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The Statutory Expert Reliance Defense and Federal Rule of Evidence 702: Lessons in Gatekeeping

Valorie K. Vojdik

THE STATUTORY EXPERT RELIANCE DEFENSE AND FEDERAL RULE OF EVIDENCE 702: LESSONS IN GATEKEEPING

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Professor Moll invites corporate scholars and lawyers to explore the benefits and risks of corporate statutes that provide board directors a defense for good faith reliance on expert reports. His presentation, "Breach of Fiduciary Duty by Corporate Directors and the Defense of Reliance on Experts," poses critical questions about the scope and impact of this defense.[1] Moll invites us to think more closely about this statutory defense. Should corporate directors be able to rely on information and reports by experts in discharging their fiduciary duties? What are the risks and benefits of the expert reliance defense? As a scholar of federal courts and procedure, and a former litigator, I suggest that corporate scholars might consider Rule 702 of the Federal Rules of Evidence, which reflects one approach to addressing some of these tensions and concerns.[2]

Many corporate statutes provide that directors, in discharging their fiduciary duties, may rely in good faith upon information, opinions, reports or statements from experts. These statutes provide a defense for directors "when their allegedly uninformed or wrongful decisions were based on credible information provided by others."[3] Section 141(e) of the Delaware General Corporation Law provides that corporate directors are fully protected when they rely in good faith upon information, opinions, reports or statements presented to the corporation by experts. It provides:

> A member of the board of directors . . . shall, in the performance of such members' duties, be fully protected in relying in good faith upon . . . such information, opinions, reports or statements presented to the corporation by any of the corporation's officers or employees, or committees of the board of directors, *or by any other person as to matters the member reasonably believes are*

* Waller Lansden Distinguished Professor of Law, University of Tennessee College of Law.

[1] *See, e.g.*, Douglas Moll, *Breach of Fiduciary Duty and the Defense of Reliance on Experts*, 20 TENN. J. BUS. L. 719 (2019).

[2] *See* FED. R. EVID. 702(a).

[3] Moll, *supra* note 1, at 725.

> *within such other person's professional or expert competence and who has been selected with reasonable care by or on behalf of the corporation.*[4]

Moll argues that these statutes arguably encourage directors to consult with experts, which is valuable to the corporation.[5] As a practical matter, directors cannot be expected to have deep expertise in every aspect of a corporation's business. Requiring a director to be a "jack of all trades," Moll observes, is unrealistic.[6] Directors routinely rely on information and reports from others with more specific knowledge and expertise. These statutes, Moll suggests, encourage directors to seek expert advice, which arguably improves the quality of director decision-making.[7] Yet Moll raises a critical question about this supposed salutary effect. Do the statutes help corporations or do they result in "expert shopping" by directors who might be eager to set up the statutory defense?[8]

Moll's inquiry regarding the expert reliance defense raises questions familiar to judges, trial lawyers, and scholars who have grappled with the admissibility of expert testimony under the Federal Rules of Evidence. Both the statutory defense for directors and Rule 702 of the Federal Rules of Evidence recognize that expert reports can be extremely probative and helpful to the ultimate factfinder. In the case of the corporation, the factfinder is the director tasked with making a business decision on behalf of the corporation. In a trial, the factfinder is the judge or jury assigned the role of determining disputed facts at trial. In both cases, the relevant rules recognize the need for the factfinder to make an informed decision and specifically permit the factfinder to consider and rely on expert opinions. A comparison of the statutory defense and Rule 702 reveals that both address the need for the expert report to be helpful to the factfinder and to be reliable. The Rules of Evidence, however, require judges—neutral and independent—to make specific findings germane to these threshold issues within the context of an adversarial trial.

Both statutes recognize and require that an expert report may be considered by the factfinder if it is helpful or relevant. The Delaware corporate statute specifically permits directors to rely on information by experts in making decisions as a board member, recognizing the need

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[4] DEL. CODE ANN. tit. 8, § 141(e) (2019) (emphasis added).

[5] Moll, *supra* note 1, at 723–25.

[6] *Id.* at 723.

[7] *Id.*

[8] *Id.* at 726.

for, and usefulness, of such reports. The director makes that decision and, to obtain the protection of the defense, must show that s/he has done so "in good faith."[9] Rule 702 of the Federal Rules of Evidence similarly requires an expert opinion to be helpful to the factfinder. It specifically requires the judge to find that the proposed expert testimony "will help the trier of fact understand the evidence or to determine a fact in issue."[10] The judge thus acts as a neutral gatekeeper, making an independent decision as to the helpfulness of the report to the factfinder. To make this determination, the judge hears argument by opposing counsel and must take into account, as with all evidence, whether its probative value is outweighed by any prejudice that might arise. This balancing test helps to insure that the evidence will be helpful and not overly harmful to the jury's deliberations.

Both statutes also require consideration of qualifications of the expert. The need for reliability is critical in both the corporate boardroom and the federal courtroom. As Professor Moll observes, the statutory expert reliance defense might perversely incentivize directors to seek opinions from experts known by the director to support his or her views.[11] The same risk arises in litigation under the Rules of Evidence. Lawyers have an incentive to retain—and pay—expert witnesses who make a living testifying for one side or another, the so-called "hired gun." In both contexts, the relevant rule/law seeks to address and minimize that risk. Delaware § 141(e), for example, requires that a director who seeks to rely on the defense must show that s/he "reasonably believes" that the expert has the "professional or expert competence" to provide information or an opinion on the matter in question.[12] Further, § 141(e) requires that the expert "has been selected with reasonable care by or on behalf of the corporation." [13]

The Federal Rules of Evidence take a more muscular approach. Under Rule 702, the federal judge plays a key gatekeeper function, deciding as a threshold matter whether a witness is qualified to testify as an expert. Thus, the decision as to whether a witness has the requisite "knowledge, skill, experience, training, or education" to offer an expert opinion rests with the judge.[14] To make this determination, the judge hears evidence and argument from counsel for the opposing parties. In

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[9] tit. 8, § 141(e) (2019).

[10] FED. R. EVID. 702(a).

[11] Moll, *supra* note 1, at 726.

[12] tit. 8, § 141(e) (2019).

[13] *Id.*

[14] FED. R. EVID. 702.

contrast, § 141(e) relies upon the director's "reasonable belief" in the expertise of the expert, coupled with the requirement that the corporation use "reasonable care" in selecting the expert.[15] While the Delaware statutory defense takes into account the fiduciary duties of care and loyalty owed by the director and the corporation, Rule 702 places the gatekeeping function in the hands of a neutral, independent federal judge, who is able to fully consider and evaluate competing arguments as to the qualifications of the expert. The process is not perfect. Some scholars have criticized Rule 702 for not providing more specific guidance to judges, leading judges to rely on statements by experts regarding their credentials instead of requiring proof of expertise—for example, objective evidence of the an expert's actual proficiency.[16] Rule 702, however, is designed to give judges flexibility in admitting expert testimony. The adversarial nature of a trial, moreover, helps insure that the judge considers the relevant arguments for and against the expert's qualifications.

Assuming the judge determines the witness is qualified to testify, Rule 702 further requires the judge to determine whether the expert testimony is reliable. It provides:

> 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:
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> (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;
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> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
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> (d) the expert has reliably applied the principles and methods to the facts of the case.[17]

The Advisory Notes explain that Rule 702 was amended in 2000 to reflect the decision of the United States Supreme Court in *Daubert v. Merrill Dow Pharmaceuticals, Inc.* and subsequent cases, requiring trial judges to act as "gatekeepers" to exclude unreliable scientific and expert

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[15] tit. 8, § 141(e) (2019).

[16] *See, e.g.*, Brandon L. Garrett & Gregory Mitchell, *The Proficiency of Experts*, 166 U. PA. L. REV. 901, 911–13 (2018) (arguing that the standard for expert qualification in Rule 702 should be "revitalized" to require evidence of proficiency to demonstrate expertise).

[17] FED. R. EVID. 702.

testimony.[18] In *Daubert*, the Supreme Court set forth a non-exhaustive list of factors for the courts to consider in making this determination: (1) whether the expert's technique or theory can be or has been tested—that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community.[19]

In contrast to Delaware's director expert reliance statute, Federal Rule of Evidence 702 thus provides more specific guidance to courts for determining whether an expert's testimony is sufficiently reliable to justify consideration by the factfinder. Designed to exclude unreliable expert evidence, Rule 702 and judicial review of expert testimony under the *Daubert/Kumho* standard is not perfect. Numerous scholars have argued that judges fail to apply Rule 702 adequately or fairly.[20] For example, scholars have argued that judges have failed to carry out their gatekeeping duties toward forensic science, resulting in the admission of unreliable expert testimony in criminal cases.[21] Other scholars argue that courts exhibit bias in determining the admissibility of evidence, routinely

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[18] *See* FED. R. EVID. 702 advisory committee's notes to 2000 amendment; Kumho Tire Co. v. Carmichael, 119 S. Ct. 1167, 1176 (1999) (holding that court's gatekeeping function applies to all expert testimony, whether or not based on "science."); Gen. Elec. Co. v. Joiner, 522 U.S. 136, 142 (1997); Daubert v. Merrell Dow Pharms., 509 U.S. 579, 592–93 (1993).

[19] *Daubert*, 509 U.S. at 593–94.

[20] *See, e.g.*, David E. Bernstein & Eric G. Lasker, *Defending Daubert: It's Time to Amend Federal Rule of Evidence 702,* 57 WM. & MARY L. REV. 1, 5 (2015) (arguing that courts have inconsistently applied Rule 702 and advocating for its amendment); Rachel Dioso-Villa, *Is the Expert Admissibility Game Fixed?: Judicial Gatekeeping of Fire and Arson Evidence*, 38 L. & POL'Y 54, 54 (2016) (study finding empirical support of judicial bias in determining admissibility of fire and arson testimony in both civil and criminal cases); Brandon L. Garrett & M. Chris Fabricant, *The Myth of the Reliability Test,* 86 FORDHAM L. REV. 1559, 1560 (2018) (finding that in criminal cases in states that have adopted Rule 702, courts largely neglect to apply the reliability test adopted in Rule 702).

[21] *See, e.g.*, DAVID L. FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY § 1:30 (2014) (noting that in general, "courts have been, at best, lackadaisical and, at worst, disingenuous, in carrying out their gatekeeping duties towards forensic science"); M. Chris Fabricant & Tucker Carrington, *The Shifted Paradigm: Forensic Science's Overdue Evolution from Magic to Law*, 4 VA. J. CRIM. L. 1, 7 (2016)(arguing that the judicial system has continued to rely on "deeply flawed, scientifically invalid precedent to support the admissibility of false and misleading evidence").

admitting the government's expert witnesses in criminal cases while rigorously scrutinizing plaintiffs' experts in civil cases.[22] Nevertheless, the evidentiary rules at a minimum provide a framework for the explicit consideration of the relevance and reliability of expert testimony, recognizing the importance of these threshold issues.

The statutory expert reliance defense allows corporate directors to rely on expert reports and avoid liability for erroneous or harmful decisions. Delaware's Section 141(e) illustrates the need to strike the proper balance between the benefits of reliance on expert testimony with the possible costs or harm. Professor Moll raises important questions about how to strike that balance. Rule 702 of the Federal Rules of Evidence seeks a similar balance, requiring judges to determine the reliability of proffered expert evidence using flexible, non-exhaustive factors to assess the evidence. Whether such an approach would allay some of the concerns raised by Professor Moll is unclear. At a minimum, a brief comparison of both approaches suggests that Professor Moll's concerns are important issues to address.

[22] Dioso-Villa, *supra* note 20, at 75 (summarizing empirical studies suggesting judicial bias in criminal and civil cases).