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December 13, 2005



When I was asked to serve as the Editor-in-Chief of *Daubert Online* I accepted without hesitation. Even since the Supreme Court's landmark decision in *Daubert v. Merrill Dow Pharmaceutical, Inc.*, 509 U.S. 579 (1993), it seems that the problem of junk science is only getting worse. This year the problem was highlighted perhaps best by U.S. District Judge Janis Graham Jack of Texas in her lengthy opinion exposing the junk science being used by the plaintiffs in the multidistrict asbestos/silicosis cases over which she was presiding. The plaintiffs' attorneys in those cases were using a screening firm that had no medical oversight to obtain silicosis diagnoses at a rate several hundred times higher than the similar diagnoses at the Mayo Clinic during the same time period.

The problem is manifested in lower profile ways as well. According to a recent *Associated Press* article, for instance, the problem of junk science has led Chattanooga, Tennessee to start using court selected, out-of-state doctors to review the testimony of potential expert witnesses in malpractice cases to determine whether they should be permitted to testify. There is no question that the time is right for the defense bar to take an organized approach to this problem.

DRI is ahead of that curve. It already maintains and consistently updates an Expert Witness database. That database has listings of tens of thousands of expert witnesses, is accessible online, is searchable by name, and provides access to reference information as well as documents pertaining to the particular experts. If you have not taken advantage of that resource you do not know what you are missing.

But a database is only part of the solution. Since *Daubert* was handed down just over twelve years ago it now has been cited more than 23,000 times. Twenty-five states now also largely follow *Daubert* and many state and federal decisions limiting or barring experts' testimony never make it into published opinions. The law governing the admission of expert testimony is without a doubt a rapidly developing area of the law. Staying abreast of the developments in this area is challenging for even the most diligent of attorneys. It is for that purpose that this Newsletter is being published.

Of course, the overarching goal is to provide the defense bar with the types of information most beneficial to it. This is an evolving area of law and this publication will evolve with it. We always will be open to your submissions. In addition, if you have any thoughts, questions, comments or suggestions for making this a more useful resource, please feel free to contact me directly.

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## Adventures of an Econometrician Lawyer:

*Controlling Regression-Based Litigation with Daubert and Statistical Analysis*



Earlier this year, the Ninth Circuit decided a case that appears likely to have a dangerous impact on a range of defense litigation practice areas that involve statistics-based expert testimony. The opinion states that statistical models can ignore obviously important explanatory variables and still be deemed reliable and admissible. In particular, it says that a regression study of promotions that fails to include a measure of the applicant's ability is reliable and admissible. *Obrey v. Johnson*, 400 F.3d 691 (9th Cir. 2005).xml:namespace prefix = o ns = "urn:schemas-microsoft-com:office:office" />

This article shows that a regression<sup>1</sup> study that does not employ a proper set of explanatory variables does not survive fundamental scientific analysis and that such a study is neither reliable nor admissible under *Daubert*;<sup>2</sup> and that, as an example of that general proposition, a regression study of promotions that fails to include a measure of the applicant's ability is neither reliable nor admissible. The article concludes with an example of how these results can be used to control a wide range of cases where statistical models are used to establish damages or some other required element of the matter.

The analysis that follows is set in the context of three employment law cases, but that is merely serendipity and the principles discussed apply directly to a range of practice areas that rely on statistical and regression analysis. These include patent, antitrust, securities class action, products liability, pharmaceuticals, discrimination, voting rights, many cases with damage estimates, and many contracts cases. Improperly performed and then improperly admitted regression is a cornerstone of junk litigation in most of those practice areas and the article closes with an example that applies the techniques discussed here to a contract matter.

### *Obrey v. Johnson*

In *Obrey v. Johnson*, 400 F.3d 691 (9th Cir. 2005), a Title VII Plaintiff proffered Rule 702 statistical testimony to show that defendant discriminated against Pacific-Americans in promotions. At the trial court level, Defendant argued that the statistician's analysis did not include the relative qualifications of the applicants and was therefore flawed into unreliability. The District Court excluded the testimony and the jury returned a defense verdict.

The Ninth Circuit reversed the exclusion, saying that the Plaintiff's statistical evidence may have failed to account for differences in qualifications, but that did not render it irrelevant or inadmissible.

The first step in analyzing *Obrey* is to note that the principles of disinterested statistical analysis reject the analysis of the Ninth Circuit. Fundamental statistical analysis requires that regression models be properly specified. In briefest description, a model is properly specified only if the model includes all relevant explanatory variables and excludes all irrelevant explanatory variables. See Kmenta, *Elements of Econometrics* 161 (McMillan Pub. xml:namespace prefix = st1 ns = "urn:schemas-microsoft-com:office:smarttags" /> Co. 1971). The essence of the statistical analysis applicable to *Obrey* is that misspecified models do not have the requisite characteristics that generate competent testing and error rate analysis; and that misspecified models do not meet the standards for peer reviewed journals, publication in which is fairly required as a precondition to general acceptance. In short, misspecified models fail all of *Daubert's* admissibility factors, making the legal analysis straightforward: misspecified statistical models do not meet *Daubert's* criteria for admissibility. Citations to econometrics treatises for these propositions abound and several are provided below; but first, another important case sets the stage for that discussion.

*Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940 (7th Cir. 1997), is important for present purposes both because it announces the better rule on omitted variables and because in announcing that rule Judge Posner, a skilled analytic statistician in his own right, provides an intuitive discussion of why statistical and regression models that omit relevant explanatory variables are, and must be, inadmissible. This is an

important counterpoint to *Obrey* for litigators charged with excluding unreliable statistical expert testimony in a variety of practice areas.

### **Sheehan v. Daily Racing Form, Inc.**

In *Sheehan v. Daily Racing Form, Inc.*, plaintiff Sheehan was a well-regarded older employee of a racing newspaper company that used manual layout procedures to generate its papers. Defendant Daily Racing Form purchased a second newspaper company that used computerized layout procedures and converted its operations to the computerized techniques.

In subsequent layoffs, Sheehan and most of the other older employees, age 48 and above were terminated, while most of the younger workers aged 42 and below, were retained. Sheehan brought suit for age discrimination and his expert proffered a statistical study that showed a strong correlation between age and the pattern of dismissal. The trial court admitted the testimony. The Seventh Circuit reversed and excluded the expert's testimony, noting that the expert had failed to consider an obviously important variable, computer skill, as an explanatory variable in his analysis of terminations. The court noted that if Daily Racing Form had terminated employees that lack computer skills, and the older workers tended to lack computer skills, then a study that omitted computer skills as an explanatory variable would find a correlation between dismissal and age, whether age was a criteria for dismissal or not. *Id.* at 942. While the opinion does not identify the type of statistical analysis employed, this failure to include an essential variable in the analysis is an example of the misspecification problem detailed in the econometrics literature. When a regression model omits explanatory variables that are correlated with included explanatory variables, the regression coefficients and their tests and error rate calculations lose the desirable properties that make the law deem them reliable. This is a prime example of why regression that omits an important variable must be excluded by the gatekeeper judge rather than being admitted and going to the weight of the evidence. When important explanatory variables are omitted, the statistical analysis is unreliable. Regression and statistical analyses that omit important explanatory variables reach inaccurate conclusions and appear to be saying things that they are not saying. They not only mislead, they lack the capacity to inform.

### **Legal View of Regression and Statistical Analysis**

Properly executed regression studies apparently meet all of the *Daubert* criteria: they perform tests and specify the error rates associated with those tests. They are pervasively published in the peer-reviewed scientific journals of a wide range of scientific disciplines and, properly executed, are a generally accepted scientific research technique in dozens of those disciplines. Regression is widely used in a range of non-litigation settings for purely scientific purposes.

Of course, the fact that properly executed regression studies apparently meet all of the *Daubert* criteria makes "properly executed" the battle ground of admissibility. The Ninth Circuit holds that an expert can omit central variables and still have his work be considered properly executed. The scientific community disagrees with this pronouncement and the balance of this article discusses how lawyers opposing error-ridden regression analysis can exclude that testimony based upon its scientific merits (or lack thereof). These scientific merits begin with whether the expert met the requirements of the regression model.

### **Lawyering Regression Analysis under Daubert**

For lawyers, the central scientific point on regression analysis is that if (and only if) the regression model is properly constructed will the regression estimators have a set of desirable properties that allow statisticians and economists to perform the testing and error rate analysis that is required under *Daubert* for admissibility in federal courts. Symmetrically, if counsel can establish that the proffered regression model's requirements have been substantially violated, the scientific basis of the testimony is discredited and the testimony loses evidentiary reliability.

There are two regression problems common in the cases that stem from the substantial violation of the requirements of the regression model: model misspecification and errors in the variables. *Obrey* is an example of model misspecification, the more complex of the two. A regression model is misspecified if the analyst has, for example, modeled termination rates as depending on age, when those termination rates could depend on computer skill.

Statisticians say that a model is "misspecified" if the true relationship between the two variables of interest is given by one equation, but the economist models the relationship using a different equation that excludes some of the important variables. Kmenta, at 391-405 (discussing model specification and econometric tests to determine if a model is misspecified); see also Judge et al., *The Theory and Practice of Econometrics* at 407-46 (John Wiley & Sons 1980) (providing an overview of regression model specification tests). Regression estimates from misspecified models are considered scientifically unreliable. This is an important consideration in a range of courtroom situations.

Regression studies that meet the assumptions of the appropriate regression model have a set of desirable characteristics (best, linear, unbiased (BLUE) and consistent), Kmenta at 161, that indicate that testing and error rate analysis done with them should meet the *Daubert* reliability standards. Tests done with

parameters estimated by misspecified models or with inaccurately measured data fail statistically. Therefore, at a minimum they fail the testing, error rate and general acceptance criteria of *Daubert*. It cannot be over-emphasized that statistical analysis that fails the *Daubert* standard because it fails statistically should be excluded not simply because it fails to meet a technicality that the Supreme Court has imposed. Statistical analysis that fails the *Daubert* test for this reason should be excluded from evidence *because it is wrong*.

The balance of this article discusses a contract law matter that illustrates how a lawyer can control matters that rely on statistical analysis by commanding the statistical analysis.

### **Controlling Statistics–Based Litigation with *Daubert*: An Example from Contract Law**

Regression based litigation is everywhere and often uses very sophisticated varieties of regression analysis. A recent contracts matter that relied on a complex regression technique shows how the requirements (statisticians call them assumptions) of the regression model can be used to dispose of litigation.

In this contracts matter the plaintiff proffered a damages expert, Dr. Noll, who used a specialized form of regression that he labeled “Cox Regression.” He explained that Cox Regression is used when the available data do not conform to the requirements of the standard regression model but do conform to a slightly more lax set of requirements. The expert was a Dean and full Professor at a major research university and he claimed that he was using the model in accord with the generally accepted standards of his profession. He even offered the expert opinion that his analysis satisfied *Daubert*.

Used properly, Cox Regression seems likely to meet the *Daubert* standards, but defense experts in this contract matter identified several errors in the expert’s methods, including his choice of regressors (explanatory variables), and his systematic errors in measuring the data he relied upon. However, plaintiff’s expert, Dr. Noll, had rationalizations for these errors. Explaining the errors required highly technical, graduate level statistics that would take almost any judge or lawyer beyond the limits of their understanding. That is especially true when the statistics are explained in the nomenclature of experts: standard errors, F-tests, t-tests, z-scores and p-values; one-tail and two-tail tests; consistent and inconsistent estimates and estimators, and so forth. There are intuitive ways of explaining many standard regression and statistics concepts to non-statisticians, but Cox Regression is especially complex and is possessed of few intuitive concepts. To complicate matters, a LEXIS search for “Cox Regression” yielded no hits.

But there are many ways to debunk regression within this article’s context of commanding litigation by commanding statistics. In this instance defense counsel noticed that Cox Regression looks very much like another regression model known as the Proportional Hazards Model, and that there was one reported case on the Proportional Hazards Model.

In *Coates v. Johnson & Johnson*, 1982 WL 285 (N.D. Ill. 1982), *aff’d*, 756 F.2d 524 (7th Cir. 1985), plaintiff relied upon the Proportional Hazards Model to establish an essential element of his case. The defense proffered Professor George Neumann of the University of Chicago Business School, one of the developers of the model, who outlined the failures of plaintiff’s expert to meet the requirements (assumptions) of the Proportional Hazards Model and the resultant unreliability of the plaintiff’s expert’s methods. The court excluded the testimony of the plaintiff’s expert.

Now, the list of errors condemned by Dr. Neumann and the Seventh Circuit is very similar to the list of errors made by Dr. Noll in this contracts example. But the fact that Dr. Noll made a series of errors that had been condemned by the court in *Coates* was only the beginning of *Coates*’ usefulness: Dr. Noll’s curriculum vitae indicated that when he earned his Ph.D. at the University of Iowa, Dr. Neumann, (the prevailing expert in *Coates*), was a senior econometrics Professor at the University of Iowa. Defense counsel was able to argue that not only did expert Noll’s Cox Regression analysis fail *Daubert*, it apparently would not even pass the final exam in Professor Neumann’s Econometrics class. The case settled immediately after briefing these issues.

Maximizing clients’ interests often require advocates to undertake the complex tasks of discrediting experts’ statistical or econometric models directly, but sometimes statistically informed lawyering provides easier and more effective avenues for excluding flawed regression testimony. Challenging statistical testimony by applying learned statistical analysis to *Daubert* issues requires an additional set of tools, but it is a highly cost effective litigation strategy, able to control substantial litigation with a modest investment of time and expense.

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[1](#) Most of what is said here about regression applies to a wide range of other statistical models. In fact, many common statistical models are simplifications of the regression model.

[2](#) We assume the reader is familiar with the basics of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999) and their progeny. Thus, we refer to this line of cases as *Daubert* for ease of exposition.

December 28, 2005

## First Circuit Report

*Inadequate qualifications undermine expert's testimony even if it is admitted.*

One of the more instructive *Daubert* opinions in the First Circuit this year focuses on the sufficiency of an expert's qualifications to render an opinion. In that case, *Alvarez v. R.J. Reynolds Tobacco Co., Inc.*, 405 F.3d 36 (1st Cir. 2005), the plaintiffs sought to recover under various theories for the smoking-related death of Mr. Francisco Lopez. The defendant moved for summary judgment arguing among other things that the plaintiffs could not establish that an ordinary consumer in the position of the decedent was unaware of the dangers of smoking. `<xml:namespace prefix = st1 ns = "urn:schemas-microsoft-com:office:smarttags" />`*Id.* at 39. In support of that position, the defendant relied on a lengthy, detailed affidavit from a highly qualified history professor with nearly 20 years teaching experience. *Id.* at 40-41.`</xml:namespace prefix = o ns = "urn:schemas-microsoft-com:office:office" />`

In response, the plaintiffs relied upon the expert opinions of a then-graduate student who had virtually no research experience relevant to the issue of the common knowledge of the health risks of smoking. Her only directly relevant work involved collecting materials about tobacco advertising in Puerto Rico, but she described that work as merely photocopying information, without analysis. *Id.* at 40.

The defendant moved to exclude the testimony of plaintiffs' proposed expert arguing, among other things, that she lacked the requisite experience to qualify as an expert. The district court did not rule explicitly on that motion, but it entered summary judgment in favor of the defendant seemingly relying entirely on the opinions of the defendant's expert. *Id.* at 39.

The First Circuit affirmed. However, because the district court did not rule explicitly on the motion to disqualify the plaintiffs' expert, the appellate court affirmed on the ground that "even under de novo review we would conclude that [the plaintiffs' expert's] presentation is inadequate . . . to permit a jury to find for plaintiffs on the issue of common knowledge." *Id.* at 39.

Nevertheless, the appellate court noted that one of the preliminary requirements under *Daubert* is for courts first to ensure that a proposed expert indeed is qualified with the knowledge, skill, experience, training or education to opine on the issue before the court. *Id.* at 40. The court observed that expert witnesses are given wide latitude to offer opinions which can be very persuasive, or very misleading, given the nature of expert testimony. For that reason, the court concluded, it is "beyond debate" that a testifying expert should have "achieved a meaningful threshold of expertise." *Id.* at 40. In this case the appellate court plainly did not believe that plaintiffs' expert possessed that requisite threshold of expertise. *Id.* (describing plaintiffs' expert as being at the beginning of an academic career with "a variegated and unfocused record of scholarly records and minimal attention to analysis"). However, because the basis of the district court's ruling was unclear, the appellate court ultimately affirmed on the ground that the plaintiffs could not make a submissible case on the issue of common knowledge even with the report submitted by plaintiffs' expert.

December 28, 2005

## Second Circuit Report

*Daubert bars expert testimony in Jones Act and Rezulin cases; standard for admissibility relaxed in actions involving "new mass torts" and "generic" witnesses.*



An often encountered hazard in expert testimony is the expert's failure to account for other likely causes of a plaintiff's injury. The Second Circuit's most recent pronouncement on the admissibility of expert testimony in *Wills v. Amerada Hess Corp.*, 379 F.3d 32 (2d Cir. 2004), cert. denied, 126 S. Ct. 355 (2005), addresses this problem. *Wills* is a Jones Act suit in which the plaintiff claimed that the cancer death of her husband, a seaman, was caused by toxic emissions aboard his vessel. The plaintiff argued that because the burden of proof on causation was relaxed in Jones Act cases, *Daubert* did not apply to her expert's testimony. In rejecting that argument the court held that the "standards for determining the reliability and credibility of expert testimony are not altered" by the relaxed burden on causation. *Id.* at 47. The court then held that the district court did not abuse its discretion when it excluded expert testimony on an "oncogene theory" because there was no evidence that theory had been tested or subjected to peer review, error rates were unknown, and because the "dose-response relationship" was a "more generally accepted theory" among scientists. *Id.* at 48-50. The court also was dissatisfied with the expert's failure to account for the possibility that the cancer had been caused by the sailor's smoking and drinking. *Id.* at 50.

Additionally, Judge Lewis A. Kaplan issued a series of decisions assessing the admissibility of expert testimony in the multidistrict decision *In re Rezulin Products Liability Litigation*, 369 F. Supp. 2d 398 (S.D.N.Y. 2005). That decision involved thousands of cases brought by plaintiffs claiming that the diabetes drug Rezulin could produce "silent" liver injury -- liver injury unaccompanied by elevation in liver enzymes. *Id.* at 407 & n.62. Significantly, no existing studies provided direct support for this contention. *Id.* at 411. The court held that the challenged testimony did not satisfy *Daubert*, identifying a series of unsupported jumps from existing scientific data to the conclusion that Rezulin could lead to silent liver damage. It then rejected the experts' theories as unreliable under *Daubert* because their extrapolations had never been tested, peer-reviewed or published, and were not widely accepted in the scientific community. Thus there was no evidence for the crucial link in the plaintiffs' causal chain.

In another recent decision, *Green v. McAllister Brothers, Inc.*, No. 02 Civ. 7588(FM), 2005 WL 742624 (S.D.N.Y. March 25, 2005), the court cautioned against requiring too high a "level of exactitude" in proving general causation from "the first several victims of a new toxic tort" where the medical literature showing the connection between the tort and the injuries might not be completed. *Id.* at \*12. The plaintiff in *Green* claimed that he suffered respiratory problems from inhaling dust from the collapsed World Trade Center while working on a tugboat owned by the defendant. The defendant challenged the testimony of plaintiff's proposed toxicology expert, arguing that to satisfy *Daubert* the expert's opinion would have to quantify the dose of specific toxins to which the plaintiff was exposed and then demonstrate that scientific literature supported the theory that exposure to similar doses could cause the type of injury that the plaintiff claimed he suffered. The court held that such a level of scientific rigidity "would likely sound the death knell" for plaintiff's claim and that this level of exactitude was not necessary in this case, given that it "seems reasonably well established" that dust itself can trigger asthma. *Id.* at \*12.

The most recent decision rendered by Judge Jed S. Rakoff in the *In re Ephedra Product Liability Litigation*, No. 04 MD 1598(JSR), 393 F. Supp. 2d 181, 2005 WL 2260204 (S.D.N.Y. Sept. 18, 2005), allowed the admission of certain "generic" expert testimony despite the concession that "the evidentiary hearings demonstrated that general causation has not been established by scientific standards of proof." *Id.* at \*3. The court held that the plaintiffs' experts would be permitted to testify (if otherwise admissible under applicable state and federal law) that "ephedra may be a contributing cause of stroke, cardiac injury, and seizure in some people." *Id.* at \*1. However, the experts would not be permitted to testify with "medical certainty" or "scientific certainty" that ephedra caused the alleged injuries. *Id.* Judge Rakoff opines: "[t]o hold the opinions of scientists inadmissible unless backed by statistically significant results from tightly controlled (and very expensive) experiments would set a separate, higher standard for scientists than for other witnesses with specialized knowledge." *Id.* at \*4. This pro-plaintiff interpretation increases the latitude of the district court's gate keeping role under what the court describes as the "liberal admissibility standards of the federal rules and the express teachings of *Daubert*." *Id.* at \*4.

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## Third Circuit Report



In the past year the Third Circuit Court of Appeals has revisited several *Daubert* issues and reaffirmed its prior stances on the admissibility of expert testimony. The Court's recent opinions remain focused on the primary concerns found in *Daubert*: (1) qualification; (2) reliability; and (3) fit. *Elliot v. Kiesewetter*, 112 Fed. Appx. 821, 824 (3d Cir. 2004); see also *U.S. v. Trala*, 386 F.3d 536, 542 (3d Cir. 2004); *U.S. v. Mitchell*, 365 F.3d 215, 234 (3d Cir.), cert. denied, 125 S. Ct. 446 (2004).

Affirming a longstanding general rule, the Third Circuit held that a trial court's *Daubert* decisions are reviewed on appeal for abuse of discretion. *Citizens Financial Group, Inc. v. Citizens National Bank*, 383 F.3d 110, 118 (3d Cir. 2004), cert. denied, 125 S. Ct. 1975 (2005); *Mitchell*, 365 F.3d at 233. The abuse of discretion standard will be utilized even when the trial court makes no findings of fact to support the admission or exclusion of expert testimony. *Mitchell*, 365 F.3d at 233-34.

The Court also noted the importance of the distinction between having an expert witness excluded and having expert testimony on particular topics excluded. `xml:namespace prefix = st1 ns = "urn:schemas-microsoft-com:office:smarts" />` *Id.* at 250-51. When an expert is excluded it generally is because they are unqualified. In other cases an otherwise qualified expert is not permitted to testify about certain subject matters. Though both types of rulings effectively might bar a particular expert witness from testifying, the exclusion of an expert often raises different appellate issues than does the exclusion of an expert's testimony on certain subject matters. *Id.* at 250. When there is confusion as to whether a trial court has excluded an expert witness from testifying entirely, or just on certain topics, the burden is on the proponent to seek a clear ruling or make an offer of proof detailing the testimony that the proponent would like to present. *Id.* at 250-51.

Speaking of the trial court's gatekeeper role in *Daubert* matters, the Third Circuit noted:

Experts with diametrically opposed opinions may nonetheless both have good grounds for their views, and a district court may not make winners and losers through its choice of which side's experts to admit, when all experts are qualified. Rather, the same standards of reliability and helpfulness should apply to both sides, with a preference for admitting any evidence having some potential for assisting the trier of fact. `xml:namespace prefix = o ns = "urn:schemas-microsoft-com:office:office" />`

*Id.* at 245 (internal citations omitted).

With regard to more substantive matters, the Third Circuit recently held that the specifically-listed *Daubert* factors were of little use in evaluating the non-scientific expert testimony of a police officer testifying based on his many years of experience with drug traffickers. *U.S. v. Davis*, 397 F.3d 173, 178 (3d Cir. 2005). In another case, when facing a question about the methodology used by an opinion poller propounded as an expert, the Court noted the distinction between technical and fatal flaws in methodology. *Citizens Financial*, 383 F.3d at 121. Fatal flaws in methodology require exclusion; however, technical flaws do not necessitate exclusion, but rather affect the weight of the testimony. *Id.*

The Third Circuit also continued to adhere to its prior enumeration of eight reliability factors for scientific testimony (building upon those set forth in *Daubert*). *Mitchell*, 365 F.3d at 234-35. The eight factors include: (1) testability of method used; (2) peer review of method; (3) known or potential error rate of method; (4) maintenance of standards controlling the operation of the method; (5) general acceptance of method; (6) relationship of method to established reliable techniques; (7) degree of testifying expert's qualifications; and (8) non-judicial uses of the method. *Id.* at 235-44 (citing *In re Paoli Railroad Yard PCB Litigation*, 35 F.3d 717 (3d Cir. 1994), cert. denied, 513 U.S. 1190 (1995)).

In a criminal case the Third Circuit rejected the innovative argument that a proffered expert witness was overly qualified. *U.S. v. Rutland*, 372 F.3d 543, 545-46 (3d Cir. 2004). The defendant in *Rutland* asked that the testimony of the government's handwriting expert be excluded as unfairly prejudicial, contending that the jury would blindly accept the testimony of the highly-qualified expert. *Id.* The Third Circuit rejected this novel argument, noting that adopting the defendant's view would lead to the absurd practice of utilizing less-qualified expert witnesses. *Id.*

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## Fourth Circuit Report

*A physician testifying as to his prior diagnoses of a deceased patient is testifying as a fact witness, not as an expert, and therefore does not need to satisfy the Daubert test.*

The Fourth Circuit Court of Appeals has addressed *Daubert* issues in several recent decisions. In those opinions the court's focus was primarily on the classic concerns of *Daubert*: (1) reliability; (2) qualification; and (3) relevance. *Anderson v. Westinghouse Savannah River Co.*, 406 F.3d 248 (4th Cir. 2005); *U.S. v. Ricketts*, 141 Fed. Appx. 93 (4th Cir. 2005); *Burns v. Anderson*, 123 Fed. Appx. 543 (4th Cir. 2004); *Brown v. Ryan's Family Steak Houses, Inc.*, 113 Fed. Appx. 512 (4th Cir. 2004).

For instance, the Fourth Circuit continued to review *Daubert* rulings for an abuse of discretion. *Anderson*, 406 F.3d at 260; *Brown*, 113 Fed. Appx. at 515; *Burns*, 123 Fed. Appx. at 549; *Ricketts*, 141 Fed. Appx. at 95. It continued to analyze the admissibility of testimony using the familiar nonexclusive *Daubert* factors: (1) whether the expert opinion can be tested; (2) whether the opinion has been subjected to peer review; (3) the rate of error of the methods employed by the expert; (4) the existence and maintenance of standards used in the expert's methods; and (5) whether the methods have been generally accepted in the expert's community. *Anderson*, 406 F.3d at 260; *Burns*, 123 Fed. Appx. at 549. The court also continued to exclude evidence that: (1) was not based on scientific, technical or other specialized knowledge; or (2) would not aid the jury or trier of fact in understanding or resolving a fact at issue. *Ricketts*, 141 Fed. Appx. at 95. The court further affirmed that testimony is properly excluded where no meaningful scientific analysis was possible. *Id.*

In *Anderson*, an employee brought suit complaining about the disparate impact of her employer's systems and processes for awarding promotions. *Anderson*, 406 F.3d at 248. She sought to introduce expert testimony regarding ratings given to African Americans as compared to the ratings given to whites. *Id.* at 261. However, the district court concluded that the expert's comparisons of ratings were not relevant because his analysis was conducted with inadequate controls. *Id.* at 263. The court therefore excluded the testimony of the plaintiff's expert, holding that the regression analysis upon which the expert's testimony was based was unreliable. *Id.*

In *Brown* the court clarified that *Daubert* does not apply to the testimony of a fact witness, such as a doctor who simply testifies as to the condition of a patient. 113 Fed. Appx. at 515. The court confirmed that if a witness is not testifying as an expert, he may testify to opinions or inferences which are rationally based on his perception of the facts if it is helpful to a clear understanding of a fact in issue, and not based on scientific, technical or specialized knowledge. *Id.* Based on those principles the court held that the district court did not abuse its discretion in admitting evidence from a physician regarding his prior diagnoses of his then deceased patient's ailments because the physician was acting as a fact witness, not as an expert. *Id.* at 516. Interestingly, the court also held that the district court had not abused its discretion in admitting the doctor's prior diagnoses of his deceased patient because "he is a qualified physician with more first-hand knowledge concerning [the deceased patient's] physical and mental well-being than any other medical professional." *Id.* That holding suggests that the court implicitly concluded that the physician's diagnoses met the *Daubert* standard in any event.

The court in *Burns* affirmed the district court's admission of expert opinion on the ground that the challenge to that testimony was not a "true *Daubert* challenge." 123 Fed. Appx. at 549. In *Burns*, a lender filed suit against borrowers to recover the balance due under a promissory note after the sale of collateral satisfied only a portion of the total amount owed. *Id.* at 543. The borrowers sought to exclude expert testimony regarding the valuation of stock pledged as collateral for the loan. *Id.* They claimed that the expert's testimony should not be admitted because the expert had not reviewed certain documents which would influence his decision and because he had based his testimony on unreliable data. *Id.* at 549. The court rejected these arguments holding that the borrowers had not demonstrated that the expert's testimony was unreliable, but rather had raised questions as to the proper weight to afford his testimony. *Id.*

December 28, 2005

## Fifth Circuit Report

*Plaintiff's expert in design defect case against forklift manufacturer was not specific enough to be admissible.*



On xml:namespace prefix = st1 ns = "urn:schemas-microsoft-com:office:smarrtags" /> December 15, 2004, the Fifth Circuit Court of Appeals affirmed the lower court's dismissal of a design defect case where the plaintiff's expert's testimony concerning the design of a forklift was untested, unreliable, and lacked specificity. *Guy v. Crown Equipment Corp.*, 394 F.3d 320 (5th Cir. 2004).

Michelle Guy was injured while operating an electric stand-up forklift manufactured by Crown Equipment Corporation. Ms. Guy offered expert testimony through John Lohman that the forklift was defectively designed because there was no operator restraint. This particular forklift required the operator to stand up while operating it. Ms. Guy hit metal railings while traveling about 3 miles per hour. Her left foot went through the operator compartment opening and was crushed between the forklift and the railings. The district court dismissed the suit, finding that Mr. Lohman had failed to show a feasible design alternative and that his theories were vague.

The statute applicable to the plaintiff's substantive claims was Miss. Code Ann. § 11-1-63(a). That statute provides that a plaintiff must show that when the product left the manufacturer the "product was defective," the defect rendered the product "unreasonably dangerous," and that the defective condition "proximately caused the injury." *Id.* One way to show that a product is unreasonably dangerous is to show that the product was "designed in a defective manner." Miss. Code Ann. § 11-1-63(a)(i). To show that a design defect renders a product unreasonably dangerous a plaintiff must show that: (1) the manufacturer knew, or should have known, about the danger that caused the injury; (2) the product failed to function as expected; and (3) there existed a feasible design alternative that would have to a reasonable probability prevented the harm. Miss. Code Ann. § 11-1-63(f).

Mr. Lohman opined generally that the forklift should have some restraint mechanism to keep the operator in the operator compartment. He did not make a determination as to which design alternative he thought was best, did not indicate specific designs defendant could use as an alternative, and did not evaluate the cost involved for an alternative design and whether it was feasible in light of the intended use of the forklift. Although Mr. Lohman's qualifications were not questioned, he testified only in generalities and never reached a definite conclusion about what he thought the best alternative design would be. Although Mr. Lohman pointed out that the defendant already made forklifts with doors, he failed to explain how putting a door on the forklift in question would affect the product's usefulness. *Guy*, 394 F.3d at 326-27. In affirming the trial court's ruling excluding Mr. Lohman's testimony, the Court of Appeals observed among other things that Mr. Lohman's generalized testimony had the effect of preventing the defendant from being able to prepare a specific defense.

The plaintiff also called as an adverse witness, Dan Dunlap, the Manager of Product Engineering for the defendant, Crown. *Id.* at 324. The plaintiff attempted to elicit from Mr. Dunlap testimony regarding 2,400 reports on prior forklift accidents at K-Mart. Although plaintiff argued that Mr. Dunlap's testimony was based generally on all of the incident reports, plaintiff made no specific showing that the incidents were similar to her accident. Only 360 of the reports related to leg injuries similar to Ms. Guy's injury. The appellate court affirmed the exclusion of the other roughly 2,000 reports holding that they were unfairly prejudicial, would confuse the issues, and would mislead the jury, among other things. *Id.* at 328-29.

As a consequence of the rulings above, *Guy* ultimately held that the plaintiff had introduced no evidence of a feasible alternative design for the forklift in question. On that basis it affirmed the trial court's entry of judgment for the defendants as a matter of law. *Id.* at 331.

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December 28, 2005

## Sixth Circuit Report

*Recent rulings confirm the district court's discretion on Daubert issues.*

Recent decisions by the Sixth Circuit Court of Appeals squarely reaffirm the trial court's



discretion in its *Daubert* gatekeeping role. Of the eight decisions in the past year to address challenges to the trial court's admission or exclusion of expert testimony, the Court *affirmed* the trial court's rulings in all but one case. Even in that case, the Court found the admission of unreliable expert testimony to be harmless error and affirmed the underlying judgment.

Of the eight cases it reviewed, the Court affirmed the trial court's *admission* of expert testimony in five cases. It affirmed the trial court's *exclusion* of proffered testimony in two cases. Defendants fared far better than plaintiffs. Of the four reviewed cases in which expert testimony was offered by the defense, it was admitted every time, with the Court affirming the trial courts' decisions without exception. Expert testimony offered by the plaintiff was excluded in three of the cases reviewed, with the Sixth Circuit affirming the trial court's decision each time. Only in one case was expert testimony offered by a plaintiff admitted and affirmed. In that case, however, summary judgment for the *defense* was affirmed notwithstanding the admissibility of expert testimony supporting the plaintiff's theory.

Those cases affirming the decision to *admit* expert testimony were:

*Deal v. Hamilton County Board of Education*, 392 F.3d 840 (6th Cir. 2004)

On December 16, 2004, the Court affirmed the admission of expert testimony offered by the Hamilton County Board of Education in a bench trial alleging violations of the Individuals with Disabilities Education Act. Plaintiffs, the parents of an autistic student, alleged that the trial court had failed to exercise its "gatekeeper" function by allowing allegedly unreliable expert testimony concerning an educational program offered by the school district in lieu of one requested by the plaintiffs. Rejecting the plaintiffs' challenge, the Court found that the proffered experts were well-qualified and offered testimony helpful to the trier of fact, in this case the trial judge. The Court also discredited the plaintiffs' arguments against admission noting that "[t]he gatekeeper doctrine was designed to protect juries and is largely irrelevant in the context of a bench trial."

*Hartley v. St. Paul Fire & Marine Insurance Company*, 118 Fed. Appx. 914 (6th Cir. 2004)

Less than one week after deciding *Deal*, the Court again affirmed a trial court's admission of expert testimony offered by the defense. In *Hartley*, a boat owner petitioned for exoneration of liability for the destruction of his and several other boats by fire. Several insurance companies defended the action arguing that the plaintiff had left a space heater unattended, save for his cat, and that he had negligently started the fire. Finding that the trial court did not err in relying on expert proof that the space heater was the actual and proximate cause of the fire, the Court noted that, by its very nature, the "cause [of a fire] must often be proven through a combination of common sense, circumstantial evidence, and expert testimony," [and thus] the reliance on expert testimony to support a common sense inference is not clearly erroneous." xml:namespace prefix = st1 ns = "urn:schemas-microsoft-com:office:smarts" />*Id.* at 919 (quoting *Minerals and Chems. Philipp Corp. v. S.S. Nat'l Tracker* 445 F.2d 831, 832 (2d Cir. 1971)). The Court also discredited the plaintiff's argument that the defendant's expert had not ruled out other causes of the fire, finding that "[a]n opinion on causation need not eliminate all other possible causes of the injury and the fact that other causes are not eliminated or a precise cause is not stated go to the accuracy of the conclusion, not the soundness of the methodology." *Id.* at 920 (citing *Jahn v. Equine Servs., PSC*, 233 F.3d 382, 390 (6th Cir. 2000)).

*Bureau v. State Farm Fire and Casualty Company*, 139 Fed. Appx. 972 (6th Cir. 2005)

In *Bureau*, the Court affirmed the trial court's admission of expert testimony for State Farm in a policyholder's action to recover benefits for mold damage that rendered his house uninhabitable. The plaintiff challenged the testimony of a structural engineer who testified for State Farm that the plaintiff's leaking roof led to moisture problems throughout his house.

Holding that the trial court did not abandon its gatekeeping role under *Daubert*, the Court found no error in the trial court's decision not to issue specific findings as to the reliability of the engineer's findings. The Court stated: "The Supreme Court clearly indicates that such findings are not necessary where reliability is 'taken for granted.'" *Id.* at 976 (quoting *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999)). The Court further rejected the plaintiff's arguments that the expert's conclusions and methodology were not subject to peer review or an authoritative text, stating that "[t]his Court has previously upheld limited comments and findings of a district court regarding the reliability of an expert's methods where such methods are relatively uncontroversial."

*One Beacon Insurance Co. v. Broadcast Development Group, Inc.*, No. 04-5517, 2005 U.S. App. LEXIS 18930 (6th Cir., Aug. 29, 2005)

In *One Beacon Insurance*, the Court addressed claims arising out of the collapse of a broadcast tower under construction. The general contractor's insurer sued the subcontractor who constructed the tower, alleging that the subcontractor's negligence caused the fall. The subcontractor countered that faulty welds by the general contractor caused the collapse, and offered the expert testimony of three witnesses – a metallurgist, a tower design expert, and a structural engineer – to support its theory. The trial court

allowed the testimony of each.

The Sixth Circuit rejected the insurer's challenge to the testimony on appeal, noting first that the insurer had stipulated that each expert was adequately qualified to testify as an expert. *Id.* at \*22 n.5. Although finding that the insurer had "raise[d] some valid questions about the persuasiveness of the [subcontractor's] experts, and the weight that should have been given their testimony by the jury," the Court nevertheless affirmed the trial court's decision to allow the testimony, stating that:

"[T]he *Daubert* Court made it explicit that in determining the scientific validity and thus the 'evidentiary reliability' of scientific evidence, 'the focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.' Questions about the certainty of the scientific results are matters of weight for the jury." *United States v Bonds*, 12 F.3d 540, 563 (6th Cir. 1993) (citing *Daubert*, 509 U.S. at 594-95). The assessment of the validity and reliability of the conclusions drawn by the expert is a jury question; the judge may only examine whether the principles and methodology are scientifically valid and generally accepted.

*One Beacon Insurance*, 2005 U.S. App. LEXIS 18930 at \*22 n.5.

*Barnes v. The Kerr Corporation*, 418 F.3d 583 (6th Cir. 2005)

In *Barnes*, decided August 11, 2005, the Court affirmed summary judgment for the manufacturer of dental amalgams on claims by a dentist that he had been harmed by mercury allegedly released when repairing and installing dental fillings. Interestingly, the trial court entered the defense judgment notwithstanding its decision to admit expert testimony offered by the plaintiff on the issue of liability. Affirming, the Sixth Circuit found no error and refused even to address the plaintiff's argument, noting that:

Even with [plaintiff's] expert testimony, however, [he] failed to establish causation and failed to raise a genuine issue of material fact as to the adequacy of [defendant's] warnings. We therefore conclude that no jurisprudential purpose would be served by reviewing the district court's ruling with regard to [plaintiff's] expert witnesses.

Only two Sixth Circuit decisions in the past year affirmed the trial court's decision to *exclude* proffered expert testimony. They are:

*Thomas v. City of Chattanooga*, 398 F.3d 426 (6th Cir. 2005)

The Court affirmed the exclusion of expert testimony offered by the plaintiffs in an action alleging 42 U.S.C. § 1983 liability for excessive force by a police officer who shot one of the plaintiffs seven times believing, mistakenly, that the plaintiff was about to shoot his wife (and fellow plaintiff). The plaintiffs proffered an expert for the proposition that the City of Chattanooga had an unwritten policy condoning excessive force. The trial court refused to admit the expert's testimony, finding that his opinion was conclusory because he had not "set forth the basis or reasoning behind his opinion." *Id.* at 430. The plaintiffs challenged the trial court's decision on appeal, claiming that the court simply disagreed with their expert's conclusion, and not his underlying methodology. *Id.* The Sixth Circuit was unpersuaded by the argument, finding no error in the exclusion of the testimony and stating that:

Although this type of assumption by a district court would not be appropriate, given the context of the opinion, it is clear that the court was not disagreeing with Davidson's expert opinion; rather, the court was pointing out that the statistics upon which that opinion was based are meaningless because Davidson did not produce any data showing what a 'normal' number of excessive force complaints would be. Consequently, we find that the court did not disagree with Davidson's conclusion; it simply could not accept the basis behind it.

Noteworthy is the fact that the Court reached its holding notwithstanding its belief that the expert was qualified as an expert. Being an expert is not enough, the Court noted. Rather:

[B]eing an expert does not lessen the burden one has in rebutting a motion for summary judgment. In fact 'if the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached . . . and how that experience is reliably applied to the facts. The trial court's gatekeeping function requires more than simply "taking the expert's word for it."

*Id.* at 432.

*Mohney v. USA Hockey, Inc.*, 138 Fed. Appx. 804 (6th Cir. 2005)

In *Mohney*, the Court affirmed the trial court's exclusion of the testimony of two experts – a mechanical engineer and a biomechanical engineer – offered by the plaintiff in support of claims that a defective hockey helmet caused his quadriplegia in a hockey accident. The Sixth Circuit's decision came notwithstanding that the experts were deemed qualified to testify. Because their underlying methodologies were unreliable, however, their testimony was excluded.

As to the biomechanical engineer, the Court first noted that the trial court had excluded his testimony because “while [he] ha[d] performed mathematical calculations, the Court . . . found these calculations and the methods employed to be suspect and unreliable.” Affirming, the Court criticized the proffered testimony on several grounds, among them: (1) the expert did not attempt “to replicate the incident, perform any manner of accident reconstruction or conduct any relevant technical or scientific testing;” (2) he “did not cite any published work to buttress his opinion, nor could he because [his] theory has not been subject to peer review and publication; (3) his opinion concerning the cause of plaintiff’s spinal injury not only lacked general acceptance within the relevant scientific community, “it is not accepted in any scientific community;” and (4) he performed his calculations based on a series of estimates and assumptions that undermined the likelihood that he “used data sufficiently tied to the facts of the case here, which the Supreme Court has indicated is critical.” *Id.* at 808-09 (citing *General Electric Co. v. Joyner*, 522 U.S. 136, 146 (1997)).

The testimony of the mechanical engineer fared no better, with the Court finding that the trial court did not err in holding that he had not conducted adequate testing to support his opinion that the helmet was defective. The Court also found no error in the trial court’s exclusion of the testimony of the plaintiff’s treating physician on the basis that the doctor’s proffered testimony was expert testimony for which the plaintiff was required, but had failed, to submit a timely Rule 26 expert disclosure.

The lone case finding error in the trial court’s decision concerning the admissibility of expert testimony was *Stone Transport, Inc. v. Volvo Trucks North America, Inc.*, 129 Fed. Appx. 205 (6th Cir. 2005). There, the Court found that the trial court erred in admitting expert damages testimony in a breach of warranty action because the trial court had also found the expert’s conclusions had “no basis whatsoever.” Because the damages about which the expert had opined had been deducted from the jury’s verdict, the Sixth Circuit found the trial court’s error to be harmless and affirmed the judgment in favor of the plaintiff.

The Sixth Circuit’s record of recent decisions is remarkable for the defense. Of the eight decisions noted above, the plaintiffs ultimately prevailed on liability in only one.

Defense: 7, Plaintiffs: 1. The defense wins . . . .

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December 28, 2005

## Seventh Circuit Report

*District courts must do more than merely review an expert’s credentials.*

One of the more interesting recent decisions out of the Seventh Circuit is *Fuesting v. Zimmer, Inc.*, 421 F.3d 528 (7<sup>th</sup> Cir. 2005). In that case the Seventh Circuit reversed a plaintiff’s judgment in a products liability case on the grounds that the testimony of the plaintiff’s expert on the issues of the product’s defective condition and causation was unreliable. The central issue was whether the prosthetic knee that the plaintiff received in his total knee replacement was defectively designed because of the method in which it was sterilized at the time of manufacture. xml:namespace prefix = st1 ns = "urn:schemas-microsoft-com:office:smarts" /> *Id.* at 531. The plaintiff argued that the manufacturer’s chosen method of sterilization together with the implant’s “time on the shelf” ultimately led to its premature failure. According to the plaintiff, better alternative methods for sterilizing knee implants were available at the time his implant was manufactured and Zimmer, the manufacturer, should have known about them.

The plaintiff’s key witness on the above issues was a biomedical engineering expert, Dr. James Pugh. *Id.* at 532, 536. Zimmer made a *Daubert* challenge to Dr. Pugh’s testimony on a variety of grounds. The district court denied that motion concluding that “Dr. Pugh possesses the requisite knowledge, skill, experience, training, and education pursuant to Fed. R. Evid. 702.” *Id.* at 535.

The appellate court agreed that Dr. Pugh was qualified to render expert opinions. However, it also noted that “possessing requisite credentials alone is not enough to render expert testimony admissible.” *Id.* District courts also must assess the methodology that otherwise qualified experts use in forming their opinions. In *Fuesting* the district court stated that Dr. Pugh’s methodology was sound because he had based his opinion upon “a scientific reason.” However the court never identified that “scientific reason” and apparently never subjected it to a *Daubert* analysis. The district court also stated that Dr. Pugh had ruled out competing theories of causation but it did not explain how it was that Dr. Pugh had ruled out

The appellate court then conducted its own *Daubert* analysis of Dr. Pugh's testimony. Specifically, the court noted that Dr. Pugh's theory regarding the sterilization process had not been subjected to the scientific method, which the court described as the "first and most significant *Daubert* factor." *Id.* at 536. Dr. Pugh did not conduct any scientific tests or experiments to bolster his theory and he did not produce or rely upon any studies to verify his conclusions. Rather he based his opinions on extrapolations from "basic polymer science" with nothing to "bridge the analytical gap between [those] basic principles and his complex conclusions." *Id.* His theory had not been published or otherwise subjected to peer review, there was no evidence that his theory had gained general acceptance in the scientific community and he developed his opinion expressly for the purposes of this litigation. The Court of Appeals therefore held that Dr. Pugh's testimony was unreliable and that the district court had erred in its decision to admit it. Because Dr. Pugh's testimony was crucial to the plaintiff's case, the court instructed the district court to enter a directed verdict in favor of Zimmer.

Interestingly, appellate preservation issues might have a hand in the plaintiff's loss in *Fuesting*. In a short discussion at the beginning of the opinion the court notes that it previously granted a motion to strike that was directed at portions of the plaintiff's original brief. The offending portion of the brief contained references to and discussion about several medical journal articles that, as the court noted, "may suggest that Pugh's challenged conclusions have received some modicum of acceptance from the scientific community." *Id.* at 533. The problem was that the plaintiff never made the journal articles part of the record in the trial court. *Id.* The appellate court gave the plaintiff a chance to remedy the defects in his brief, but his revised brief still contained five pages discussing those same articles. As a consequence, the court struck those five pages describing the reference to the journal articles as an attempt to "mislead the court." *Id.* at 533. It then conducted the above *Daubert* analysis of Dr. Pugh's testimony in which it repeatedly noted the plaintiff and Dr. Pugh had produced no scientific literature to support Dr. Pugh's opinions.

Another interesting decision was handed down by an Illinois Appellate Court in *Thompson v. Gordon*, 827 N.E.2d 983 (Il. App. Ct. 2005). The underlying substantive dispute in the case concerned the question of whether improper roadwork contributed to a fatal motor vehicle accident. In response to a dispositive motion the plaintiff had submitted the affidavit of Andrew Ramisch, a civil engineer, licensed in the District of Columbia and who had 30 years experience in the analysis, design and construction of roadways. *Id.* at 986.

The defendants moved to strike Mr. Ramisch's affidavit arguing that he was not qualified to render an engineering opinion because he was not licensed as a professional engineer under Illinois law. Bolstering the defendants' position, the Illinois Department of Professional Regulation issued a Cease and Desist Order against Mr. Ramisch barring him from testifying and exposing him to possible civil and criminal penalties if he violated the Order. *Id.* at 992.

The Illinois Appellate Court nevertheless rejected the defendants' somewhat novel argument. In so doing the court noted that: (a) the Illinois law governing the licensure of engineers did not state that unlicensed engineers were prohibited from testifying in the State of Illinois; and (b) the Illinois Supreme Court never has held that an engineer had to be licensed as a professional engineer under Illinois law in order to testify as an expert in Illinois courts. More important, the court explicitly recognized that licensure by the state is not required in order for a witness to possess the necessary knowledge, skill, experience, training, or education to testify as an expert under Illinois law. Thus, the court held that the "lack of an Illinois professional engineering license goes to the weight of [an expert's] testimony, not his competency." *Id.* at 994.

Though Illinois has not adopted *Daubert*, the ruling in *Thompson* nevertheless is instructive in *Daubert* jurisdictions. Illinois law, like Rule 702 of Federal Rules of Evidence, requires that a witness who is to testify as an "expert" be "qualified by knowledge, skill, experience, training, or education." *Id.* at 992. Thus the reasoning upon which *Thompson* concluded that licensure under a particular state's law is not necessary to qualify as an expert under Illinois law would seem to apply with equal force in *Daubert* jurisdictions.

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## Eighth Circuit Report

*Challenges to the factual basis for an expert's analysis, rather than to the reliability of the expert's methodology, are issues for cross-examination.*

In the past year the Eighth Circuit has further explored and defined the contours of the *Daubert* test for the admissibility of expert opinion testimony. While the court has not been called on to address an issue that required a reappraisal of the basic rules, it has reviewed district courts' application of the rules in determining whether particular types of testimony met the test. In evaluating whether a district court has abused its discretion in admitting or excluding such evidence, the court appears to have focused on whether the testimony has met the basic requirements of reliability and relevance in the federal rules, while leaving actual application of the *Daubert* factors to the considerable discretion of the district courts.

In two cases, the Eighth Circuit Court of Appeals considered challenges to admissibility rulings where adherence of an expert to an independent source of rules governing methodology was at issue. In the first case, *Marvin Lumber and Cedar Co. v. PPG Industries*, 401 F.3d 901 (8th Cir. 2005), the court upheld the admission of testimony of an expert retained by the plaintiff, Marvin Lumber, concerning the expert's statistical studies of wood-rot problems that he attributed to the defendant, PPG's, wood preservative. PPG had challenged the methodology and reliability of the statistical studies, contending that the district court had failed to perform its general "gatekeeping" function under *Daubert*. PPG had argued that the underlying studies deviated materially from the guidelines of the Federal Judicial Center's Reference Manual on Scientific Evidence. Specifically, PPG argued that: the studies were done in anticipation of litigation; the data was collected by an employee of Marvin's legal department who was aware of the purpose of the studies; the sample size was too small and the samples were not taken from a geographical cross-section; Marvin failed to perform elementary tests for reliability, and the studies did not account for factors other than the wood preservative that could have caused the wood deterioration. The court rejected PPG's arguments, pointing out that the Manual itself states that it is "not intended to instruct judges concerning what evidence should be admissible or to establish minimum standards for acceptable scientific testimony." *Id.* at 915. Moreover, the court characterized PPG's challenge as one that was primarily directed at the factual basis for the expert's analysis, rather than its evidentiary reliability. In disposing of PPG's argument, the court concluded that any weaknesses in the factual basis for an expert's opinion are a matter of credibility of the testimony rather than admissibility and should be attacked on cross-examination. *Id.* at 916.

In a second case, *Fireman's Fund Insurance Co. v. Canon U.S.A.*, 394 F.3d 1054 (8th Cir. 2005), the Eighth Circuit upheld the district court's exclusion of expert testimony in a product liability case. In that case the district court had excluded the expert testimony of two fire causation experts retained by the plaintiff who had opined that a copying machine manufactured by defendant was the cause of a strip-mall fire. The defendant, Canon, had hired its own expert, who filed an expert report challenging plaintiff's theory of liability. The plaintiff's experts subsequently filed rebuttal reports. Canon filed a motion for summary judgment arguing that plaintiff's expert opinions were inadmissible and that absent such opinions, plaintiff had no way to prove liability. The district court granted Canon's motion for summary judgment and the plaintiff appealed.

In its opinion, the appellate court agreed with the district court, reasoning that the experimental testing done by the plaintiff's experts did not apply National Fire Protection Association principles and methods reliably to the facts of the case and that, therefore, the factual basis of the opinions was too unreliable for the opinions to be admitted. *Id.* at 1058. The court noted, in particular, that the experts did not attempt to resolve several inconsistencies, such as the fact that examination of the thermal fuse of the copier at issue indicated that the heating element they pinned as the cause of the fire was not even activated when the temperature of the copier had risen enough to open the fuse. *Id.*

In a legal malpractice case, *First Union National Bank v. Benham*, 423 F.3d 855 (8th Cir. 2005), the Eighth Circuit reversed the decision of the district court, holding, *inter alia*, that disallowing an attorney's expert testimony on the issue of legal malpractice in Arkansas was an abuse of discretion. Recognizing the trial judge's gate-keeping responsibility under *Daubert* and Federal Rule of Evidence 702, the court nevertheless reversed the district court, reasoning that the proffered expert, a lawyer with extensive experience in the area of law at issue, was qualified to testify as to whether the defendant attorney had conducted himself as a reasonable attorney under the circumstances, the malpractice standard of care at issue in the case. The expert, an Arkansas mergers and acquisitions lawyer, opined that the defendant had failed to adhere to the standard of care for a mergers and acquisitions attorney in Arkansas when he wrongly advised his client of when the statutory time limit began running to bring suit for a valuation of the assets being bought from the target company and its dissenting shareholder, as well as when he failed to file suit in a timely manner. *Id.* at 859. Notwithstanding this, the district court had reasoned that longtime practice in a field alone did not necessarily make the attorney an expert on what is considered reasonable conduct in that field. *Id.* at 861. Applying the *Daubert* factors, the district court stated that the attorney's opinion was not based on any scholarly work, testing or studies on the standard of care for an Arkansas mergers and acquisitions attorney. *Id.* at 862.

In reversing, the Eighth Circuit cited the expert's background and record and found that they qualified as relevant "knowledge, skill, experience, training or education" for purposes of enabling the expert to testify

as to what constitutes reasonable conduct. *Id.* While the court reaffirmed that the district courts are given “great latitude” in exercising their gate-keeping function by applying the *Daubert* factors to make admissibility rulings, the ultimate inquiry remains whether the proffered testimony is reliable and relevant. *Id.* at 861. Here, the court reasoned that the expert’s testimony would have been helpful to the jury because he had extensive general knowledge of the field, he had received demand letters from dissenting shareholders like the one at issue, and he expressly testified that his opinion concerned the standard of care for an attorney in the circumstances rather than his personal opinion. *Id.* at 863.

In an aggravated sexual abuse case, *U.S. v. Conroy*, 424 F.3d 833 (8th Cir. 2005), the Eighth Circuit Court of Appeals upheld the district court’s admission of a government forensic expert’s testimony concerning possible reasons for the absence of bodily fluid evidence on a rug. The expert’s testimony concerned how time and environmental factors might have eliminated traces of the semen that one of the victims claimed the petitioner wiped on the rug after assaulting her. While the court agreed with the petitioner that the testimony was somewhat speculative, it stated that “[a] certain amount of speculation is necessary, an even greater amount is permissible (and goes to the weight of the testimony), but too much is fatal to admission.” *Id.* at 839 (quoting *Group Health Plan v. Philip Morris USA, Inc.*, 344 F.3d 753, 760 (8th Cir. 2003)). Here, the court stated that it owed the district court “significant deference” in its determination that the level of speculation was permissible. *Id.*

In *Unrein v. Timesavers, Inc.*, 394 F.3d 1008 (8th Cir. 2005), the Eighth Circuit affirmed the district court’s exclusion of an engineer’s testimony that had been proffered to show that an injury could have been avoided by making his proposed safety modifications to an industrial sander. The court based its decision on its conclusion that the expert had failed to demonstrate how the modifications could have been made without interfering with the machine’s utility. In affirming, the appellate court disregarded the respondent’s argument that the exclusion should have been upheld because the testimony did not satisfy any of the *Daubert* factors, focusing particularly on the fact that the expert’s proposal had not been tested in an actual sander. *Id.* at 1011. Instead, the court stated that its decisions did not require that an expert build a new device or prototype to test his conclusions. Rather, the question was whether the opinion and its basis were sufficiently reliable and relevant to be helpful to the jury. *Id.* at 1012. The court concluded that the testimony was still not admissible because the expert had failed to even prepare drawings showing how his modifications could be integrated into the sander or to present any evidence of their use in other machines. *Id.* at 1012.

December 28, 2005

## Ninth Circuit Report

*The evidentiary standards of Daubert do not apply to factual finding by legislative bodies.*

The Ninth Circuit Court of Appeals has revisited *Daubert* on a number of issues and in two recent cases, the Court of Appeals and the United States District Court for Hawaii refused to apply the *Daubert* standard to evidence used to support legislative action.

In *Gammoh v. City of La Habra*, 395 F.3d 1114, amended on denial of rehearing, 402 F.3d 875 (9th Cir.), cert. denied, 126 S. Ct. 374 (2005), the Ninth Circuit Court of Appeals, in upholding the City of La Habra’s Municipal Ordinance 1626 regulating adult businesses, refused to apply a *Daubert* standard to evidence used in supporting government action or fact finding. The Ordinance at issue contained findings that adult businesses “generate crime, economic harm, and the spread of sexually transmitted diseases.” *Gammoh*, 395 F.3d at 1118. The data used to support these findings included “studies and police declarations from other jurisdictions, federal and state judicial opinions, and public health data from surrounding southern California counties.” *Id.* The Ordinance was challenged on constitutional grounds for vagueness, overbreadth, regulatory takings, and free speech and expression.

In evaluating the free speech and expression challenge, the Court applied an intermediate level of scrutiny, despite recognizing that content based regulation is generally subject to strict scrutiny, because the Ordinance: 1) regulated speech that was sexual or pornographic in nature; and 2) the primary motivation for the regulation was to prevent the secondary effects stated in the findings. *Id.* at 1122 (citing *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 448 (2002) (Kennedy, J., concurring) and *Center for Fair Pub. Policy v. Maricopa County*, 336 F.3d 1153, 1161 (9th Cir. 2003) (plurality opinion) (recognizing Justice Kennedy’s opinion in *Alameda Books* as controlling because it is the narrowest opinion joining the plurality’s judgment), cert. denied, 541 U.S. 973 (2004)).

The Court reviewed the Ordinance to determine if it was: 1) designed to serve a substantial government interest; 2) narrowly tailored to serve that interest; and 3) did not unreasonably limit alternative avenues of communication. *Id.* at 1126-28. The appellants conceded that preventing the secondary effects of adult businesses was a substantial government interest, but argued the City’s evidence of secondary effects was flawed and inapplicable in part because it did not address the specific activity being regulated. *Id.* In making this determination, the Court reviewed the data presented to the City Counsel prior to the enactment of the Ordinance and the appellant’s expert’s declaration condemning the City’s evidence. The Court, citing *G.M. Enterprises, Inc. v. Town of St. Joseph*, 350 F.3d 631, 640 (7th Cir. 2003), cert. denied, 125 S. Ct. 49 (2004), rejected application of “*Daubert*-quality evidence” requirement to government action

stating that such a requirement would “impose an unreasonable burden on the legislative process.”  
xml:namespace prefix = st1 ns = "urn:schemas-microsoft-com:office:smarts" /> *Id.* at 1126 n.5. The Court also stated that:

While we do not permit legislative bodies to rely on shoddy data, we also will not specify the methodological standards to which their evidence must conform . . . . No precedent requires the City to obtain research targeting the exact activity that it wishes to regulate: the City is only required to rely on evidence “reasonably believed to be relevant” to the problem being addressed.xml:namespace prefix = o ns = "urn:schemas-microsoft-com:office:office" />

*Id.* at 1126-27 (citing *Alameda Books*, 535 U.S. at 438).

In *UFO Chuting of Hawaii, Inc. v. Peter T. Young*,<sup>[3]</sup> 380 F. Supp. 2d 1160 (D. Haw. 2005), the district court applied *Gammoh* in granting the State of Hawaii’s motion for summary judgment dismissing constitutional challenges under the “Dormant Commerce Clause.” The plaintiff challenged the State’s regulations banning thrill craft and parasailing activities. The regulations that were enacted to protect humpback whale populations in various locations. The plaintiff challenged the State’s findings of the benefits of the seasonal parasail ban as “illusory” because the State allegedly could not prove that parasail operations threatened whale populations. The plaintiff also challenged the State’s findings because they did “not meet the standard of admissibility” under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *UFO Chuting*, 380 F. Supp. 2d at 1161 and 1163. In rejecting the plaintiff’s arguments the Court held that:

The Ninth Circuit, . . . has expressly rejected the suggestion that a legislature must apply the evidentiary standards of *Daubert* in considering whether evidence supports proposed legislation.

*Id.* at 1163 (citing *Gammoh*, 395 F.3d at 1127).

The Ninth Circuit also recently held that expert evidence need not conclusively establish an element of a claim or defense in order to muster the test for admissibility under *Daubert*. In *Obrey v. Johnson*, 400 F.3d 691 (9th Cir. 2005), the Court found reversible error where the district court had refused to admit a statistical report proffered by the plaintiff in support of his employment discrimination claim.<sup>[4]</sup> The report, prepared by plaintiff’s expert, purported to show a correlation between race and the employer’s promotion practices. The employer argued, and the district court agreed, that the report was incomplete because it failed to account for the relative qualifications of the applicants studied. *Id.* at 694. In reversing the district court, the Ninth Circuit reasoned:

A statistical study may fall short of proving the plaintiff’s case, but still remain relevant to the issues in dispute . . . . Thus, objections to a study’s completeness generally go to the weight, not the admissibility of the statistical evidence . . . and should be addressed by rebuttal, not exclusion . . . . Here, the . . . study is based entirely on statistical disparities. While we, and other courts, have commented on the inadequacy of such studies, we have typically done so in the context of finding insufficient evidence to support a prima facie case of discrimination, and not to rule those studies inadmissible for purposes of Rule 702.

*Id.* at 695-696 (internal citations omitted).

In *Dorn v. Burlington Northern Santa Fe Railroad Co.*, 397 F.3d 1183 (9th Cir. 2005), the Ninth Circuit reaffirmed its position that “the authority to determine the victor in . . . a ‘battle of expert witnesses is properly reposed in the jury.’” *Id.* at 1196 (quoting *Humetrix, Inc. v. Gemplus S.C.A.*, 268 F.3d 910, 919 (9th Cir. 2001)). *Dorn* involved a wrongful death and survivor action arising out of the railroad crossing fatality of Larry Dorn. Dorn was struck and killed by a Burlington Northern train when he attempted to cross the tracks while driving a grain truck along a gravel drive that crossed the Burlington’s railroad tracks at a sharp angle (roughly 45 degrees) as it heads into the parking lot of Cenex, a privately-owned commercial grain elevator.

Among other evidentiary challenges, Burlington contended that the district court’s ruling allowing plaintiff’s economist to provide expert testimony regarding hedonic damages,<sup>[5]</sup> and the court’s ruling excluding the testimony of its expert who Burlington contended would have refuted plaintiff’s expert’s opinions, were reversible error. The Court of Appeals held that the district court erred, not in allowing plaintiff’s expert testimony (despite finding the methodology questionable), but because it refused to allow Burlington’s expert to testify. *Id.* at 1195. Prior to ruling, the district court conducted a *Daubert* hearing where Burlington’s expert testified that economists cannot measure the value of a human life because there is no market for happiness, for lost society, or for lost enjoyment of life. *Id.* at 1188. The district court excluded Burlington’s expert’s testimony without finding him unqualified to serve as an expert. *Id.*

As part of its analyses of the district court action, the Court of Appeals found that the Supreme Court in *Daubert*,

was not overly concerned about the prospect that some dubious scientific theories may pass the gatekeeper and reach the jury under the liberal standard of admissibility set forth in that opinion.

*Id.* at 1196. The Court of Appeals further stated that:

If two contradictory expert witnesses [can offer testimony that is reliable and helpful], both are admissible, and it is the function of the finder of fact, not the trial court, to determine which is the more trustworthy and credible.

*Id.* at 1196 (quoting 4 J. Weinstein & M. Berger, Weinstein's Federal Evidence § 702.05[3], at 702-80.12 to 702-80.13 (2d ed. 2004)). The Court of Appeals found the error prejudicial with regard to the jury's award of damages.

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[1] See *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (describing the "necessary to serve a compelling state interest" strict scrutiny test).

[2] The specific activity was partially clothed close proximity dancing as opposed to nude close proximity dancing.

[3] Young was sued in his capacity as the Chair of the Board of Land and Natural Resources for the State of Hawaii along with Stephen Thompson in his capacity as Acting Administrator, Division of Boating and Ocean Recreation, Department of Land and Natural Resources, State of Hawaii.

[4] Although the District Court did not give its reasons for excluding the statistical report, the Court of Appeals for the Ninth Circuit presumed it excluded the report on grounds that the statistics were unreliable under *Daubert*.

[5] Hedonic damages are those "that attempt to compensate for the loss of the pleasure of being alive." Black's Law Dictionary 395 (7<sup>th</sup> ed. 1999). The Court of Appeals found that Montana's law did not specifically allow or disallow such testimony and because it was not "directed to a firm statement of Montana law, we cannot say that the district court's decision to allow hedonic damages "lies beyond the pale of reasonable justification under the circumstances." *Id.* at 1195 (quoting *Harman v. Apfel*, 211 F.3d 1172, 1175 (9th Cir.), *cert. denied*, 531 U.S. 1038 (2000)).

December 28, 2005

## Tenth Circuit Report

*Clinical experience alone is not sufficient to satisfy Daubert.*



In *Norris v. Baxter Healthcare Corp.*, 397 F.3d 878 (10th Cir. 2005), the Tenth Circuit confronted a classic *Daubert* issue and reaffirmed the court's "gatekeeper" role with respect to medical expert testimony. In *Norris*, a plaintiff sued for injuries allegedly sustained from breast implants that leaked. *Norris*, 397 F.3d at 879. The Tenth Circuit applied *Daubert* to determine whether the scientific methodology used by plaintiff's expert witnesses was reliable, and thus, admissible. *Id.* at 884. The Court noted that plaintiffs' experts had to show both that silicone breast implants could generally cause systemic injuries, and that the plaintiff's specific alleged injuries were caused by her leaking breast implants. *Id.* at 881. The district court precluded plaintiff's doctors from testifying, ruling that their medical and scientific reasoning was unreliable. *Id.* The Tenth Circuit affirmed. *Id.* at 886.

The Tenth Circuit reviews *de novo* whether the district court performed its role as a "gatekeeper" pursuant to Federal Rule of Evidence 702 and *Daubert*. *Norris*, 397 F.3d at 883. It then applies an abuse of discretion standard when reviewing the manner in which the district court exercises its *Daubert* gatekeeping role. *Id.* (noting that a district court has "wide discretion both in deciding how to assess an expert's reliability and in making a determination of that reliability").

*Norris* reviewed the *Daubert* guidelines as to what a district court should consider when determining whether the expert's reasoning or methodology is valid. Those include: (1) whether a theory has been or can be tested or falsified; (2) whether the theory or technique has been subject to peer review and publication; (3) whether there are known or potential rates of error with regard to specific techniques; and (4) whether the theory or approach has "general acceptance." *Norris*, 397 F.3d at 884 (citing *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 595 (1993)). The Tenth Circuit emphasized that these guidelines require a district court to focus not upon the conclusions reached by the expert, but on the methodology employed in reaching those conclusions. *Id.*

The plaintiff's experts in *Norris* had ignored many previous epidemiological studies that concluded that there was no medically reliable connection between silicone breast implants and systemic disease, and that the plaintiff's experts relied only on their prior clinical experience. *Id.* at 885. The district court

therefore held that plaintiff's expert witnesses' reliance on prior clinical experience and differential diagnosis, without any supporting epidemiological evidence, was misplaced and unreliable science. *Id.* The Court noted that "[o]bservations cannot define a disease," and that "[a] correlation does not equal causation." *Id.* at 885.

The Tenth Circuit affirmed the district court, ruling that it did not abuse its discretion in exercising its *Daubert* gatekeeping role because the plaintiff's experts' conclusions were not peer-reviewed, were not developed independent of the litigation, and were generally not accepted by the relevant scientific community. *Id.* at 886. The plaintiff's experts could not refute the generally accepted epidemiological studies, except by offering their own personal observations and those, the Court noted, did not support their conclusions with any accepted scientific methodology. *Id.* at 885.

In another interesting case from the Tenth Circuit, *United States v. Lauder*, 409 F.3d 1254 (10th Cir. 2005), the Court of Appeals analyzed whether fingerprinting technology used by an expert was subject to a *Daubert* analysis. Plaintiff objected to the admission of fingerprint cards containing his fingerprints because the cards were created using technology referred to as the "live-skin" method. *Id.* at 1262. The live-skin method is a digitally captured system where the fingerprint is placed on a glass plate that has technology inside that duplicates the fingerprint without ink, using only the friction of the skin. *Id.* at 1262-63.

Plaintiff's counsel challenged the admission of the fingerprint cards produced by the live-skin method based on *Daubert*. The Tenth Circuit, however, ruled that *Daubert* only applies to the qualifications of an expert and the methodology or reasoning used by the expert to render an opinion. *Lauder*, 409 F.3d at 1264. *Daubert*, the Court noted, does not "regulate the underlying facts or data" that an expert may rely upon when forming his or her opinion. *Id.* The Tenth Circuit noted that the plaintiff did not challenge the expert's qualifications or the methodology used in matching the plaintiff's live-skin print to the print found by law enforcement authorities. *Id.* The Court ruled that whether the live-skin method generated an accurate image was properly viewed as an authentication of evidence question that was unaffected by a *Daubert* analysis. *Id.* at 1264-65. The Court of Appeals analogized the issue with the situation where an expert relied on photographs taken by a new digital camera, as opposed to a traditional film camera. The Court ruled, "absent some specific objection to the technology underlying the digital equipment, a Court is not required to take testimony as to how the equipment works. If the party opposing the exhibit has doubts as to whether the matter in question is what its proponent claims, the proper objection would arise under Rule 901, not Rule 702/*Daubert*." *Id.* at 1265.

In a third interesting decision, the Tenth Circuit upheld the district court's ruling that the fact that a plaintiff offered to take a polygraph examination was inadmissible at trial. *Jones v. Geneva Pharmaceuticals, Inc.*, 132 Fed. Appx. 772 (10th Cir. 2005). The Court noted that polygraph tests were generally inadmissible in the Tenth Circuit, see *Palmer v. City of Monticello*, 31 F.3d 1499, 1506 (10th Cir. 1994), and that a party who desired to admit a polygraph test must first satisfy the *Daubert* criteria. *Jones*, 132 Fed. Appx. at 776. The Tenth Circuit affirmed the district court ruling that the plaintiff's offer to take a polygraph test was inadmissible because:

[B]y offering such evidence, the plaintiff intends the jury to presume that her submission to a polygraph examination would have revealed the truth. In other words, the probative value of the plaintiff's proffer is dependent upon the jury believing that the polygraph examination is a reliable indicator of honesty. The plaintiff, however, has no intention of making the rigorous showing that the examination's reliability and effectiveness under *Daubert* or Rule 702. Thus, under the circumstances, permitting the plaintiff to testify as to her offer without first qualifying the polygraph testing under *Daubert* would be improper.

*Jones*, 132 Fed. Appx. at 776.

December 28, 2005

## 11th Circuit Report

*An expert cannot rely on regulatory agency rules as the basis for his conclusions.*

The Eleventh Circuit Court of Appeals rendered numerous opinions this year on *Daubert* issues. In the majority of decisions involving the admissibility of expert testimony under *Daubert*, the proffered testimony was stricken or disallowed by the Court. The following is a brief summary of three of the more interesting of these opinions to date in 2005.xml:namespace prefix = o ns = "urn:schemas-microsoft-com:office:office" />

In *McClain v. Metabolife International, Inc.*, 401 F.3d 1233 (11th Cir. 2005), the plaintiff obtained a jury verdict against an herbal supplement manufacturer for selling an unreasonably dangerous diet drug. The plaintiff alleged that the product caused ischemic strokes and heart attacks. The Court of Appeals ruled that testimony from an expert pharmacologist was based on questionable pharmacological principles and inferred conclusions. The Court reversed and remanded because the proffered testimony did not satisfy the *Daubert* requirement that it be based upon scientific knowledge.

Significantly, the Court held that the expert could not rely on regulatory agency rules (using the higher standard of a risk-utility analysis) as the basis for his conclusions. The trial court failed to distinguish between the use of the agency rule as a means for protecting the public at large versus being part of the methodology to establish causation for the specific plaintiff.

The Court also held that a neurologist's reliance on anecdotal reports rather than more reliable controlled scientific studies did not satisfy the reliability requirements of *Daubert*.

In *United States v. Masferrer*, 367 F. Supp. 2d 1365 (11th Cir. 2005), following an indictment of the defendants for conspiracy to defraud and wire fraud, the government's proposed experts were stricken on reliability and helpfulness grounds. In reviewing bank transactions, an international law, banking and finance professor's expert testimony relied solely on the evidence of the transactions and his own conclusions and was thus held inadmissible under the reliability requirements of *Daubert*. The Court held that the testimony, as offered, would not assist the trier of fact, and thus would invade the province of the jury.

Proposed testimony from an expert investment banker and an expert accountant was also held inadmissible on similar grounds. With regard to the expert investment banker's testimony, the Court stated "[i]t is simply his opinion of what he would do if he were a juror considering the facts which need no interpretation by an 'expert.'" xml:namespace prefix = st1 ns = "urn:schemas-microsoft-com:office:smarts" /> *Id.* at 1378.

In *J & V Development, Inc. v. Athens-Clarke County*, 387 F. Supp. 2d 1214 (11th Cir. 2005), the Court reviewed the trial court's ruling on the defendant's motion in limine seeking to prohibit testimony from an expert sociologist that the denial of a special land-use permit had a disparate impact on minorities. The defendant argued that the expert's testimony was not admissible because the reliability of his methodology was unsubstantiated and because there were statistical flaws in his key opinions.

Specifically, the expert did not explain how his methodology could be tested, offered no testimony about the error rate for his methodology, gave no information about the peer review of his methods or opinions, gave no indication of the publication of his methodology, and gave no evidence regarding the general acceptance of his methods used to reach his conclusion of the existence of a disparate impact on minorities. Therefore, the Court held that his testimony was inadmissible.

December 28, 2005

## An Expert's Viewpoint – How to Prepare Your Next Expert Witness



As a certified public accountant who has served as an expert witness in numerous cases during the past ten years, I've observed both good and bad practices followed by attorneys engaging experts. Often, the difference between good and bad practices in preparing and working with your expert can mean the difference between winning and losing the case. You know the good results – the expert is knowledgeable, has sufficient and appropriate background, is well-groomed, is conflict-free, and is involved early on. You also may have experienced some of the bad – the expert is unprepared, is pompous, executes poorly, isn't aware of the role he needs to play, and looks as though he's just jumped out of bed.xml:namespace prefix = o ns = "urn:schemas-microsoft-com:office:office" />

Based on my experiences, observations and real-life anecdotes, the following are some recommendations to ensure a more successful engagement – for the attorney, expert, and client – with a testifying expert.

- 1) **Meet the expert witness prior to formally engaging him.** Whenever possible, meet a prospective expert in advance of your need. Oftentimes, this is possible through informal networking. The

next time you receive a request to meet an expert, accept. A face-to-face meeting is your opportunity to evaluate him – is he articulate, amiable, neat, and credible, or bumbling, messy, and pompous? Evaluate what overall impression he might make on the trier of fact. Consider the attorney who engaged an expert based largely on the position he held in a professional organization. When the expert testified in trial, his condescending attitude and demeaning comments about the opposing expert failed to curry favor with the jury. Or, consider the attorney who engaged an expert located across the country. When the expert arrived the day of trial, the attorney was shocked to see “the most slovenly person I have ever seen.” The attorney’s paralegal re-outfitted the expert at a local clothing store just in time for his appearance in Court.

2) **Review the expert’s curriculum vitae, testimony experience, and articles she has authored.**

By discussing the expert’s background with her, you’ll have a better understanding of her capabilities and experience. Has she testified in cases such as yours in the past? Is her education and professional experience suited to the issues at hand? Do her published articles contain opinions that may be problematic for your case? Does she come with any “baggage” – has she been disqualified from testifying; does she always testify for the plaintiff/defendant? Consider the expert who, at deposition, testified that: she derived 95 percent of her income from expert testimony; she never had a separate professional practice; and, she always testified for the defendant. After deposition testimony, the engaging attorney chose not to use this expert at trial for fear the jury would view her as a “hired-gun”.

3) **Explore any real or perceived conflicts.** When you contact an expert about a new engagement, provide him the case caption and the name(s) of opposing counsel. In this way, you can learn if opposing counsel has ever engaged him as an expert in other similar cases. Additionally, you can determine in advance whether he or his firm has any relationship with any of the parties to the lawsuit. Consider the situation in which plaintiff’s counsel engaged an expert whose partner, years earlier, had provided one-time consulting services to the plaintiff. Despite the expert disclosing this information, counsel decided to retain him. He ultimately had to defend his independence to the jury during cross-examination – not much fun for the witness, and potentially, not much good for the client.

4) **Ensure the expert you hire will be sufficiently involved in the origination of her opinion.**

Although it is unreasonable to expect that the expert you hire to testify will complete all the work on an engagement without assistance from others, it is critical that she, herself, develop any opinions to which she testifies. These are, after all, her opinions, not those of a staff person. Consider the situation in which the expert tells the jury that she spent a mere seven hours – out of more than 500 hours spent by her firm – developing her opinion on the case at hand. After coming back in favor of the opposing party, the jurors commented on the expert’s lack of participation in determining the opinion.

5) **Define the role you expect the expert to play in the case.** At the time of engagement, tell the expert which issues he needs to address and whether a written report is necessary. Do not assume that the expert will discern the appropriate issues merely by reading the pleadings. Consider the situation where the attorney provided the expert no overview of issues, nor instructed him that the report should be oral. The expert submitted a formal, written report replete with opinions on issues extraneous – and possibly detrimental – to the attorney’s position. Clearly, this could have been avoided if the attorney had provided direction to the expert or the expert had asked the attorney what was appropriate.

6) **Allow the expert to testify within her area of expertise.** An expert is only valuable when opining credibly on areas in which she is qualified. Asking an expert to testify on issues for which she has no training, background or expertise is a quick route to a Daubert challenge. Consider the situation in which the attorney tells the damages expert that he also wants her to testify about the residential real estate market – something clearly beyond her scope of knowledge. Fortunately for all, she refused the engagement.

7) **Engage the expert early in the process.** By so doing, the expert can still request documents needed to complete his analysis (assuming discovery remains open), have sufficient time to review all documents, read depositions, and develop a thorough, credible opinion – whether the report is written or oral. Moreover, this allows the attorney and expert to eliminate any possible date conflicts for deposition and trial. Consider the attorney who contacted the seemingly perfect expert at the last minute, only to learn that the expert would not be available for trial due to conflicts with his long-planned 25<sup>th</sup> wedding anniversary trip to Tahiti.

8) **Prepare the expert for her deposition.** This may be one of the most important steps in the process of using an expert. It is a time to review her file, discern her opinions, and prepare her for opposing counsel’s possible questions and areas of interest. Any background you can provide on opposing counsel’s style or manner of handling depositions also is valuable to the expert. There’s no substitution for this preparation, which ideally should be in person. Consider the attorney who failed to prepare the expert before deposition, and found the expert to be pedantic to a fault. The attorney chose not to call her at trial, fearing a negative reaction from the jury.

9) **Practice with the expert prior to trial.** This is the last opportunity to prepare the expert for his critical testimony, whether that is accomplished through an informal one-on-one session or in a mock-trial setting. Review the expert’s testimony with him, so that in Court he can be more concise, use less technical jargon, and focus better on the question at hand. Trial preparation also can include designing effective demonstrative aids for Court and reviewing last-minute housekeeping matters – exchange of phone numbers, where to be and when, appropriate dress, etc. Consider the attorney who engaged an

expert who had not previously testified in Court. The expert, anxious to please, arrived early and went directly into the courtroom. Opposing counsel objected to his presence and precluded his testimony.

In summary, the difference between good practices and bad is significant. The time and effort required to prepare an expert properly is relatively insignificant in the scheme of things. By following the foregoing, you can improve the odds of enjoying a smoother, more productive relationship with your testifying expert witness.

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December 28, 2005

## The Expert Check Up

***Would you like to have access to a database that catalogs experts whose testimony has been the subject of successful Daubert challenges? The Daubert Newsletter is going to be creating such a database.*** We want to know about your *Daubert* successes – regardless of whether the results are published and regardless of when the ruling came down. All newly identified experts will be listed in next issue of the *Daubert* Newsletter with links to additional related information (some examples are below) – and you will have the chance to do some shameless bragging. So if you have a *Daubert* victory send us an e-mail at [pkenny@armstrongteasdale.com](mailto:pkenny@armstrongteasdale.com).

**Experts addressed in *Daubert* rulings**  
**(click on the expert's name for more information)**  
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Additional Information: Reported in *McCoy v. Whirlpool Corp.*, 379 F. Supp. 2d 1187 (D. Kan. 2005).

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Additional Information: Reported in *Truck Insurance Exchange v. Magnetek, Inc.*, 360 F.3d 1206 (10<sup>th</sup> Cir.

2004)

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