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October 15, 2020

Rebecca A. Womeldorf, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

Re: Amending Federal Rule of Evidence 702 – A Louisiana Perspective.

Dear Ms. Womeldorf:

As a Louisiana attorney and mass tort litigator in Louisiana state and federal courts, I am writing in support of a clarifying amendment to Federal Rule of Evidence 702.[1] In lieu of repeating the well-reasoned and thoroughly researched positions of my peers,[2] I thought it may be helpful to provide the Committee with a recent example of the "trickle-down" effect of the ambiguity of Rule 702 on Louisiana litigation.

Louisiana Code of Evidence Rule 702 Mirrors the Federal Rule of Evidence 702

The Louisiana Supreme Court has long recognized that the applicable federal law interpreting Rule 702, including *Daubert* and its progeny, is relevant and persuasive when analyzing Louisiana Code of Evidence Rule 702. *See e.g., State v. Foret*, 628 So. 2d 1116 (La. 1993) ("As [La. C.E. art. 702] is virtually identical to its source provision in the Federal Rules of Evidence, F.R.E. 702 and in several states' evidentiary rules, we will examine and consider federal jurisprudence and other states' jurisprudence interpreting the proper application of this rule.").

La. C. E. art. 702 was revised in 2014 to track Fed. R. Evid. 702, which was amended as part of a restyling of the Federal Rules of Evidence. *See* La. C.E. art. 702, cmt. (b); *see also* FED. R. EVID. 702, cmt. The revision creates a five-element test as to the admissibility of expert testimony, requiring that the witness be "qualified as an expert by knowledge, skill, experience, training, or education" and setting forth four enumerated requirements of the qualified expert's testimony that relate to its reliability and relevance.

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[1] *See* Daniel Capra, *Memorandum to Rule 702 Subcommittee re: Rule 702(b) and (d) — Weight and Admissibility Questions*, at 1 (Oct. 1, 2018) (Agenda Book, Advisory Committee on Evidence Rules (Oct. 19, 2018, meeting) at 171); *see also* David E. Bernstein & Eric G. Lasker, *Defending Daubert: It's Time to Amend Federal Rule of Evidence 702*, 57 Wm. & MARY L. REV. 1, 30, 33 (2015).

[2] *See, e.g.* June 9, 2020, Memorandum from Thomas J. Sheehan, Eva Canaan, and Joshua Glasgow, to Committee on Rules of Practice and Procedure, *re: Amending Federal Rule of Evidence 702 – a Review of Gatekeeping Practices in Multidistrict Litigation.*

Failure of the witness to qualify as an expert pursuant to the introductory paragraph of La. C.E. art. 702(A) *or* failure of the testimony to meet any of the indicia of reliability or relevancy set forth in La. C.E. art. 702(A)(1) through (A)(4) will render the testimony inadmissible. *See Blair v. Coney*, 2019-00795 (La. 4/3/20), *reh'g denied,* 2019-00795 (La. 7/9/20), 298 So. 3d 168.

Prior to the foregoing revision to La. C.E. art. 702, the Louisiana Supreme Court recognized that the admission of expert testimony is proper only if all three of the following are established: "(1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in [*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)]; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue." *Cheairs v. State ex rel. Dep't of Transp. & Dev.*, 2003-680, pp. 9-10 (La. 12/3/03), 861 So. 2d 536, 542–43 (quoting *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548 (11th Cir. 1998). These requirements are reproduced in the introductory paragraph of La. C.E. art. 702(A), in La. C.E. art. 702(A)(3), and in La. C.E. art. 702(A)(1), respectively.[3]

The foregoing amendment to La. C.E. art. 702 ostensibly adds two requirements to the three-prong inquiry adopted in *Cheairs*: first, that the testimony must be based on sufficient facts or data, La. C.E. art. 702(A)(2), and; second, that the expert must reliably apply the principles and methods to the facts of the case, La. C.E. art. 702(A)(4). Although not previously enumerated in La. C.E. art. 702 or *Cheairs*, these additions do not change the law. Instead, La. C.E. art. 702(A)(2) and C.E. art. 702(A)(4) are grounded in the longstanding principle recognized in *Daubert* that the determination of whether an expert's testimony is admissible requires an assessment of "whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert*, 509 U.S. at 592–593, 113 S.Ct. 2786; *see also* La. Acts 2014, No. 630, § 2 ("No change in law or result in a ruling on evidence admissibility shall be presumed or is intended by the Legislature of Louisiana by the passage of this Act.").

In Louisiana, like in federal courts, the district court performs the important gatekeeping role of ensuring "that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Cheairs*, 861 So. 2d at 541 (citing *Daubert*, 509 U.S. at 589, 113 S.Ct. 2786). Accordingly, a district court is afforded broad discretion in determining whether expert testimony is admissible, and its decision with respect thereto shall not be overturned absent an abuse of that discretion. *Cheairs*, 861 So. 2d at 541 (citing *State v. Castleberry*, 98-1388 (La. 4/13/99), 758 So. 2d 749, 776); *see also* La. C.E. art. 702, cmt (d) ("[b]road discretion should be accorded the trial judge in his determination as to whether

[3] The four non-exclusive factors set forth in *Daubert* for determining reliability of an expert's methodology – namely, (1) whether it can be (and has been) tested, (2) if the theory or technique has been subjected to peer review and publication, (3) the known or potential rate of error, and (4) whether it is generally accepted within the scientific community – are appropriately reviewed under C.E. art. 702(A)(3*). See Indep. Fire Ins. Co. v. Sunbeam Corp.*, 99-2181, p. 13 (La. 2/29/00), 755 So. 2d 226, 234 (citing *Daubert*, 509 U.S. at 594–95, 113 S.Ct. 2786).

expert testimony should be held admissible and who should or should not be permitted to testify as an expert."); *State v. Foret*, 628 So. 2d 1116, 1123 (La. 1993) ("The admission of the evidence [is] subject to the discretion of the trial judge.") (internal quotations omitted).

Importantly, the factual basis for an expert's opinion determines the reliability of the testimony, and the trial court's inquiry must be tied to the specific facts of the particular case. *Giavotella v. Mitchell*, 2019-0100 (La. App. 1 Cir. 10/24/19), 289 So. 3d 1058, 1071–72, *writ denied,* 2019-01855 (La. 1/22/20), 291 So. 3d 1044 (citing *Robertson v. Doug Ashy Bldg. Materials, Inc.*, 2010-1552 (La. App. 1st Cir. 10/4/11), 77 So. 3d 339, 355, *writs denied,* 2011-2468, 2011-2430 (La. 1/13/12), 77 So.3d 973). The relaxation of the usual requirement that a witness have firsthand knowledge and the permission granted to an expert to express opinions not based on firsthand knowledge or observation "is premised on an assumption that the expert's opinion will have a reliable basis in the knowledge and experience of the discipline." *Indep. Fire Ins. Co. v. Sunbeam Corp.*, 99-2181 (La. 2/29/00), 755 So. 2d 226 (citing *Daubert*, 509 U.S. at 591–92, 113 S.Ct. 2786). "On the other hand, we recognize that '[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.'" *Blair v. Coney*, 2019-00795 (La. 4/3/20), *reh'g denied,* 2019-00795 (La. 7/9/20), 298 So. 3d 168 (*quoting Daubert*, 509 U.S. at 596, 113 S.Ct. 2786).

Recent (Mis)Application of Rule 702 by the Louisiana Supreme Court:
***Everett v. Air Prod. & Chemicals Inc.*, 2019-01975 (La. 5/26/20), 296 So. 3d 1011**

Recently, in *Everett v. Air Prod. & Chemicals Inc.*, the Louisiana Supreme Court overturned a district court's ruling excluding an expert's specific causation opinions for failing to satisfy the requirements of La. C. E. 702, stating in a footnote, "To the extent there are disputes over the accuracy of the facts relied upon by [the expert], the court may find such a challenge goes to the weight of the testimony rather than its admissibility. Additionally, any challenge over the accuracy or sufficiency of the facts underlying the expert opinion may be resolved by an appropriate pre-trial motion, such as a motion for summary judgment, or at trial by the trier of fact." 2019-01975 (La. 5/26/20), 296 So. 3d 1011. Without context, this statement appears mostly innocuous. However, when placed in the context of the facts of that case, the extent to which the gatekeeping function of the courts is being undermined, and the urgency with which a clarifying amendment is required, becomes disturbingly clear.

In *Everett,* Plaintiffs, William Everett, Jr. and Paula Everett, individually and on behalf of their deceased mother, Emily Everett ("Ms. Everett"), alleged that Ms. Everett was exposed to asbestos from laundering the work clothes of her former husband, William Everett, Sr. during his career, and that this exposure substantially contributed to her development of peritoneal mesothelioma, a rare form of mesothelioma affecting the abdominal lining. To prove this allegation, Plaintiffs retained Dr. Edwin Holstein, a medical doctor who offered various opinions relating to the alleged exposure. While he did not submit a report detailing his opinions, in violation of the trial court's scheduling order, Dr. Holstein was deposed in that matter.

During his deposition, Dr. Holstein testified that, while peritoneal mesothelioma is extremely rare and idiopathic in 25-50% of cases involving women such as Ms. Everett, he nonetheless believed that her peritoneal mesothelioma was caused by her ex-husband's exposure to asbestos by specific defendants. Dr. Holstein also testified that he based his specific causation opinions on the deposition testimony of Mr. Everett, and that this testimony was the *only* source of information he had been provided by Plaintiffs' counsel to advise his specific causation opinions. While Dr. Holstein claimed his opinions as to specific defendants were also informed by his historical knowledge, Dr. Holstein did not maintain any files or information on the individual defendants, nor did he attempt to review any other sources of information relevant to the individual defendants, or Ms. Everett's potential exposures, prior to formulating his specific causation opinions in that matter. Instead, Dr. Holstein determined that Ms. Everett's peritoneal mesothelioma was caused by her exposure to asbestos by particular defendants based on Mr. Everett's vague testimony – often stating little more than that he *may* have worked in some capacity at a defendants' premises, where there *may* have been a contractor doing something, and where there *could have been* what he *assumed* to be an asbestos containing product, *at some point* over the course of a decade.

Notwithstanding his various opinions, without any information regarding the conditions of Mr. Everett's workplace, or the proximity, duration, or frequency of any possible exposure he may have encountered, Dr. Holstein was unable to quantify, in any manner, the former husband's exposure from any particular defendant, *as Louisiana law requires*. In turn, Dr. Holstein was also unable to quantify the exposure allegedly encountered by Ms. Everett as a result of laundering her then-husband's clothes. Accordingly, several defendants filed motions to exclude Dr. Holstein's opinion as to specific causation, *i.e.* that the exposure from a particular defendant was a substantial contributing factor to the development of Ms. Everett's peritoneal mesothelioma.

Plaintiffs filed an omnibus opposition in response to the defendants' motions. Despite bearing the burden of proof, Plaintiffs provided little support for the reliability and admissibility of Dr. Holstein's specific causation opinions. Rather, the evidence presented to the trial court clearly showed that Dr. Holstein's reliance on Mr. Everett's testimony was misplaced: Mr. Everett's testimony was vague and generalized; he could not recall many important details (if any at all); there was a lack of information related to the duration, frequency, and proximity of his possible exposures; and, Mr. Everett actually admitted that he only ***assumed*** that the products he was working with or around contained asbestos and, in fact, could not honestly testify that those products were asbestos-containing. Based on the record, and with no other source of facts or data on which to base a quantitative or qualitative assessment of asbestos exposure, Plaintiffs' expert's causation opinions simply could not pass muster under La. C. E. art. 702.

The defendants' motions were heard by the trial court on September 13, 2019. At the hearing, the defendants successfully argued that Dr. Holstein's opinions were not based on, nor supported by facts and, as such, were unreliable and unhelpful to the trier of fact and should be precluded from trial. After

considering the motions, exhibits, applicable law, and the arguments of counsel, district court judge agreed with the defendants and excluded Dr. Holstein's specific causation opinions from trial.[4]

In excluding Dr. Holstein's specific causation opinions, the trial court concluded that any of Dr. Holstein's opinions regarding exposure at a particular premise, or as a result of a particular defendant's conduct, would not be based on reliable facts or data. In its Reasons for Judgment, the trial court explained that, because the *only* source of information regarding Mr. Everett's exposure was the vague and speculative testimony of Mr. Everett himself, Dr. Holstein's opinions were not based on sufficient relevant facts or data, and so do not meet the requirements for admissibility under La. C. E. art. 702. Furthermore, Dr. Holstein did not even attempt any kind of quantitative ***or*** qualitative assessment of the possible exposure levels of either Mr. or Ms. Everett, nor could he have done so based solely on Mr. Everett's deposition and with no records pertaining to the individual defendants. Without an understanding of the nature of Mr. Everett's exposures, it was simply not possible to scientifically determine that *any particular defendant* caused Ms. Everett's peritoneal mesothelioma.

In response to the trial court's decision to exclude their expert's causation opinion, Plaintiffs filed an application for supervisory writ to the Louisiana Fourth Circuit Court of Appeal on November 12, 2019. On November 13, 2019, the Fourth Circuit denied Plaintiffs' application for supervisory writ, correctly finding no abuse of discretion by the trial court. Plaintiffs then filed a writ of certiorari with the Louisiana Supreme Court.

The Louisiana Supreme Court granted Plaintiffs' writ, vacated and set aside the district courts ruling, and remanded the case to the district court to "make specific findings, after an appropriate hearing, as to whether Dr. Holstein's testimony on causation satisfies the requirements of La. Code Evid. art. 702 as well as the considerations set forth in *Daubert v Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and *State v. Foret*, 628 So. 2d 1116 (La. 1993)." *Everett v. Air Prod. & Chemicals Inc.*, 2019-01975 (La. 5/26/20), 296 So. 3d 1011. While the Court's decision was primarily based on the lack of information provided in the appellate record, in the brief *per curiam* opinion, the Court included the following footnote, citing a California U.S. district court opinion:

> To the extent there are disputes over **the accuracy of the facts** relied upon by Dr. Holstein, **the court may find such a challenge goes to the weight of the testimony rather than its admissibility.** Additionally, any challenge over the **accuracy or sufficiency of the facts underlying the expert opinion** may be resolved by an appropriate pre-trial motion, such as a motion for summary judgment, **or at trial by the trier of fact.** *See, e.g., Walashek v. Air Liquid Systems Corporation*, 2016 WL 614030 (S.D.Cal. Feb. 16, 2016) (Not Reported in Fed. Supp.).

[4] After granting the motions *in limine*, the trial court mooted a Motion to Exclude Dr. Holstein for Non-Compliance with the Court's Scheduling Order, which had been filed as a result of Dr. Holstein's failure to submit an expert report in direct violation of the trial court's scheduling order.

Id. (emphasis added).

Because the issue in that case was the ***absence of facts*** upon which the expert relied in forming his opinion, this footnote demonstrates why a clarifying amendment is required for Rule 702. Even though the statute plainly requires that an expert's opinion must be based on sufficient facts or data, and despite the trial court's proper application of La. C. E. 702 and exercise of its gatekeeping function, the confusion resulting from the lack of guidance on Rule 702 has reached the highest court in this State. Moreover, Louisiana law generally does not require a quantitative exposure analysis as long as there are some basic facts from which a qualitative analysis may be made by the expert, a liberal standard to be sure. The egregious thing about *Everett* is that there were no facts -- only assumptions and vague non-specific recollections – upon which even a qualitative analysis could be based. The La. Supreme Court will now allow the absence of facts to be obscured and, moreover, negated by an expert's opinion -- who has no firsthand knowledge of any facts and whose opinion has significant persuasive power on a jury.

Simply put, the confusion surrounding the application of Rule 702 is causing uncertainty and unnecessary expense on both sides of the aisle, in both state and federal court, and will continue to undermine the purpose and spirit of Rule 702 unless corrected by the Advisory Committee.[5]

An Amendment Regarding Weight/Admissibility under Rule 702 is Necessary to Prevent Further Misapplications of Rule 702.

In "a disturbing number of cases," courts make the broad misstatement that "challenges to the sufficiency of an expert's basis raise questions of weight and not admissibility."[6] That misstatement is equivalent to throwing in the towel and conceding a result when confronted with difficult circumstances. Yet, the difficult task of determining expert validity is unquestionably the role of the trial court and not the jury, and experienced judges are in a far better position to accomplish that task than lay jurors.

In refusing to exercise their gatekeeping duties, courts effectively shift *Daubert*'s gatekeeping requirement to counsel opposing the expert testimony. Any failure by the court to conduct a thorough Rule 702 analysis can supposedly be remedied by vigorous cross-examination. Yet, once the expert is allowed to testify, the cat is out of the bag. Indeed, there are at least two instances where cross-

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[5] *See also, Certain Underwriters at Lloyd's London v. United States Steel Corp.*, 2019-1730 (La. 1/28/20), 288 So. 3d 120, 122 ("We agree with [the dissent] that the majority below and the trial court erred in considering factors which may affect the credibility of the experts' opinions or the weight the jury affords their conclusions, but do not undermine the soundness of the methodology employed by the experts . . . "An expert may provide testimony based on information obtained from others, and **the character of the evidence upon which the expert bases an opinion affects only the weight to be afforded the expert's conclusion.**" (citations omitted);

[6] Daniel Capra, *Memorandum to Advisory Committee on Evidence Rules re: Possible Amendment to Rule 702*, (Oct. 1, 2019)(Agenda Book, Advisory Committee on Evidence Rules (Oct. 25, 2019 meeting) at 160).

examination of an expert will be insufficient to remedy a failure to conduct a comprehensive Rule 702 analysis.[7]

- First, the significance of cross-examination might "go over the heads" of jurors where expert testimony deals with complex and difficult subject matter. This is the very reason for Daubert's gatekeeping requirement.[8]

- Second, even successful cross-examination of an expert can be ineffective if the expert's opinion is unfairly prejudicial, touching upon sensitive or emotion-laden subjects.[9]

Such an opinion should be inadmissible in the first instance because it does not help the trier of fact under Rule 702(a). "The whole point of Rule 702 – and the *Daubert*-Rule 104(a) gatekeeping function – is that these issues cannot be left to cross-examination."[10]

In order to provide greater clarity and consistent interpretation of Rule 702 by the Courts, I am writing to express my full support of a clarifying amendment or comment so far as it addresses the weight/admissibility issue and urges its adoption. As succinctly noted in the Washington Legal Foundation's recent Working Paper, the intent of Rule702 was – and remains – to establish rather than evade a uniform standard courts will use to scrutinize an expert's basis, methodology and application.[11] The Committee must now issue necessary clarification so that the Rule can function as intended and safeguard the trial process against misleading and unqualified opinion testimony.

Conclusion

Thank you very much for your time and valuable consideration on these important issues. Please do not hesitate to contact me if you have any questions, and I look forward to the opportunity to further engage with the committees regarding the importance of Rule 702.

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[7] *See* 29 WRIGHT & GOLD, Federal Practice & Procedure § 6294. Wright & Gold discuss Rule 705 and the general weaknesses in cross-examining experts. Rule 702 is woven throughout that discussion.

[8] *Id.*

[9] *Id.*

[10] Capra, *supra* note 9 at 141.

[11] Mickus, *Gatekeeping Reorientation: Amend Rule 702 to Correct Judicial Misunderstanding About Expert Evidence*, Washington Legal Foundation, Critical Legal Issues Working Paper Series, Number 217 (May 2020).

Respectfully submitted,

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