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## **Courts crack down on policyholders' business interruption experts**

By Samuel H. Ruby

*Motions to exclude expert witnesses—commonly known in federal court as Daubert motions—are most often thought of in connection with products liability and other personal injury cases. However, in business interruption coverage litigation, policyholders frequently retain purported economic experts to support their business income loss calculations. A pair of recent decisions demonstrates that Daubert motions are appropriate in such cases and can be successful.*

Federal Rule of Evidence 702 provides that testimony is admissible as expert testimony 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. The rule has long been applied to scientific testimony, but as the Supreme Court clarified in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), the rule applies to other types of expert testimony as well. Recently, in *Cooper v. Travelers Indemnity Company of Illinois*, U.S.D.C. (N.D. Cal.) No. 01-2400 and *Lava Trading, Inc. v. Hartford Fire Ins. Co.*, U.S.D.C. (S.D.N.Y.) No. 03-7037, insurers successfully invoked Rule 702 in motions to exclude policyholders' business interruption experts.

In *Cooper*, the insured disclosed Robert Johnson, an economic consultant, as its expert on the insured's alleged loss of business income during the closure of his restaurant. At Johnson's deposition and during voir dire at the trial, numerous deficiencies in Johnson's work were brought to light. Chiefly, Johnson was forced to admit that his calculations were based almost entirely on unverified data provided by the insured. The trial court sustained the insurer's motion to exclude Johnson, and in an unpublished decision, the Ninth Circuit recently affirmed the ruling.

A similar situation arose in *Lava Trading*, a World Trade Center case. The insured disclosed Eric Clemmons as its expert on business income losses. The insurer moved to exclude Clemmons, citing his use of an unreliable model for his calculations and his reliance on unverified estimates provided by the insured. In a strongly-worded opinion, the magistrate judge who heard the motion has recommended to the trial judge that the expert be excluded.

*Cooper* and *Lava Trading* demonstrate that *Daubert* motions are not just for personal injury cases. An insurer in coverage litigation, faced with the disclosure of a purported economic expert, should insist that the expert submit the detailed report that is required by Federal Rule of Civil Procedure 26(a). The insurer should then carefully depose the expert to determine if his ultimate opinions are the product of reliable methodology and data. If the answer is "no" in either respect, the insurer should move to exclude the expert's testimony.