Update on *Daubert:* What Has It Done to Affect the Right to Jury Trial?

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Since 1993, when the Supreme Court issued its decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[1] federal courts have been grappling with how to properly apply the Court's gatekeeping mandate. Now that many states have adopted *Daubert* as well, the affect of the Court's decision has expanded to virtually every jurisdiction in some form or another. Countless articles have been written about the *Daubert* line of cases and all that is required to comply with the relevance and reliability standards stated therein. What is rarely discussed, however, is what *Daubert* has done to affect litigants', and particularly, plaintiffs' right to trial by jury. In looking at the state of the law, it is abundantly clear that while the Court purported to expand the admission of expert testimony in *Daubert*, the opinion has actually most often been used to cut short many viable cases through an overly strict interpretation of the standards set forth for admission of expert's opinion testimony. Because of the abuse of discretion standard established in *General Electric Co. v. Joiner*,[2] a district court's decision to strike expert testimony, thus shutting down the case before trial, is virtually immune from criticism. Therefore, much more important than understanding what *Daubert* purported to do, is figuring out how to overcome it.

A. Why *Daubert* Is So Dangerous

Justice Rehnquist, in his dissent in *Daubert*, noted that "[q]uestions arise simply from reading . . . the Court's opinion, and countless more questions will surely arise when hundreds of district judges try to apply its teaching to particular offers of expert testimony."[3] Thus, as a starting point its important to recognize that the *Daubert* opinion doesn't even really tell judges what they are supposed to do. As one commentator put it, "*Daubert* has no clear legal rule for judges to apply, has no cognizable position on the degree of scrutiny expert testimony should face, and has no clear stand – even in dicta – on what constitutes 'good science.'"[4]

Under *Daubert*, it is generally understood that a trial court judge faced with a proffer of expert scientific testimony must determine whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or

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[1] 509 U.S. 579 (1993).
[2] 522 U.S. 136 (1997).
[3] 509 U.S at 600 (Rehnquist, C.J., concurring in part and dissenting in part).
[4] Robert Robinson, "Daubert v. Merrell Dow Pharmaceuticals and the Local Construction of Reliability," 19 Alb. L.J. Sci. & Tech. 39 (2009). "Law is most effective in guiding judicial behavior when the law has a relatively clear rule, a relatively clear substantive meaning, or where judges face meaningful appellate oversight. *Daubert* decisions fit none of these criteria." *Id*. at 42.

determine a fact at issue. In order to determine whether proffered evidence is "scientific knowledge" that "will assist the trier of fact to understand or determine a fact in issue," the majority provided a list of criteria to assist the trial judge's assessment. Generally, these criteria have been reduced to the following four general conditions: (1) whether the methods upon which the testimony is based are centered upon a testable hypothesis; (2) the known or potential rate of error associated with the method; (3) whether the method has been subject to peer review; and (4) whether the method is generally accepted in the relevant scientific community. What has been lost in the subsequent interpretation, however, is that the Court nevertheless stated that any consideration of admissibility under Rule 702 must still be "flexible."[5] Despite the admonishment that courts not use the *Daubert* criteria as a "checklist," many courts have not only looked to the Court's suggested criteria as a mandate, but they have either overemphasized or fully mischaracterized the meaning of the mandate in applying the test to the proposed testimony.

In their role as gatekeepers judges examine a theory, gather opposing facts about it, and then attempt to make a "reasoned judgment" about which set of facts are correct. Traditionally, this has been a role for juries, not judges. If a judge wishes to prevent a case from going to a jury, he or she can almost always find a way to rigidly apply the *Daubert* factors to justify the decision to strike an expert and completely gut a party's case. "After more than a decade of experience with *Daubert*, it is now clear that the lower courts have applied it vigorously to exclude expert testimony."[6]

Most notable regarding this trend is the fact that even opinions supported by peer-reviewed evidence (one of the four *Daubert* criteria) are being struck on *Daubert* grounds. For example, in *Castellow v. Chevron USA*,[7] the trial court struck the plaintiff's causation expert because it would not accept the methodology the expert used to determine the plaintiff's exposure to benzene, despite the fact that the plaintiff's offered a publication by the American Industrial Hygiene Association ("AIHA") in which the modeling approach utilized by the expert was described and advocated. Thus, the judge chose to exclude the evidence as "unscientific," even though the scientific community agreed with the approach. Further, not surprisingly, the judge then sealed the deal by granting summary judgment on the grounds that the plaintiff had no proof of causation.

Even where plaintiffs *are* successful at the trial level in proffering scientific evidence to support their claims, the appellate courts are often ready and willing to retroactively apply *Daubert* to undue that proof. For example, in *Wright v. Willamette Industries, Inc.*,[8] the plaintiffs sought to recover various ailments that were allegedly

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[5] *Id*. at 594. "[T]he Daubert test for reliability is flexible and 'Daubert's list of specific factors neither necessarily nor exclusively applies to all experts or in every case."' *Fillebrown v. Steelcase, Inc*., 63 F. App'x 54, 56 (3rd Cir. 2003).

[6] Jeffry D. Cutler, *Implications of Strict Scrutiny of Scientific Evidence: Does Daubert Deal a Death Blow to Toxic Tort Plaintiffs?,* 10 J. Envtl. L. &Litig. 189, 214 (1995).

[7] 97 F.Supp.2d 780 (2000).

[8] 91 F.3d 1105 (8th Cir. 1996).

caused by their exposure to particulates emitted by the defendant's fiberboard plant. It was undisputed that the plaintiffs were exposed to particles, which were laced with formaldehyde that vastly exceeded acceptable levels. In fact, the particles were found in the plaintiffs' house, and in their sputum and urine. Nevertheless, the court found that the testimony about the exposure was "speculative," because the plaintiffs failed to produce evidence that they were exposed to a hazardous level of formaldehyde from the fibers emanating from defendant's plant. In so holding, the court completely misinterpreted the scientific theory of dose-response offered and substituted its own requirement that there be a certain degree of exposure tied directly to the defendant's plant.

It is rather ironic how the circuit courts tend to steadfastly stand by the abuse of discretion standard established in *Joiner* to meekly refuse to overturn an obviously erroneous ruling excluding relevant evidence, yet seem to have no qualms about reversing the admission of expert testimony when it adversely affects the defendant at trial. An example of this double standard is the Fifth Circuit's decision in *Huss v. Gayden*.[9] In that case the plaintiff was awarded $3.5 Million for injuries she received as a result of the negligent administration Terbutaline sulfate during her pregnancy. The plaintiff argued at trial that defendants breached the standard of care by administering a tocolytic agent when she was not actually in labor, which caused her to develop a number of cardiac complications. Whether Terbutine can and did cause cardiomyopathy was obviously hotly disputed in the case. The defendants sought to elicit testimony from their expert Dr. Reddix, an internist, that medical literature relied upon by the plaintiff's expert in forming his opinion did not show a causative relationship between Terbutaline and cardiomyopathy. The magistrate judge did not permit the internist to state this opinion, as this was "outside the area of his expertise." Specifically, the trial court focused on the fact that Dr. Reddix had virtually no experience in obstetrics and gynecology and no experience whatsoever with Terbutaline, and was neither a cardiologist nor a toxicologist. Nevertheless, the Circuit Court found the exclusion of Dr. Reddix's opinion testimony was an abuse of discretion, noting that "the *Daubert* standards are flexible, and the most important question is not whether one party's expert is more qualified than the other's, but rather, whether an expert's testimony is reliable."[10]

As if this reversal was not enough, the Court went on to caution the trial court against admitting the plaintiff's expert testimony at the retrial. Having just enunciated the "flexible" nature of the *Daubert* analysis (when applied to the defendant's expert), the Court proceeded to comment on how the plaintiff's expert proof may be deemed so unreliable as to require judgment against plaintiff as a matter of law. Amazingly, the Court was critical of the fact that the plaintiffs had identified no case finding that Terbutaline causes cardiomyopathy. Is the requirement no longer that we look for support in the medical and scientific literature? We now have to find case law to support our claims of causation? As if to provide a safe harbor for what was obviously an overstepping of the court's grounds in this opinion, it summed up by stating: "The observations about general and specific causation are not a part of the holding today.

[9] 571 F.3d 442 (5th Cir. 2009).
[10] *Id*. at 456.

However, it is important to identify problematic aspects in the scientific and factual proof necessary to this case so that any shortcomings can be properly addressed upon retrial." [11]

Although the Supreme Court has made clear that a proffered opinion cannot be based upon the *ipse dixit* of the expert,[12] the same rule does not seem to apply to the courts' interpretation of that evidence. Whether an opinion is admissible appears to have less to do with the reliability and relevance of the evidence than it does to the personal interpretation of the judge or judges reviewing it. Although the Eighth Circuit reversed the trial court's decision to admit the expert testimony in *Wright v. Willamette Industries, Inc.*, other courts applying that decision to similar factual situations have reached entirely different results. In *Alder v. Bayer Corp., AGFA Div.*,[13] the Utah Supreme Court refused to apply *Wright* to exclude evidence of toxic exposure causing the plaintiff's injuries, finding that a "reasonable person could conclude" that the plaintiff's exposure to "toxic levels" of chemicals "probably caused" the injuries, which was sufficient. With this inconsistency, the bottom line is that there is no way for a litigant to know, in many instances, whether expert testimony is going to be allowed under a *Daubert* analysis until the testimony is offered at trial and subject to subsequent review by the appellate court. As will be shown below, while the plaintiff benefited from the random nature of the rule's application in *Alder*, the plaintiff rarely benefits when *Daubert* comes into play.

B. The Negative Implications of *Daubert* Disproportionately Affect Plaintiffs.

There is no question that challenges to expert testimony have steadily increased in the post-*Daubert* era, and a number of studies have supported the anecdotal evidence of this fact.[14] As a result, more summary judgment motions are granted, because once the expert is struck, the plaintiff no longer has the proof necessary to meet his or her burden.[15] And litigants are on notice that they get but one bite at the apple. "It is implausible to suggest, post-*Daubert* that parties will initially present less than their best expert evidence in the expectation of a second chance should their first try fail."[16] The problem, of course, is that this "*Daubert* cocktail" only affects the plaintiff. The defense

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[11] *Id*. at 461.
[12] *General Electric Co. v. Joiner*, 522 U.S. 136, 146.
[13] 61 P.3d 1068, 1086-1087 (Utah 2002).
[14] For example, RAND Inst. for Civil Justice published a study in 2001 entitled "Changes in the Standards for Admitting Expert Evidence in Federal Civil Cases Since the Daubert Decision."
[15] *See, e.g., Rink v. Cheminova, Inc.*, 400 F.3d 1286 (11th Cir. 2005). In *Rink*, the district court granted summary judgment to the manufacturer of pesticides following the court's exclusion of expert testimony under the principles of *Daubert*. The Eleventh Circuit, having found no abuse of discretion in excluding the expert testimony, affirmed the grant of expert testimony "because the requisite proof of causation was lacking without the expert testimony."
[16] *Weisgram v. Marley Co.*, 528 U.S. 440, 455 (2000) (faulting a litigant for not taking steps to supplement its evidence with another expert when the opposing party was challenging a crucial expert).

never has to face the one-two punch of the *Daubert* motion quickly followed by the summary judgment order or directed verdict. If a defendant looses an expert, the defense isn't shut down; the jury can still consider the case.

The powerful affect of such an evidentiary ruling is illustrated in the case of *Pressley v. Lakewood Engineering & Manufacturing Co*.[17] Following a fire in the plaintiff's home, they hired Arms, a fire expert and electrical engineer, to investigate the cause of the fire, and ultimately filed a product liability claim based on Arms' conclusion that a manufacturing defect in the defendant's heater caused the fire. In reaching his conclusion, Arms relied upon guidelines published by the National Fire Prevention Association (NFPA) as well as other treatises and publications, and also developed his theories through his own observations and testing, and consideration of metallurgical and flammability tests performed by outside experts. Arms explained that his "piecemeal" approach to analyzing the event was necessary because he believed it was impossible to recreate the actual fire scene through a laboratory experiment; however, he stated that his own observations and testing were sufficient to rule out other causes for the fire.

The defendant simultaneously moved to exclude Arm's testimony and for summary judgment. The court conducted a hearing that similarly considered both the admissibility of Arm's testimony and the summary judgment argument. The trial court granted both motions. The plaintiff appealed, on the grounds that the district court incorrectly interpreted prior case law to require testing at every step in fire cases. The Eighth Circuit agreed that there is "no bright-line rule for testing in fire cases," but nevertheless found that the district court's declaration that Arm's "lack of testing was 'troubling as to whether there's any scientifically reliable basis for any opinion that he might give,'"[18] was sufficient to find that no abuse of discretion occurred. Given that the motions were filed simultaneously, even the plaintiff had to concede that summary judgment was appropriate.[19]

Keep in mind that any claims of deficiency in the testimony pursuant to the *Daubert* analysis must be made at the time the evidence is offered, either by pretrial motion or at trial contemporaneously with the proffered testimony.[20] However, where the court can't justify the exclusion of a plaintiff's expert testimony as a basis for reversing a jury verdict in his favor, there are always other mechanisms to serve that purpose. An example of a different approach is *Amorgianos v. National R.R. Passenger Corp.*,[21] where the court affirmed the trial court's grant of the defendant's motion for new trial in the plaintiff's claim for injuries sustained when he was exposed to toxic fumes while painting a bridge, finding the motion was not an impermissible post-trial *Daubert* ruling,

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[17] 553 F.3d 638 (8th Cir. 2009).
[18] *Id*. at 646.
[19] *Id.* at 647.
[20] *See, e.g.*, *Macsenti v. Becker*, 237 F.3d 1223, 1230-34 (10th Cir. 2001) (concluding that *Daubert* motion at the close of the evidence was untimely; reviewing for plain error district court's admission of allegedly improper evidence under *Daubert*).
[21] 303 F.3d 256 (2nd Cir. 2002).

because the court based its ruling on a finding the jury's verdict was against the weight of the evidence, not on conclusion that the plaintiff's experts should have been excluded under *Daubert*. This was the Court's holding despite the fact that the entirety of the opinion addresses the challenges made to the plaintiff's expert testimony – a challenge that was made in a post-trial *Daubert* motion.[22]

In order to fight a *Daubert* challenge, litigants are forced to spend significant additional resources – time and money, to establish the reliability of the challenged testimony. Plaintiffs already embark on a complex claims knowing that it will be an uphill battle. It is pretty much inevitable that summary judgment motions will have to be addressed, which typically requires a plaintiff to submit detailed affidavits. But with *Daubert* motions, the party offering the testimony often has to pay for experts to sit through lengthy hearings, which, even when successful, can be so costly as to make the case no longer economically viable. Defendants know this, so they have an incentive to file as many *Daubert* motions as possible, and insist on having an opportunity to voir dire the witness live at a hearing, so that plaintiffs will have to reconsider whether to even continue to prosecute the case. The use of *Daubert* as a primary litigation strategy has become so central to the defense of complex cases that a niche practice of "Daubert counsel" has evolved.[23] Because of the expense involved, smaller claims requiring expert testimony, while rare before *Daubert*, are now all but extinct.[24]

When *Daubert* is used too aggressively, it isn't just the plaintiff in an individual case who is affected. There are broader societal implications for this trend. To summarize, the numerous repercussions of the strict application of *Daubert* have been described as follows:

> The effect of this abuse has been a tremendous impact upon the judicial system, far beyond what anyone could have imagined the Supreme Court's decision would have. For one, evidence exclusion has led to more summary judgments in favor of defendants, which has had a chilling effect on plaintiffs bringing otherwise meritorious suits. This chilling effect has extended into the realm of science as well, where scientists are refusing to

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[22] *Id*. at 267. "[I]f the admissible evidence is insufficient to permit a rational juror to find in favor of the plaintiff, the court remains free to direct a verdict or grant summary judgment for defendant."

[23] See Stephen Mahle, *Issue Spotting in Daubert Motion Practice: Two Reasons Every Litigator Who Opposes or Uses an Expert Witness Wants Specialized Daubert Counsel on Their Litigation,* on DHR website: http://www.imakenews.com/intllaw/e_article000838255.cfm?x=b11,0,w

[24] "The more strictly courts apply Daubert to avoid injustice from junk science, the more courts also create injustice by pricing out valid claims where expensive expert fees are not economically viable or where the high standard makes proving valid cases impossible." Richard L. Cupp, Jr.*, Believing in Products Liability: Reflection on Daubert, Doctrinal Evolution, and David Owen's Products Liability Law*, 40 U.C. Davis L .Rev. 511, 528 (2006).

> testify as to their findings, so as not to be "discredited" in an American court of law. Daubert has undermined the U.S. courtroom as a mechanism for public hearing and exposing industry practices and dangerous products. Perhaps its most ironic effect is that, whereas judges who abuse Daubert think they are clearing their dockets, Daubert has led to such forum fighting between plaintiffs and defendants that more judicial resources are wasted, not conserved. The effects of Daubert abuse on collateral estoppel are also troubling, as is its politicization of the judiciary and impending creep into regulatory agency thinking.[25]

Therefore, it is easy to see how *Daubert* has turned out to be one of the single biggest obstacles to justice for those who seek redress in the courts.

C. How to Win the *Daubert* Battle

If one thing is clear in the current realm of complex, and even fairly mundane litigation, *Daubert* is a part of it. Don't ignore it. Think about *Daubert* at the earliest point in the case. Think about whether a *Daubert* challenge will make or break a case at the time of case selection, based both on the value of the case and the forum you're in. Obviously, it is imperative to select experts who can withstand a *Daubert* challenge. There is no excuse for proffering an expert who does not have the credentials to opine on a certain topic; but it is also important to ensure that the methodology the expert intends to apply has been properly vetted as well.

Also, consider when a challenge may be made. There are some that advocate for reserving challenges until after all discovery is completed, given the need for the expert to have sufficient facts to support his opinion.[26] However, there is another consideration here. It is even more imperative that the proponent of expert testimony have an opportunity to cure any deficiency in the proof *before* the motion for summary judgment is upon you. One way to do this is to obtain an agreement that *Daubert* challenges must be made within a reasonable time after the Rule 26 Report is produced and/or the expert is deposed. This should occur within the discovery period so that the proponent can either (2) have the expert provide a supplemental report or opinion statement that fills in the gaps alleged or otherwise provides the support that is supposedly lacking; or (2) retain a new or supplemental expert. Thus, when the summary judgment motion comes, the issues that form that motion have likely already been revealed in the motion to strike, and can be addressed with the corrected information now available. What must be avoided at all costs is the simultaneous *Daubert* motion with summary judgment motion. If any deficiencies exist (or, more appropriately, if the court *deems* certain deficiencies exist) in the expert proof, there is no way to remedy that situation before the case is thrown out of court.

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[25] Allan Kanner, *Daubert and the Disappearing Jury Trial*, 69 U. Pitt. L. Rev. 281, 313 (2007).

[26] *Id*. at 325. "It is crucial to avoid Daubert hearings at the pre-discovery stages of trial."

Finally, in some respects, succeeding in the *Daubert* era requires litigants to adhere to the cliché, "if you can't beat 'em, join 'em." Plaintiffs and defendants alike should consider aggressively using *Daubert* challenges when appropriate. At a minimum it will force the opposition to reveal the intricacies of their case. At best, it will provide an opportunity to strike defenses or potentially gut an entire case. There are very often many ways to criticize what experts do and say and if that is the case, take advantage of this powerful mechanism to call them on their insufficiency. Defendants have a tendency to consider *Daubert* as only a means to attack the plaintiff's case; as such, they don't always pick the best experts themselves. Defense counsel should be aware by now of the power of *Daubert*'s requirement that courts scrutinize all expert testimony and chose, and prepare, experts accordingly. While courts are clearly more reluctant to strike a defendant's expert, there is no harm in trying. In fact, by filing a motion to strike one of the defense's experts, it might make the court less inclined to strike the plaintiff's, so as to at least present the appearance of fairness in the process.