AMERICAN BAR ASSOCIATION
Forum on Franchising

FRANCHISE LAW JOURNAL

QUARTERLY JOURNAL OF THE FORUM ON FRANCHISING VOLUME 30, NUMBER 1 • SUMMER 2010

In This Issue

Franchise Law Journal (ISSN: 8756-7962) is published quarterly, by season, by the American Bar Association Forum on Franchising, 321 North Clark Street, Chicago, Illinois 60654-7598. *Franchise Law Journal* seeks to inform and educate members of the bar by publishing articles, columns, and reviews concerning legal developments relevant to franchising as a method of distributing products and services. *Franchise Law Journal* is indexed in the *Current Law Index* under the citation Franchising.

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Survey of *Daubert* Challenges in the Context of Franchise Liability Experts

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Franchise litigators routinely retain experts to present evidence in support of damages claims. However, both franchisees and franchisors are increasingly offering expert testimony also to prove or defend liability by offering an opinion on the ultimate issue to be decided by the trier of fact. As the case law shows, these liability experts are most often offered in franchise litigation to give an expert opinion on ultimate issues such as compliance with industry standards, the duties and obligations of franchisors and franchisees, and whether a contract constitutes the sale of a franchise. These proposed liability experts are and have been subject to *Daubert* challenges, but a properly selected and prepared liability expert can meet the challenge and be an effective addition to a party's trial strategy.

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This article will survey and analyze recent cases addressing *Daubert* challenges to franchise liability experts. We will first provide a brief background on the Federal Rules governing the admission of expert testimony. Next, we will survey recent franchise cases addressing *Daubert* challenges to liability expert testimony in the context of industry standards, the interpretation of the duties and obligations of a franchisor and/or franchisee, and whether or not a contract constitutes a franchise agreement. Finally, we will explore the trends that these cases reveal and suggest strategies for selecting a franchise liability expert.

RULES GOVERNING EXPERT TESTIMONY

Federal Rule of Evidence 702 governs the admission of expert testimony. It states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to determine a fact at 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, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.[1]

As the U.S. Supreme Court declared in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, Rule 702 requires trial judges to act as gatekeepers to ensure that any and all scientific testimony or evidence is not only relevant but also reliable.[2] To help trial judges accomplish this task, the Court provided a list of nonexhaustive factors for trial courts to consider when evaluating proposed expert evidence: (1) whether the scientific theory has been tested, (2) whether the theory has been subject to peer review or publication, (3) whether there is a known rate of error, and (4) whether the scientific theory has been generally accepted.[3]

The Court further proclaimed in *Kumho Tire Co., Ltd. v. Carmichael* that the gatekeeper responsibility applies to all expert testimony, not just testimony based in science.[4] Thus, there is no question that the *Daubert* standard and the requirements set forth in Rule 702 apply to experts proposing to testify regarding liability issues in franchise litigation.

Expert testimony may include opinions on the ultimate issue to be decided by the trier of fact. Federal Rule of Evidence 704(a) states that "[e]xcept as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

However, the determination of purely legal issues is the exclusive purview of the court. Therefore, expert testimony that merely states a legal conclusion will be excluded.[5] In addition, experts proposing to testify regarding an ultimate issue must be qualified by "knowledge, skill, experience, training, or education" to render an opinion. The proposed opinion evidence must also be deemed reliable and helpful to the trier of fact.[6]

A party seeking to exclude expert testimony will often assert a *Daubert* challenge seeking to exclude the testimony on one or more of three bases: (1) the expert is not sufficiently qualified, (2) the proposed testimony is not reliable, and/or (3) the proposed testimony will not assist the trier of fact.

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Published in *Franchise Law Journal*, Volume 30, Number 1, Summer 2010.

EXPERT QUALIFICATIONS

Under Rule 702, a proposed expert will be able to offer expert testimony or evidence only if the moving party establishes that the expert is "sufficiently qualified."[7] Therefore, a court's first step in its gatekeeping duties is to determine whether a proposed expert is qualified in the subject matters about which the expert will testify.[8] The Federal Rules do not require an expert to have any particular credentials to qualify as an expert witness.[9] A witness may qualify as an expert based on his or her (1) knowledge, (2) skill, (3) experience, (4) training, or (5) education.[10] Thus, a background in just one of these five categories is sufficient.[11] Neither *Daubert* nor the Federal Rules define these categories; therefore, courts have applied "common sense interpretations."[12]

RELIABILITY OF AN EXPERT'S TESTIMONY

Although franchise liability experts are typically not classified as scientific experts, they are still subject to *Daubert* challenges based on the reliability of the proposed expert testimony. Rule 702 unequivocally applies to "technical or other specialized knowledge."[13] When faced with a *Daubert* reliability challenge to exclude a nonscientific expert, including a franchise liability expert, courts tend to ignore the *Daubert* factors because they are often of "limited utility in the context of nonscientific expert testimony."[14] As the U.S. Court of Appeals for the Sixth Circuit remarked, "If [the *Daubert*] framework were to be extended to outside the scientific realm, many types of relevant and reliable expert testimony—that derived substantially from practical experience—would be excluded."[15] This trend is consistent with the *Kumho* decision in which the Supreme Court noted that "*Daubert*'s list of specific factors neither necessarily nor exclusively applies to all experts in every case. . . . [W]hether *Daubert*'s specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine."[16]

RELEVANCY OF AN EXPERT'S TESTIMONY

In addition to requiring expert testimony and evidence to be reliable, Rule 702 allows testimony and evidence to be admitted only if it "will assist the trier of fact to understand the evidence or determine a fact in issue."[17] This requirement is primarily directed to relevance.[18] Expert testimony will be excluded where

> all the primary facts can be accurately and intelligibly described to the jury, and if they, as [persons] of common understanding, are as capable of comprehending the primary facts and of drawing correct conclusions from them as are witnesses possessed of special or peculiar training, experience, or observation in respect to the subject under investigation.[19]

In recent franchise cases, courts have excluded expert testimony on the ground that it does not assist the trier of fact and therefore is not relevant.[20]

SURVEY OF FRANCHISE CASES

Industry Standards

The majority of cases addressing the admission of liability experts involve witnesses who propose to offer an opinion on industry standards and whether or not the opposing party conforms to such standards. Generally, industry standards are an appropriate topic for a liability expert as long as the expert's qualifications and proposed evidence satisfy Rule 702.[21] As the case law below illustrates, this general proposition is also true for franchise liability experts.

In *Mathis v. Exxon Corp.*, the U.S. Court of Appeals for the Fifth Circuit applied the *Daubert* factors and held that the trial court did not abuse its discretion by admitting the franchisee's expert's testimony.[22] *Mathis* involved a breach of contract action filed by a franchisee against the franchisor, Exxon, based on a contract that required the franchisees to purchase gasoline from Exxon at a specified quantity and price.[23] In support of its claims, the franchisee proposed to offer the opinions of an expert in the economics and industry standards of the gasoline market in the relevant geographic area.[24] The expert opined that Exxon's price of gasoline "was not commercially reasonable from an economic perspective because it was a price that, over time, put the purchaser at a competitive disadvantage."[25] This opinion was based on the expert's calculation that "75 percent of the franchisee's competitors were able to purchase gasoline at a lower price" and his calculation of what he determined to be a reasonable price.[26]

On appeal, Exxon argued that the trial court erred by permitting the expert to testify.[27] The Fifth Circuit disagreed. The Fifth Circuit determined that the expert's "testimony primarily drew on general business and economic principles that satisfy the *Daubert* factors."[28] In making this determination, the court focused on the main purpose of the expert's testimony, i.e., that the price Exxon charged its franchisees exceeded the reasonable price, and determined that any objections to the expert's methods or his definition of the relevant markets could be addressed through cross-examination.[29]

In *AAMCO Transmissions, Inc. v. Baker*, the U.S. District Court for the Eastern District of Pennsylvania determined that the proposed testimony of a franchisee's liability expert was admissible.[30] *Baker* involved a trademark infringement, unfair competition, and breach of contract action filed by a franchisor against a franchisee arising out of the franchisor's termination of a franchise agreement.[31] The franchisor alleged that the franchisee failed to deal fairly and honestly with the public.[32] In support of its defense, the franchisee proposed to offer testimony from a liability expert.[33] The franchisor filed a motion in limine to exclude the liability expert's testimony, arguing that his opinion regarding liability was "unreliable because he failed to identify any methodology and he asserted facts he identified for the reader's consideration instead of drawing any conclusions within reasonable scientific certainty."[34]

The court disagreed. The court first noted that the expert's opinion was reliable because he relied on

"automotive industry standards," which the court determined were "good grounds" for reliability.[35] Second, the court reviewed the expert's curriculum vitae. The expert's vast "professional experience, training, and certifications regarding automobile repair and inspections" enhanced the reliability of his testimony.[36] Finally, the expert explained in detail the specific process he used in formulating and applying his opinion in his expert report.[37] Taken together, the court held that the expert's opinions were admissible; any weaknesses or inadequacies in his opinions could be addressed through cross-examination.[38]

In *Thomas J. Kline, Inc. v. Lorillard, Inc.*, the U.S. Court of Appeals for the Fourth Circuit affirmed the trial court's decision to exclude the testimony of an expert witness who proposed to testify regarding the legitimacy and justifications for certain credit decisions made by defendant in an anti–price discrimination action.[39] The proposed expert was not an economist; she held only a master's degree in business administration.[40] The expert had previously published only one article that had nothing to do with price discrimination, credit decisions, or antitrust issues.[41] Finally, the proposed expert admitted that she did not have any personal experience making credit decisions and "that her present employer devoted most of its efforts to providing expert testimony" in complex business litigation.[42] Although no single factor alone disqualified the proposed expert, taken together, the expert's qualifications could not satisfy the minimum requirements set forth in Federal Rule of Evidence 702 as "it would be absurd to conclude that one can become an expert simply by accumulating experience in testifying."[43]

CONDUCTING DUE DILIGENCE ON YOUR EXPERT WITNESS

Become aware of your expert's qualifications before any surprises are revealed in court. This includes, among other things:

- Conducting independent research of the expert's curriculum vitae to ensure that it is accurate
- Locating all articles, speeches, treatises, and other materials authored by the expert
- Researching the expert's prior history of testifying
- Determining whether the expert has previously been subject to a *Daubert* challenge and whether his testimony was excluded
- Ensuring that the expert's prior testimony is not inconsistent with his current testimony
- Ensuring that the expert has the proper background and can qualify to render an opinion based on his knowledge, skill, experience, training, and education
- Reviewing the expert's methodology or basis for his opinions and ensuring that he has a proper foundation for opinion
- Ensuring that the expert can explain opinions in a way that is understandable to the trier of fact and will be helpful to explain the issues involved in the litigation

In *Lone Star Steakhouse & Saloon, Inc. v. Liberty Mutual Savings Group*, the U.S. District Court for the District of Kansas held in part that the franchisor's expert was qualified to offer expert opinions on insurance industry standards and practices.[44] Lone Star sued Liberty Mutual Savings Group for breach of contract of a commercial general liability insurance policy and breach of the implied covenant of good faith and fair dealing because Liberty Mutual refused to contribute any payment to a settlement agreement that Lone Star reached in an underlying lawsuit.[45] Liberty Mutual moved to strike Lone Star's expert, who proposed to testify, among other things, that the claims alleged in the underlying litigation fell within the insurance policy coverage.[46] The court examined the expert's experience and training, which included over twenty years of "experience handling and supervising insurance claims," and concluded that he was more than sufficiently "qualified to express opinions relating to insurance industry standards and whether Liberty Mutual's conduct conformed to such standards."[47] The court further noted that such opinions were "relevant to Lone Star's claim that Liberty Mutual breached its implied obligation of good faith and fair dealing."[48]

Duties and Obligations of Franchisors and Franchisees

Expert testimony on the duties and obligations of franchisors and franchisees many times depends on an interpretation of certain provisions contained in the franchise agreement. Courts have typically allowed expert witnesses to testify about the proper interpretation of contract terms when the meaning depends on industry standards or trade practice.[49] However, "such expert testimony is admissible only if the contract language at issue is ambiguous or involves a specialized term of art, science or trade."[50] As the following case law illustrates, if the franchise agreement is not ambiguous, liability expert evidence is not proper.

In *TCBY Systems, Inc. v. RSP Co.*, the court admitted testimony of a franchise liability expert as to the custom and practice in the fast-food industry to assist the trier of fact in interpreting a franchisor's duty to assist a franchisee in the site selection of the franchise store.[51] *TCBY* involved a lawsuit arising out the premature termination of a franchise agreement by the franchisee.[52] The franchisor sued the franchisee, and the franchisee counterclaimed against the franchisor alleging that the franchisor "breached the franchise agreement by failing to provide reasonable assistance in selecting and evaluating a location for [the franchisee's] [TCBY] store."[53]

The main issue was the interpretation of the franchise agreement. The relevant portion of the franchise agreement stated that the franchisor would provide reasonable assistance in selecting and evaluating proposed store locations, but its selection was not a warranty or representation of the

suitability of the selection.[54] Despite the fact that the franchisee's site selection did not meet the franchisor's geographic specifications, the franchisor approved the selection.[55] After the franchisor refused to allow the franchisee to serve certain menu items, the franchisee unilaterally terminated the franchise agreement.[56] Thereafter, the franchisor sued the franchisee to "recover the value of royalties and advertising funds it would have received over the remaining term of the . . . franchise agreement."[57] The franchisee counterclaimed for breach of contract.[58]

To support its breach of contract claim, the franchisee proposed to offer a franchise expert to give an opinion that the process the franchisor followed in approving a site for a TCBY store did not meet the custom and industry practices in the fast-food industry.[59] The trial court admitted this testimony.[60] On appeal, the U.S. Court of Appeals for the Eighth Circuit affirmed, concluding that the franchise agreement at issue was ambiguous as to the franchisor's duties in assisting the franchisee in a site selection for the TCBY store. Therefore expert testimony on the applicable industry standard was required to assist the trier of fact in resolving the ambiguity.[61]

Experts who only provide conclusory opinions do not assist the trier of fact and, therefore, will not be permitted to testify.

In *Braucher v. Swagat Group, L.L.C.*, the U.S. District Court for the Central District of Illinois determined that a proposed expert witness lacked the required expertise to render an opinion as to a franchisor's duty to maintain a hotel pool and spa in a negligence and wrongful death action.[62] A guest visiting an independently operated Comfort Inn Hotel was diagnosed with Legionnaires' Disease and died after staying at the Comfort Inn Hotel.[63] Approximately one month later, the Illinois Department of Public Health investigated a possible outbreak and found 160 cases of respiratory illnesses reported by guests, five of whom were diagnosed with Legionnaires' Disease, including the decedent.[64] The department determined that the level of Legionella bacteria found in the pool and spa was 2,000 times higher than the level typically found in tap water.[65]

Plaintiff proposed to offer the testimony of a retired U.S. Coast Guard commander who opined that the franchisee had failed to maintain the pool properly, the decedent's death was caused by the improperly maintained pool, the franchisee's pool attendant falsified pool records, and, most importantly, both the franchisee and franchisor had a duty to maintain the pool.[66] The witness had significant experience in water safety and water rescue procedures, but plaintiff did not present any evidence of the witness's experience or knowledge relating to the duties and obligations of franchisors and franchisees on the topic of pool maintenance. The franchisor filed a motion to bar the witness's testimony on the grounds that the witness was not qualified to testify regarding the duty of the franchisor or franchisee to maintain the pool.[67]

The court agreed that although the witness had vast experience maintaining pools and was qualified to testify to the maintenance of the pool in general, he was not qualified to render an expert opinion as to whether the franchisee or franchisor had a legal obligation to maintain the pool.[68] The court observed that the witness "does not have any experience in either franchise relationships or in hotel industry practices. He has no special knowledge, experience, or training to enable him to render an expert opinion about when a franchisor is obligated to maintain a pool at a hotel operated under a written franchise agreement."[69] His expert testimony was thus excluded.

The U.S. District Court for the Middle District of Tennessee in *Cowan v. Treetop Enterprises, Inc.* applied certain *Daubert* factors in excluding a proposed liability expert's opinion that the franchisee's restaurant managers were considered employees under the Fair Labor Standards Act (FLSA).[70] Plaintiffs filed an action under the FLSA alleging that the franchisee improperly deemed them bona fide executive employees and therefore exempt from FLSA's overtime pay requirements.[71] Plaintiffs argued that even though they were classified as unit managers, they were regular employees entitled to overtime pay.[72]

Pursuant to a franchise agreement with Waffle House, Inc., defendant franchisee owned and operated several franchises, each of which was a separate facility.[73] Under the franchisor's organizational structure, the franchisee assigned a unit manager to each restaurant.[74] In support of the franchisee's defense, the franchisor offered the expert report of a professor of industrial engineering who proposed to opine that unit managers were responsible for the day-to-day operations of the restaurant and for the profitable operation of the restaurant.[75] The expert witness based his opinion on "a documentary review of job titles, the Dictionary of Occupational Titles, Treetop's organizational charts, and interviews."[76] The expert also interviewed four unit district relief managers.[77] Based on this analysis, the expert concluded that plaintiffs performed management functions. Plaintiffs filed a motion to strike, arguing in part that the expert's methods were unreliable.[78]

After consideration of the *Daubert* factors, the court agreed.[79] The court compared the case *Donovan v. Waffle House, Inc.*, where the U.S. District Court for the Northern District of Georgia determined that similar expert reports were admissible because they were supported by tests and analysis conducted by the expert.[80] The expert's report in *Cowan*, however, did not reflect any underlying analyses. Thus, the court concluded that the expert's methodology was unreliable and not admissible.[81]

In *Little Oil Co., Inc. v. Atlantic Richfield Co.*, franchise gasoline distributors filed a lawsuit against a franchisor alleging that the franchisor's institution of new marketing changes was prohibited by the terms of the franchise agreement and constituted constructive termination of the

Published in *Franchise Law Journal*, Volume 30, Number 1, Summer 2010.

franchise agreement in violation of the Petroleum Marketing Practices Act.[82] In support of their claims, the distributors retained an expert who proposed to opine, among other things, that the franchisor's marketing changes constituted termination of the franchise agreement.[83]

The court did not permit the witness to offer any opinions that were a determination solely of ultimate facts, including the opinion that the franchisor's marketing changes constituted a termination of the franchise agreement, because those opinions would not have been helpful to the jury.[84] The jury had enough information and facts to reach its own conclusion; thus, expert testimony was not proper.[85]

Elements of a Franchise

In our review of franchise cases addressing the admissibility of liability expert testimony, we came across one case, *Palazzetti Import/Export, Inc. v. Morson*, in which the court, the U.S. District Court for the Southern District of New York, excluded the expert testimony of a franchise attorney who proposed to testify that a contract constituted the sale of a franchise based in part on industry standards.[86]

Palazzetti involved a dispute over the sale of a furniture store.[87] Defendant asserted as an affirmative defense that the contract at issue constituted a sale of a franchise and was subject to rescission because plaintiff did not follow the registration requirements.[88] Plaintiff moved for an order from the court authorizing the testimony of its expert, a franchise law attorney who proposed to testify that the contract at issue did not constitute a franchise agreement, and even if it did constitute a franchise, it was subject to the "single instance" exception.[89] The witness also proposed to offer expert testimony that certain agreements involving plaintiff and other parties were not franchise agreements because plaintiff made capital contributions, which were not customary in the franchise industry.[90]

In response, defendant maintained that the elements of a franchise agreement are straightforward, and therefore expert testimony about them would not assist the trier of fact in understanding or determining an issue in dispute.[91] The court agreed:

> Here, it is clear that neither of the elements of a franchise agreement requires knowledge beyond the ken of the average juror. Under Section 681, a franchise is a contract in which a franchisor (i) for a fee (ii)(a) prescribes a marketing plan for the sale of goods or services or (ii)(b) grants a franchisee the right to sell goods or services associated with the franchisor's trademark. There is nothing particularly esoteric about any of these elements and, therefore, nothing that leads me to believe that the jurors would be assisted (rather than improperly swayed) by the testimony of the expert. Accordingly, his proposed expert testimony regarding the elements of a franchise agreement and their alleged absence here does not meet the standard of Rule 702.[92]

The court also excluded the witness's proposed testimony as to industry standards.[93] Although the court acknowledged that industry custom is generally an appropriate topic for expert testimony, the only issue before the court was whether the contract met the statutory definition.[94] Therefore, industry standards were irrelevant.[95]

The decision in *Palazzetti* to exclude testimony on the elements of a franchise agreement is consistent with the recent trend of trial judges generally choosing to exclude expert opinions on the meaning and elements of statutes and regulations.[96] Indeed, recent case law from the district courts of the U.S. Court of Appeals for the Seventh Circuit establishes that an expert may not properly offer opinion testimony as to the elements of a statute and whether or not a defendant violated such statute where the statute is an issue in dispute.[97]

Moreover, in *Stone Creek Investments, LLC v. United States*, the Federal Claims Court excluded plaintiffs' proposed expert reports and testimony of a federal income tax law professor and a practicing tax attorney.[98] The tax professor sought to testify that the tax transactions at issue did not lack economic substance and that plaintiffs fulfilled the requirements to satisfy a reasonable cause defense.[99] The tax attorney sought to testify that an opinion letter at issue was of a quality and character upon which plaintiffs could reasonably rely in preparing the tax returns at issue.[100]

The court excluded the experts' evidence because the experts impermissibly proposed to apply the law to the facts rather than to explain the law in a manner that would assist the trier of fact in resolving the ultimate issues in dispute.[101] The court noted that the admission of expert testimony on the application of the law depends on whether or not it will assist the trier of fact in understanding the evidence or the ultimate issue in dispute.[102] "[E]xpert testimony that merely tells the trier of fact what result to reach or states a legal conclusion in a way that says nothing about the facts is still objectionable. . . . Such evidence does not 'assist' as required by Rule 702."[103]

RECENT TRENDS

The foregoing cases reveal a few key observations. First, courts are generally receptive to admitting franchise liability expert testimony and evidence as long as the issue is suitable for an expert opinion. Experts who only provide conclusory opinions, however, do not assist the trier of fact and, therefore, will not be permitted to testify.

Second, the right liability expert must be selected. Franchise litigators should keep Rule 702 in mind when choosing an expert to testify on liability issues. In particular, litigators should gather *Daubert*-related material from a proposed liability expert right away to ensure that the expert is qualified and will offer testimony and evidence that is both reliable and relevant (see sidebar on page 19). In tendering an expert to, in effect, opine that your client should win on a key issue of the case, you will invite a *Daubert* challenge. That challenge can be overcome if you select a truly qualified expert and require a rigorous review to identify facts necessary to support the opinion offered.

ENDNOTES

1. Fed. R. Evid. 702; Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).
2. *Daubert*, 509 U.S. 579.
3. *Id.* at 592–94.
4. 526 U.S. 137 (1995).
5. Palazzetti Imp./Exp., Inc. v. Morson, 2001 U.S. Dist. LEXIS 9538, at *6 (S.D.N.Y July 9, 2001).
6. Fed. R. Evid. 702; Ralston v. Smith & Nephew Richards, Inc., 275 F.3d 965, 969 (10th Cir. 2001).
7. Whiting v. Boston Edison Co., 891 F. Supp. 12, 24 (D. Mass. 1995) (quoting Rule 702).
8. Braucher v. Swagat Group, L.L.C., 2010 U.S. Dist. LEXIS 26294, at *24 (C.D. Ill. Mar. 19, 2010); Casey v. Ohio Med. Prods., 877 F. Supp. 1380, 1383 (N.D. Cal. 1995); *Whiting*, 891 F. Supp. at 24.
9. Turf Racing v. Am. Suzuki, 223 F.3d 585, 591 (7th Cir. 2000).
10. Wright & Gold, 29 Federal Practice and Procedure § 6265 (1997).
11. *Id.*
12. *Id.*
13. Fed. R. Evid. 702.
14. First Tenn. Bank Nat'l Ass'n v. Hector, 268 F.3d 319, 334 (6th Cir. 2001) (citing United States v. Jones, 107 F.3d 1147, 1158 (6th Cir. 1997)).
15. *Id.*
16. Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 153 (1995).
17. Fed. R. Evid. 702; Smith v. IMG Worldwide, Inc., 2006 U.S. Dist. LEXIS 82566, at *16 (E.D. Pa. Nov. 9, 2006).
18. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 591 (1993).
19. Palazzetti Imp./Exp., Inc. v. Morson, 2001 U.S. Dist. LEXIS 9538, at *7 (S.D.N.Y. July 9, 2001) (citing United States v. Castillo, 924 F.2d 1227 (2d Cir. 1991) (quoting Salem v. U.S. Lines Co., 370 U.S. 31, 35 (1962)).
20. *See* Howerton v. Red Ribbon, Inc., 715 N.E.2d 963, 965 (Ind. Ct. App. 1999).
21. Levin v. Dalva Bros., Inc., 459 F.3d 68, 79 (1st Cir. 2006) (citing Ford v. Allied Mut. Ins. Co., 72 F.3d 836, 841 (10th Cir. 2006); Vann v. City of N.Y., 72 F.3d 1040, 1049 (2d Cir. 1995); TCBY Sys., Inc. v. RSP Co., Inc., 33 F.3d 925, 928 (8th Cir. 1994)).
22. 302 F.3d 448, 461 (5th Cir. 2002).
23. *Id.* at 451–52.
24. *Id.* at 452.
25. *Id.*
26. *Id.* at 452–53.
27. *Id.* at 459.
28. *Id.* at 460.
29. *Id.*
30. 2008 WL 5245768, at *4 (E.D. Penn. 2008).
31. *Id.* at *1.
32. *Id.*
33. *Id.*
34. *Id.* at *4.
35. *Id.*
36. *Id.*
37. *Id.* at *5.
38. *Id.*
39. 878 F.2d 791, 800 (4th Cir. 1989).
40. *Id.* at 799.
41. *Id.*
42. *Id.*
43. *Id.*
44. 343 F. Supp. 2d 989, 1015 (D. Kan. 2004).
45. *Id.* at 992–93.
46. *Id.* at 1015.
47. *Id.*
48. *Id.* The court, however, excluded the expert's opinion on other issues having to do with the interpretation of the policy and Liberty Mutual's handling of the underlying litigation. *Id.*
49. Kona Tech. Corp. v. S. Pac. Transp. Co., 225 F.3d 595, 611 (5th Cir. 2000) (holding that expert testimony is admissible to interpret a contract provision having a specialized meaning in the railroad industry).
50. Suzlon Wind Energy Corp. v. Shippers Stevedoring Co., 662 F. Supp. 2d 623, 668 (S.D. Tex. 2009); *see also* WH Smith Hotel Servs., Inc. v. Wendy's Int'l, Inc., 25 F.3d 422 (7th Cir. 1994) (admitting expert testimony on industry custom and usage to assist the trier of fact with interpreting ambiguous contract terms).
51. 33 F.3d 925 (8th Cir. 1994).
52. *Id.* at 926.
53. *Id.*
54. *Id.* at 927.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* at 929.
60. *Id.*
61. *Id.*
62. 2010 U.S. Dist. LEXIS 26294, at *24 (C.D. Ill. 2010).
63. *Id.* at *17.
64. *Id.*
65. *Id.*
66. *Id.* at *18, 23.
67. *Id.* at *23.
68. *Id.*
69. *Id.*
70. 120 F. Supp. 2d 672, 683 (M.D. Tenn. 1999).
71. *Id.* at 674.
72. *Id.*
73. *Id.*
74. *Id.* at 675.
75. *Id.* at 681.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* at 683. The court also considered an additional factor, i.e., "whether the expert's opinion is a product of independent research or whether the opinion was formulated for the litigation." *Id.* (citing Daubert v. Merrell Dow Pharm., Inc., 43 F.3d 1311, 1317 (9th Cir. 1995)).
80. *Id.* (citing Donovan v. Waffle House, Inc., 1983 U.S. Dist.

LEXIS 13420 (N.D. Ga. Sept. 26, 1983)).

81. *Id.* at 683–84. The court also determined that Dr. Deivanayagam's opinion constituted a legal conclusion as the term *primary responsibility* has a distinct legal meaning under FLSA regulations. *Id.* at 684.

82. 852 F.2d 441, 443 (9th Cir. 1988)..

83. *Id.* at 445–46.

84. *Id.* at 446.

85. *Id.*

86. 2001 U.S. Dist. LEXIS 9538, at *7–10 (S.D.N.Y. July 9, 2001).

87. *Id.* at *1.

88. *Id.* at *2.

89. *Id.* at *2–3.

90. *Id.* at *3.

91. *Id.* at *3–4.

92. *Id.* at *8.

93. *Id.* at *9.

94. *Id.*

95. *Id.*

96. *See* Frank Fried, Recent Decisions Address the Use of Expert Testimony in Government Contract Cases (Mar. 31, 2003), www.ffhsj.com/printfriendly.com.cfm?pageID=25&itemID=1715.

97. *See* Klaczak v. Consol. Med. Transp. Inc., 2005 U.S. Dist. LEXIS 13607 (N.D. Ill. May 26, 2005) (citing McCabe v. Crawford & Co., 272 F. Supp. 2d 736, 740 (N.D. Ill. 2003) (holding that plaintiff's expert, a law professor who specialized in consumer law, "may not expound on what complies and does not comply with the [Fair Debt Collection Practices Act]; these are inappropriate legal conclusions"); Cent. Die Casting & Mfg. Co., Inc. v. Tokheim Corp., 1998 U.S. Dist. LEXIS 18472, at *9 (N.D. Ill. Nov 19, 1998) ("The Court agrees that an expert's opinion concerning whether a statute or regulation was violated is likely an inadmissible legal conclusion. . . .")).

98. 81 Fed. Cl. 358, 364 (2008).

99. *Id.* at 359.

100. *Id.* at 360.

101. *Id.* at 364.

102. *Id.* at 363.

103. *Id.* (internal citations omitted).