressed in the pending summary judgment motions. One overarching issue is whether the sample documents produced are statistically significant. It must be determined whether results properly can be extrapolated from the sampling as to all claims. Conversely, if the sampling is statistically insignificant or invalid, MSA may not be able to prevail without litigating the exhaustion issue in reliance on the source documents for each individual claim.

At this point in the proceedings, the Court cannot resolve this motion in isolation. **Therefore, MSA's Motion to Strike Portions of the Expert Reports and Deposition Testimony of John Goldwater and to Preclude Mr. Goldwater from Testifying at Trial Regarding the Stricken Portions of his Opinion is hereby DENIED AT THIS TIME AS NOT YET RIPE FOR DETERMINATION.**

North River's Motion to Strike Reports and Testimony of MSA's Proposed Expert, Jeffrey Posner

MSA retained Jeffrey Posner as an expert on exhaustion and impairment of insurance. Mr. Posner is an insurance and risk management consultant. His specialty is allocation of toxic tort claims, including asbestos. He previously has testified as an expert.

In his report, Mr. Posner [REDACTED]

Mr. Posner based his report on the source documents produced for the sample claims. North River argues that the data relied upon by Mr. Posner is unreliable. Additionally, his methodology is flawed. Finally, the legal assumptions underlying Mr. Posner's conclusions are not applicable to this case.

As with the motion regarding Mr. Goldwater, this motion cannot be fully examined until the underlying issue is resolved. Namely, the Court first must determine whether the sample documents are representative and statistically significant.

North River's Motion to Strike Reports and Testimony of MSA's Proposed Expert, Jeffrey Posner, is hereby DENIED AT THIS TIME AS NOT YET RIPE FOR DETERMINATION.

Hartford Defendants' Motion to Strike Certain Portions of the Expert Report of Catherine Mohan

MSA offered Catherine Mohan as an expert in the field of defending and settling mass and toxic tort claims.

Hartford argues that Ms. Mohan is not qualified as an expert regarding the defense and resolution of silica or coal dust claims because she has no experience with such claims. MSA concedes that Ms. Mohan's experience is largely limited to asbestos claims. Nevertheless, MSA contends that the expert's experience demonstrates sufficient knowledge of general principles regarding the defense and settlement of toxic tort claims, as well as the materials that toxic tort defendants typically provide to substantiate claims for coverage. Further, MSA intends to present evidence that the defense of silica and coal dust toxic tort claims is similar to the defense of asbestos claims.

Hartford also alleges that Ms. Mohan's opinions are deficient for other reasons. [REDACTED] Thus, Ms. Mohan is unable to testify as to certain, continuous and uniform industry custom and practice. Hartford argues that because Ms. Mohan was unable to identify specific defense cost invoices, she is unable to opine on reasonableness.

MSA responds by addressing the factors enunciated in *Daubert*,[21] as adopted by the Delaware Supreme Court.[22] MSA contends that Ms. Mohan is qualified to opine on what tort defendants typically provide to their insurers in support of claims for coverage. She has decades of experience defending and settling mass and toxic tort claims. The reasonableness of MSA's defense and settlement strategy is relevant to this litigation. Ms. Mohan's testimony will assist, and not prejudice, confuse, or mislead the jury. Based on her extensive litigation experience, Ms. Mohan is able to reliably testify as to a reasonable methodology for analyzing defense costs. The circumstance–that insurers have varying requirements for documents and information before agreeing to pay a claim–does not disqualify the expert testimony.[23]

The Court is not persuaded by Hartford's objections to Ms. Mohan's qualifications. Hartford has failed to demonstrate that the defense and settlement of asbestos toxic torts (for example) differs in any substantive or relevant manner from strategies reasonably employed in silica or coal dust claims. The Court finds that Ms. Mohan's proffered testimony meets the *Daubert* standards for admissibility. Hartford's objections more properly are subjects for cross-examination. The issues

[21] *Daubert*, 509 U.S. 579 (1993).
[22] *Bowen v. E.I. DuPont de Nemours & Co.*, 906 A.2d 787, 795 (Del. 2006).
[23] *See Pfizer Inc. v. Advanced Monobloc Corp.*, 1999 WL 743927, at *7 (Del. Super.) (noting that a challenge to uniformity does not disallow custom and practice testimony).

raised by Hartford's motion go to the weight to be accorded to the testimony, not to admissibility.

Hartford Defendants' Motion to Strike Certain Portions of the Expert Report of Catherine Mohan is hereby DENIED.

North River's Motion to Strike Portions of Robert A. Haney's Expert Report and to Preclude Certain Expert Testimony

MSA has proffered Robert A. Haney as an expert on respirable dust and silica in coal mines. Mr. Haney formerly was Chief of the Dust Division of the United States Department of Labor's Mine Safety Health Administration, and is a mining engineer with over forty years of experience. [REDACTED]

North River objects to Mr. Haney on the basis that he is unqualified to render medical, epidemiological or toxicological opinions. Additionally, because Mr. Haney lacks medical expertise, he cannot explain the methodology upon which he relies. Mr. Haney has admitted that his testimony, in part, concerns what he has gleaned from scientific literature, and is not based on any independent knowledge.

MSA counters that Mr. Haney is not offered as an expert on any medical issues. He is not purporting to opine on specific diseases, diagnoses, treatments or conditions. Those topics will be addressed by MSA's medical experts. [REDACTED]

This proffered testimony appears to the Court to be background–setting the stage for the jury. It is not clear that Mr. Haney is intended to present evidence related to any disputed issue. However, no motion is before the Court at this time requesting that the entire expert report be stricken.

The Court finds that Mr. Haney is not qualified as an expert in the fields of medicine, epidemiology, or toxicology. Mr. Haney will not be permitted to testify on the following opinions:

[REDACTED]

North River's Motion to Strike Portions of Robert A. Haney's Expert Report and to Preclude Certain Expert Testimony is hereby GRANTED.

Hartford Defendant's Motion to Strike Expert Report of Paul David McKnight

MSA retained Paul David McKnight to opine on the reasonableness of the "general expenses" it seeks to recover from the insurers. General expenses are defense costs that apply to multiple tort claims. [REDACTED]

As with Ms. Mohan, Hartford objects to Mr. McKnight's qualifications on the basis that his experience primarily is with asbestos claims, not silica and coal dust. For the reasons set forth in the analysis of Ms. Mohan's motion, the Court is not persuaded by this argument. Hartford's objections go to weight, not admissibility.

Hartford Defendant's Motion to Strike Expert Report of Paul David McKnight is hereby DENIED.

IT IS SO ORDERED.

/s/ *Mary M. Johnston*
The Honorable Mary M. Johnston