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Daubert Challenge Resolves Coverage Dispute On Summary Judgment

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Daubert challenges are common in commercial disputes and often have a powerful impact on litigation results. As established by Federal Rule of Evidence 702 and the U.S. Supreme Court case *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 589 (1993) certain requirements were set forth for expert testimony to be admissible, like the expert's qualifications and whether the testimony is based on sufficient facts and reliable methods. However, it is not often that you see a *Daubert* challenge resolve an entire insurance coverage dispute – let alone at the summary judgment phase. Yet, the recent case *Varlen Corporation v. Liberty Mutual Insurance Company,* No. 13-cv-05463 (N.D. Ill. Sept. 25, 2017), did just that. This case involved a coverage dispute stemming from environmental contamination that hinged on whether the pollution exclusion barred coverage. As anyone familiar with the insurance coverage world knows, the pollution exclusion has been widely litigated. The insurance policies in this case had the common pollution exclusion language, which stated that the exclusion did not apply if the "discharge, dispersal, release or escape is sudden and accidental." However, instead of the typical coverage case that usually turns on which state's law applies and whether the alleged contamination was "sudden and accidental" under that state's case law, this case is unique because the pollution exclusion was found to apply due to a successful *Daubert* challenge. The court held on summary judgment that the plaintiff's expert did not use "scientifically reliable methods to reach his opinion that sudden and accidental discharges occurred" at the sites. Therefore, since the plaintiff relied exclusively on its expert's report and deposition to create a fact issue about whether the contamination was "sudden and accidental," the insurance company won on summary judgment once the court excluded the expert's testimony under *Daubert* and Federal Rule of Evidence 702. It is interesting to note that the court found the expert's report met the requirements of Federal Rule of Civil Procedure 26(a)(2), which governs the required contents of expert reports, despite ultimately excluding the testimony. In fact, it appears from the order that the court did not take issue with any of the facts the expert relied on. The court even stated that the expert "established a proper basis for his opinions, but he has not demonstrated that they result from a reliable methodology." Rather, the court took issue with the lack of explanation by the expert about how he "concluded that the pollutants were discharged suddenly and accidentally" so as to rise above mere speculation. Thus, this case may have turned out differently if the expert report or deposition fleshed out the expert's reasoning slightly better. This case is a good reminder that if a party is going to use an expert, it must take care to make sure the requirements of *Daubert* and Federal Rule of Evidence 702 are met at every stage – report, deposition and trial. Additionally, in the insurance coverage context, parties should not assume that expert issues are for trial purposes only, since the *Varlen* case – and its summary judgment result – has now shown otherwise when no other proof besides expert testimony is offered.

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