THE ADEQUACY OF EXPERT DISCLOSURE IN MOTION PRACTICE

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At the heart of every products liability case is the liability expert. Inevitably, the adequacy of the expert disclosure will be brought up in either a motion for summary judgment or a motion *in limine*. To ensure that a case is decided on the merits, it is imperative that the expert exchanges are done properly.

In the state of New York, expert disclosure is governed by a CPLR § 3101(d) and in the federal court under FRCP § 26(a)(2). In federal court, disclosure is further modified by the Federal Rules of Evidence § 702.

CPLR § 3101(d)

CPLR § 3101 governs disclosure of material in litigation, with subsection (d) directed at disclosure of relevant expert witness information and materials.

CPLR § 3101(d)(1)(i) specifically states:

> Upon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion.

> However, where a party for good cause shown retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof, the party shall not thereupon be precluded from introducing the expert's testimony at the trial solely on grounds of noncompliance with this paragraph. In that instance, upon motion of any party, made before or at trial, or on its own initiative, the court may make whatever order may be just. In an action for medical, dental or podiatric malpractice, a party, in responding to a request, may omit the names of medical, dental or podiatric experts but shall be required to disclose all other information concerning such experts otherwise required by this paragraph.

Under § 3101(d) also requires that a party seeking discovery of § 3101 materials (i.e. reports, expert's documents, etc.) show that it has "substantial need" of the materials in the preparation of the case, and that it is unable "without undue hardship" to obtain the information by other means. CPLR § 3101(d)(2).

Identity of Expert Witnesses

Notably, CPLR § 3101(d)(1) carves out several exceptions to the disclosure requirements of the rule for malpractice suits only. For example, a party need not disclose the name of or revealing information regarding expert

witness in a medical malpractice suit. However, where a plaintiff brings claims involving both medical malpractice and products liability against a defendant, he must disclose the only identity of the expert witness who will be testifying in support of the products liability claim.[i]

Expert Witness Qualifications

"Practical experience" may qualify a witness to testify in a products liability case based upon allegations of defective design, even though the witness "was not a *designer* of and had never participated in *constructing*" the kind of product at issue. [ii]

Time for Disclosure

While CPLR § 3101(d) does not provide a time frame or require expert disclosure at any particular time as a practical matter, disclosure needs to be made early enough to avoid prejudice to the other side. In a case where a motion for summary judgment is being contemplated, that time frame has been interpreted to mean by the filing of the note of issue.

Violations of Disclosure - State Court

In *Mankowski v. Two Park Co.*, the Second Department held that it was proper for the Supreme Court to preclude the use of an expert or the expert's affidavit to oppose a motion for summary judgment since the plaintiff failed to timely respond to the defendant's discovery demands.[iii] Throughout the years, the Second Department made similar rulings.[iv]

In *Pellechia v. Partner Aviation Enterprises, Inc.*, the plaintiff allegedly sustained injuries when he slipped and fell while disembarking from defendant's charter jet.[v] The Second Department affirmed the Supreme Court's granting of summary judgment for the defendant on the grounds that the defendant made out a prima facie showing for summary judgment and the plaintiff was unable to raise a triable issue of fact. The Second Department upheld the Supreme Court's decision to disallow the plaintiff's expert affidavit "because the plaintiff never complied with any of the disclosure requirement of CPLR 3101 (d) (1) (i), and only first identified his expert witness in opposition to the defendant's summary judgment motion, after the plaintiff filed the note of issue and certificate of readiness." The Court also held that: (1) the expert did not demonstrate that he was qualified to render an opinion and (2) the affidavit was "speculative and conclusory, and was not based on accepted industry standards…."[vi]

In *Ehrenberg v. Starbucks Coffee Company*[vii], the plaintiff sued Starbucks Coffee Company when a cup of hot tea spilled on him, claiming that the accident was the result of a dangerous and defective condition on the premises. Starbucks moved for summary judgment, which was denied by the Supreme Court. On appeal, the Second Department reversed on the grounds that the Supreme Court improperly considered the affidavit of the plaintiff's expert that was submitted in opposition to the motion. The Second Department held that the Supreme Court should not have considered the affidavit "since that expert witness was not

identified by the plaintiffs until after the note of issue and certificate of readiness were filed, attesting to the completion of discovery, and the plaintiffs offered no valid excuse for the delay." As a result, the Court granted summary judgment to Starbucks.[viii]

In the first case, *Tomaino v. 209 E. 84th Street Corporation*, the plaintiff slipped and fell down a flight of steps and sued the owner of the premises.[ix] The defendant moved for summary judgment on the grounds that the plaintiff was unable to state exactly where she fell and the exact cause of her fall, but the Supreme Court denied the motion. On appeal, the First Department affirmed the denial of the defendant's motion for summary judgment and to preclude plaintiffs' expert testimony. It held that the Supreme Court properly did not exclude the plaintiff's expert's affidavit and testimony because "[p]laintiffs established good cause for the untimely disclosure, which does not appear to have surprised or prejudiced defendant."[x]

In *Harrington v. City of New York*, the First Department affirmed the Supreme Court's order which granted defendants' motion for summary judgment and denied plaintiff's cross motion for partial summary judgment. The First Department held that even if the defendant's were negligent, "such negligence was not a substantial cause of the events producing the injury" and that the plaintiff "failed to establish prima facie entitlement to summary judgment in her favor on liability." However, the court also stated that "the motion court properly

declined to consider the [plaintiff's] expert's affirmation because plaintiff failed to timely disclose his identity."[xi] In making this statement, the court cited to a Second Department case, *Wartski v. C.W. Post Campus of Long Is. Univ.*, which held that "[t]he plaintiff's expert affidavit should not have been considered in determining the motion since the expert was not identified by the plaintiff until after the note of issue and certificate of readiness were filed attesting to the completion of discovery, and the plaintiff offered no valid excuse for her delay in identifying the expert."[xii] However, the First Department also made clear that even if the expert's affidavit were allowed, that it was insufficient to raise an issue of fact.[xiii]

FRCP § 26(a)(2)

Expert Disclosure is federal court is more detailed. IT is governed by FRCP § 26(a)(2) which states:

> (2) *Disclosure of Expert Testimony.*
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> (A) In General. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under *Federal Rule of Evidence 702*, *703*, or *705*.
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> (B) Witnesses Who Must Provide a Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report--prepared and signed by the witness--if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) Witnesses Who Do Not Provide a Written Report. Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

(i) the subject matter on which the witness is expected to present evidence under *Federal Rule of Evidence 702*, *703*, or *705*; and

(ii) a summary of the facts and opinions to which the witness is expected to testify.

(D) Time to Disclose Expert Testimony. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or

(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

(E) Supplementing the Disclosure. The parties must supplement these disclosures when required under Rule 26(e).

As is evident from the statute, there is a lot more information that must be disclosed in federal court. In federal court, parties must exchange the report, the facts and data used to form the expert opinion and exhibits that the expert will rely upon to for that opinion.

Violations of Disclosure - Federal Court

In general, a motion seeking to preclude expert testimony on grounds of an improper disclosure is to be made under FRCP § 37(c)(1) which states:

> (1) *Failure to Disclose or Supplement.* If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:
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> (A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;
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> (B) may inform the jury of the party's failure; and
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> (C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).

Thus, the standard to impose sanctions for a late or incomplete disclosure is whether or not the improper disclosure was either harmless or justifiable.

In *Wills v Amerada Hess Corp.*, the plaintiff disclosed expert's report concerning causation of seaman's injury pursuant to FRCP 26(a)(2), but did not disclose reports of two other experts except in response to defendants' motion for summary judgment, exclusion of two proposed expert witnesses as untimely disclosed was proper; plaintiff's manner of identifying experts appeared intended

to delay completion of pre-trial process and it was questionable whether substance of proposed experts' testimony would be sufficient to allow plaintiff to survive summary judgment.[xiv]

Conversely, in *Commercial Data Servers, Inc. v IBM*, the plaintiff computer systems company's submission, with its response to defendant competitor's summary judgment motion, of expert witness affidavit that was inconsistent with its corresponding FRCP 26 reports such that submission was, in essence, new and untimely expert report, was harmless and did not warrant excluding consideration of experts' evidence under FRCP 37 sanction provisions.[xv]

Perhaps as important it that objections to an improper expert disclosure must be made timely or the court will deny the requested relief. In *Rupolo v Oshkosh Truck Corp.*, the court held that preclusion of admission of defendant's expert's testimony as sanction under FRCP 37(c)(1) was inappropriate, even though defendant's FRCP 26(a)(2) disclosure concerning expert was inadequate, because plaintiffs waited more than one and half years before objecting on this basis and did not seek more complete disclosure, expert's testimony was crucial to defendant's case on issue of causation, and any prejudice to plaintiff was due to its delay before objecting to report.[xvi]

Federal Rules of Evidence 702

Fed. R. Evid. 702 governs testimony by expert witnesses. It states:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Under the *Daubert*[xvii] standard, a witness must first be shown to be sufficiently qualified by "knowledge, skill, experience, training, or education," pursuant to Fed. R. Evid. 702. In a products liability action, an expert may be qualified as an expert, even though he may not be the "best qualified" expert, or have direct "specialization" in a field, if his expertise in similar areas is sufficient to assist the trier of fact understand the issues.[xviii]

As with all other types of claims, the testimony of expert witnesses in products liability suits may be precluded if the witness has is unqualified, has no expertise, or if his methodology is clearly unreliable.[xix] In the alternative, a court may limit the type and use of an expert witness's testimony to contain it within the scope of the witness's expertise.[xx]

Federal Rules of Evidence 104(a)

Fed. R. Evid. 104(a) provides that "The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those

on privilege." This Rule is applied in the context of *Daubert*[xxi] determinations, as described below.

A court is not required to hold a 104(a) hearing to determine the admissibility of expert witness testimony where it conducts a thorough review of the record, including the witness's deposition transcript.[xxii] A court may also forgo the full 104(a) hearing where the witness's testimony is so blatantly unreasonable that a hearing would be useless.[xxiii] While there is no requirement that a court hold a 104(a) hearing, the court must have a proper and reviewable foundation for making its admissibility findings.[xxiv]

Admissibility of Expert Testimony under *Daubert* and *Frye*

The threshold standard for admissibility of novel scientific evidence in New York State is derived from *Frye v. United States*.[xxv] The *Frye* rule requires that innovative scientific evidence be based on "a principle or procedure [which] has 'gained general acceptance' in its special field." "[T]he particular procedure need not be 'unanimously endorsed' by the scientific community but must be 'generally accepted as reliable.'"[xxvi] The proponent of a scientific procedure "is required to show the generally accepted reliability of such procedure in the relevant scientific community through judicial opinions, scientific or legal writings, or expert opinion other than that of the proffered expert."[xxvii]

The *Frye* rule as applied in New York differs from the more liberal federal standard established by the United States Supreme Court in *Daubert v. Merrell*

Dow Pharms..[xxviii] In *Daubert*, the Court rejected the *Frye* rule in favor of a "reliability standard" derived from the Federal Rules of Evidence Rule 702. Under the *Daubert* standard, the court makes "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid."[xxix] In contrast, under *Frye,* the court does not determine whether a scientific technique is reliable but, instead, "whether there [is a] consensus in the scientific community as to its reliability."[xxx] The *Daubert* test essentially requires federal trial judges to play the role of a "gatekeeper," insuring that the fact-finding process does not become distorted by "expertise that is *fausse* and science that is junky."[xxxi]

Under the *Daubert* standard, a witness must first be shown to be sufficiently qualified by "knowledge, skill, experience, training, or education," pursuant to Fed. R. Evid. 702. Second, the Federal Rules of Evidence require that the judge "ensure that any and all scientific testimony or evidence admitted is not only relevant, but [also] reliable." *Daubert*, 509 U.S. at 589. "[T]he trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." *Id*. at 592-593.

Although *Daubert* was decided in the context of scientific knowledge, the test has since been extended to the kind of "technical or other specialized knowledge" often at issue in products liability cases.[xxxii]

New York

There is some disagreement in New York courts as to whether the *Daubert* or *Frye* standard is generally applicable. After the *Daubert* decision was rendered, some New York courts continued to use the stricter "general acceptance" test of *Frye* in cases where the issue was the reliability and admissibility of novel scientific evidence.[xxxiii] However, where the evidence is not scientific or novel, some courts have held that the *Frye* analysis is not applicable.[xxxiv] "Nevertheless, whenever directly confronted with the issue, appellate courts have consistently rejected the idea that *Daubert* should be the controlling standard in New York rather than *Frye*."[xxxv]

In products liability cases where the testimony is based upon recognized technical or other specialized knowledge, courts have applied the liberal *Daubert* test.[xxxvi] However, where there is a question as to whether the witness's testimony is supported by accepted scientific methods, as where the expert's conclusions are novel, courts have applied the stricter *Frye* standard.[xxxvii]

Motions *In Limine*

A motion *in limine* allows the trial court to consider the exclusion of evidence which may be logically, but not legally, relevant.[xxxviii] In considering such a motion, the court exercises its role as "gatekeeper," *see Daubert*, 409 U.S. at 579, to determine what types of evidence may be admitted at trial. In deciding a motion *in limine*, the court follows the *Daubert* analysis described above. The

use of a motion *in limine* in a products liability suit does not differ from its use generally in litigation.[xxxix]

Plaintiffs may not use a motion *in limine* to use the methodologies of their own expert to challenge the methodologies of the defendants' experts. Such a "battle of the experts" is for a fact finder to resolve after the direct and cross-examinations of both.[xl]

A motion *in limine* does not preserve error for appellate review. A party whose motion *in limine* has been overruled must object when the error the party sought to prevent with the motion is about to occur at trial.[xli] Most objections made pursuant to a motion *in limine* will prove to be dependent on trial context and will be determined to be waived if not renewed at trial. Nevertheless, a pretrial motion *in limine* may preserve an objection if the following three factors are met: (1) the issue was fairly presented to the district court; (2) the issue is the type that can be finally decided in a pretrial hearing; and (3) the issue was unequivocally decided by the trial judge.[xlii]

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[i] *See, e.g., Travis v. Wormer*, 524 N.Y.S.2d 913 (App. Div. 4th Dep't 1988) (plaintiff must disclose identity of medical expert to defendant drug manufacturer sued in strict products liability and breach of warranty notwithstanding other pending claim of medical malpractice against codefendants).

[ii] *See Caprara v. Chrysler Corp.*, 52 N.Y.2d 114 (1981) (emphasis in original).

[iii] *Mankowski v. Two Park Co.*, 225 A.D.2d 673, 639 N.Y.S.2d 847 (2d Dept. 1996).

[iv] *See Vailes v. Nassau County Police Activity League, Inc., Roosevelt Unit*, 72 A.D.3d 804 (2d Dept. 2010); *Yax v. Development Team, Inc.*, 67 A.D.3d 1003 (2d Dept. 2009); *Gerardi v. Verizon N.Y., Inc.*, 66 A.D.3d 960 (3d Dept. 2009); *Wartski v. C.W. Post Campus of Long Is. Univ.*, 63 A.D.3d 916 (2d Dept. 2009); *King v. Gregruss Mgt. Corp.*, 57 A.D.3d 851 (2d Dept. 2008); *McArthur v. Muhammad*, 16 A.D.3d 630 (2d Dept. 2005); *Ortega v. New York City Tr. Auth.*, 262 A.D.2d 470 (2d Dept. 1999).

[v] 80 A.D.3d 740, 916 N.Y.S.2d 130 (2d Dept. 2011).
[vi] *Id.*
[vii] 82 A.D.3d 829, 918 N.Y.S.2d 556 (2d Dept. 2011).
[viii] *Id.*
[ix] 72 A.D.3d 460, 900 N.Y.S.2d 245 (1st Dept. 2010)
[x] *Id.* (internal citations omitted).
[xi] *Id.*
[xii] 63 A.D.3d 916, 917, 882 N.Y.S.2d 192 (2d Dept. 2009).
[xiii] *Harrington*, 79 A.D.3d 545.
[xiv] *Wills v Amerada Hess Corp.* (2004, CA2 NY) 379 F3d 32, 2004 AMC 2082, 64 Fed Rules Evid Serv 1153, cert den (2005) 546 US 822, 126 S Ct 355, 163 L Ed 2d 64.
[xv] *Commercial Data Servers, Inc. v IBM* (2003, SD NY) 262 F Supp 2d 50, 2003-1 CCH Trade Cases P 74022.
[xvi] Rupolo v Oshkosh Truck Corp. (2010, ED NY) 749 F Supp 2d 31.
[xvii] *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993)
[xviii] *Pineda v. Ford Motor Co.*, 520 F.3d 237 (3d Cir. 2008); *see also McCloud v. Goodyear Dunlop Tires N. Am., Ltd.*, 479 F. Supp. 2d 882 (C.D.Ill. 2007) (witnesses qualified to testify as experts where they qualified as experts to the field of tires in general, although they did not specialize in the particular subset of motorcycle tires at issue).
[xix] *Smith v. Goodyear Tire & Rubber Co.*, 495 F.3d 224 (5th Cir. 2007); *Khoury v. Philips Med. Sys*, 615 F.3d 888 (8th Cir. 2010).
[xx] *See Schaff v. Caterpillar, Inc.*, 286 F. Supp. 2d 1070 (D.N.D. 2003).
[xxi] *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993)
[xxii] *Anderson v. Raymond Corp.*, 340 F.3d 520 (8th Cir. 2003) (no abuse of discretion where court did not hold 104(a) hearing for admissibility of an engineer's testimony in a product liability case).
[xxiii] *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1223, 1246 (E.D.N.Y. 1985) (no need for 104(a) hearing in products liability suit where the witness relied on litigants' checklists to reach a conclusion, a process that "no reputable physician" would use).
[xxiv] *See In re Paoli R. Yard PCB Litigation*, 916 F.2d 829, 854 (3d Cir. 1999).
[xxv] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)
[xxvi] *People v. Wesley*, 83 N.Y.2d 417, 422 (1994)
[xxvii] *Cameron v. Knapp*, 137 Misc. 2d 373, 375 (Sup. Ct, NY County 1987).
[xxviii] *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993)
[xxix] *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993)
[xxx] *Wesley*, 83 N.Y.2d at 439 (Kaye, J, concurring).
[xxxi] *Kumho Tire Co, Ltd. V. Charmichael*, 526 U.S. 137, 159 (1999) (Scalia, J., concurring).
[xxxii] *Kumho Tire, Ltd.*, 526 U.S. at 159; *see also, Clay v. Ford Motor Co.*, 215 F.3d 663 (6th Cir. 2000).
[xxxiii] *Wahl v. American Honda Motor Co.*, 693 N.Y.S.2d 875, 877 (Sup. Ct. Suffolk County, 1999).
[xxxiv] *See People v. Wernick*, 89 N.Y.2d 111 (1996); *Wesley*, 83 N.Y.2d at 417.
[xxxv] *Matter of Seventh Jud. Dist. Asbestos Litig.*, 797 N.Y.S.2d 743, 751 (2005).
[xxxvi] *See, e.g., Wahl*, 693 N.Y.S.2d at 878 (permitting engineer's expert witness testimony under the *Daubert* standard).
[xxxvii] *See Selig v. Pfizer, Inc.*, 13 N.Y.S.2d 898, 902-903 (Sup. Ct. NY County, 2000) (applying the *Frye* standard and precluding testimony not generally accepted in the scientific community).
[xxxviii] *See Bruckman v. Pena*, 487 P.2d 566 (Colo. App. 1971).

[xxxix] *See, e.g., Cummins v. Lyle Indus.*, 93 F.3d 362, 367-371 (7th Cir. 1996) (reviewing the *Daubert* analysis used by the trial court in deciding the motion *in limine* to exclude a plaintiff's expert witness testimony).
[xl] *Sohngen v. Home Depot U.S.A., Inc.*, 2008 U.S. Dist. LEXIS 8080, at *24 (W.D. Pa., Feb. 4, 2008).
[xli] *Starr v. Hacker Co.*, 688 F.2d 78, 81 (8th Cir. 1982).
[xlii] *United States v. Mejia-Alarcon*, 995 F.2d 982, 988 (10th Cir. 1993).