



presents

***Daubert* Standards for Expert Witness Testimony**

Effective Strategies for Bringing and Defending *Daubert* Challenges

A Live 90-Minute Teleconference/Webinar with Interactive Q&A

Today's panel features:

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Thursday, February 25, 2010

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Effective Strategies for Bringing and Defending *Daubert* Challenges

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February 25, 2010

I. Overview of Daubert Standard

What is an Expert?

- “An expert is one who knows more and more about less and less.”

Nicholas Murray Butler, commencement address, Columbia University.

- Federal Rule of Evidence 702:
“a witness **qualified** as an expert by knowledge, skill, experience, training, or education,”
whose
“scientific, technical, or other specialized knowledge will **assist** the trier of fact”

Why Was Gatekeeping Needed?

- “An expert can be found to testify to the truth of almost any factual theory no matter how frivolous, . . .” Jack B. Weinstein, *Richmond Law Review* (1987).
- “It is quite apparent that experts are readily available to present essentially frivolous theories in an effort to defeat summary judgment or to create reasonable doubt.” Margaret Berger, 115 F.R.D. 89 (1987).
- “It is time to take hold of expert testimony.” *In re Air Crash Disaster at New Orleans*, 795 F.2d 1230, 1234 (5th Cir. 1986).

The Supreme Court Trilogy

- *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)
- *General Electric Co. v. Joiner*, 522 U.S. 136 (1997)
- *Kumho Tire Company, Ltd. v. Carmichael*, 526 U.S. 137 (1999)

Daubert

- *Frye* is superseded by FRE.
- Trial Judge is to be a gatekeeper under Rule 104
- Rule 702—reliability, relevance, and “fit”
- Evidentiary reliability depends on scientific validity
- Factors--testing; peer review; error rate; general acceptance
- Methodology, not conclusions

The *Daubert* Factors

1. **Testing/Falsifiability – Applying the scientific method.**
2. **Error rate – Assuring the validity of a technique**
3. **Peer Review and Publication – Submission to the expert community**
4. **General Acceptance – *Frye* redux?**

The *Daubert* Factors: Testing

Testing – Most important in products liability/design defect cases:

- *Brooks v. OMC*, 234 F.3d 89 (2d Cir. 2000) – Expert failed to test kill switch theory in accident reconstruction.
- *Rypkema v. Time Mfg.*, 263 F. Supp.2d 687 (S.D.N.Y. 2003) – “Adherence to engineering standards of intellectual rigor almost always requires testing of a hypothesis if the expert cannot point to an existing design in the marketplace.”
- *Johnson v. Manitowoc Boom Trucks*, 484 F. 3d 426 (6th Cir. 2007) – Expert never tested design for crane interlocking outrigger system

The *Daubert* Factors: Testing

Compare:

- *Cromwell v. Wal-Mart*, 2002 WL 1973906 (5th Cir.) – Expert not required to test ladder design.
- *Vulcan Materials v. Atofina Chemicals*, 355 F. Supp.2d 1214 (D. Kan. 2005) – “independent testing is not a sine qua non of expert testimony admissibility” re theory of transportation of chemicals.

The *Daubert* Factors: Testing

The expert does not have to personally conduct test:

- *Shatz v. Ford Motor Co.*, 412 F. Supp.2d 581 (N.D. W. Va. 2006) – cross examination allowed though expert did not design or run vehicle tests.
- *Lohmann & Rauscher v. YKK (U.S.A.)*, 477 F. Supp.2d 1147 (D. Kan. 2007) – Expert not required to witness or participate in lab testing.

Compare:

- *Melendez-Diaz v. Mass.*, 129 S. Ct. 2527 (June 25, 2009) – Lab analyst must appear in court to satisfy Confrontation Clause.

The *Daubert* Factors: Error Rate

Most common with forensic testing techniques:

- *United States v. Hicks*, 389 F.3d 514 (5th Cir. 2004) – Expert testified that error rate in matching spent cartridge cases was near zero.

Compare:

- *United States v. Green*, 405 F. Supp.2d 104 (D. Mass. 2005). Problems with shell casing opinion: no blind tests, observer bias, no studies of error rate, not reviewed by another examiner, expert not certified. But no case had ever excluded, so court allowed.

The *Daubert* Factors: Peer Review

Independent review by experts in field followed by publication in reputable journal:

- *Black v. Rhone-Poulenc*, 19 F. Supp.2d 592 (S.D. W. Va. 1998) – Rejecting method of psychology: “The importance of adequate, true peer review cannot be overstated.”

Not review by co-workers:

- *Ahlberg v. Chrysler*, 481 F.3d 630 (8th Cir. 2007) – rejecting engineer’s claim that technique was subject to review by peers at Chrysler.

The *Daubert* Factors: Peer Review

Typically not relevant in engineering and design cases:

- *Hartsfield v. Bradford-White Water Heaters*, 2004 WL 515612 (N.D. Tex.) – peer review not required for opinion re defect in water heater

But compare:

- *Shaffer v. Amada America, Inc.*, 335 F. Supp.2d 992 (E.D. Mo. 2003) – Alternate design for press break had not been peer reviewed.

The *Daubert* Factors: General Acceptance

- “A ‘reliability assessment does not require, although it does permit, explicit identification of a relevant scientific community and an express determination of acceptance within that community.’”

Daubert, 509 U.S. at 594.

- General acceptance does not “show that an expert’s testimony is reliable where the discipline itself lacks reliability.”

Kumho, 526 U.S. at 151.

- *See Summers v. Missouri Pac. R. R.*, 132 F.3d 599 (10th Cir. 1997) – rejecting theory of clinical ecology

Joiner

- No “analytical gap”
- Testimony must be more than the *ipse dixit* of the witness
- Methodology and conclusions are not entirely separate
- Abuse of discretion standard of review

Kumho Tire

- **No exception for experience**
- ***Daubert* factors not limited to science**
- **Factors and analysis appropriate to field**
- **Rational basis even for experience-based testimony**
- **Methodology not separate from conclusions**

Changes to Rule 702

- . . . a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, provided that (1) the testimony is sufficiently based upon reliable facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Gatekeeping Today:
Establishing the *Daubert*
Framework

- Qualifications
- Relevance or “Fit”
- Reliability

Qualifications

- **Pre-*Daubert* – “Qualifications Only”**
- **Post-*Daubert* – Less Important**
 - “[T]he ‘emphasis on qualifications over reliability of the expert testimony reflects a pre-*Daubert* sensibility.’ . . . As long as some reasonable indication of qualifications is adduced, the court may admit the evidence without abdicating its gate-keeping function.” *Rushing v. Kansas City Southern Railway Co.*, 185 F.3d 496, 507(5th Cir. 1999).
 - “Under *Daubert*, disputes as to an expert’s credentials are properly explored through cross-examination at trial and go to the weight and credibility of the testimony , not its admissibility.” *Cotten v. Phillips*, 280 Ga. App. 280, 286, 633 S.E.2d 655 (2006).

Relevance and “Fit”

- **Not relevant to issue before the court**
 - *Phillips v. Hillcrest Medical Center*, 244 F.3d 790 (10th Cir. 2001). Physician’s opinion drug use did not cause death was irrelevant, as opponent did not make such assertion at trial.
 - *Daubert II*, 43 F.3d 1311, 1315 (9th Cir. 1995) – Expert could not show $RR > 2$, so not relevant to Cal. standard of “more likely than not”
 - *Loeffel Steel Products, Inc. v. Delta Brands, Inc.*, 387 F. Supp.2d 794 (N. D. Ill. 2005) – Economic loss opinion did not fit state damages law.
- **Not a “fit” to facts of case:**
 - *Jordan v. State*, 877 S.W.2d 902, 905 (Fort Worth 1994). Opinion on eyewitness identification did not “fit” actual circumstances of case.
 - *Chan ex rel. Brewer v. Coggins*, 2007 WL 2783355 (S.D. Miss. 2007) – Reconstructionist ignored turning radius of truck and testimony of eyewitnesses

Reliability – The Scientific Method

- “The hallmark of this reliability prong is the scientific method, *i.e.*, the generation of testable hypotheses that are then subjected to the real world crucible of experimentation, falsification/validation, and replication.”

Caraker v. Sandoz Pharmaceuticals Corp., 172 F. Supp.2d 1046 (S. D. Ill. 2001).

Standards for Reliability

- The *Daubert* Factors are non-exclusive
- Other General Factors:
 - *Daubert* footnote 12
 - Nature and breadth of inference
 - Strength of opposing views
 - Review in earlier cases
 - *Paoli II* (3d Cir.)
 - Existence and maintenance of standards
 - Relationship to methods found reliable
 - Qualifications re methodology
 - Non-Judicial Uses
 - *Daubert II* (9th Cir.)
 - Independent validation of methodology
 - *Claar* (9th Cir.)
 - Forming opinion before getting the data

Field –Specific Indicia

- Indicia of reliability are specific to field of expertise
 - Epidemiology – Bradford Hill postulates
 - Fire Origin – NFPA 921
 - Accounting/Auditing – GAAP/GAAS
 - Appraisal – USPAP
 - Engineering tests – ASTM standards
 - Auto standards – SAE
 - Actuaries – Actuarial Standards of Practice (ASOPs)
 - FJC Manual

III. Defending a *Daubert* Challenge

Selecting the Expert Witness

- “Usually, I like my expert to be around 50 years old, have some gray in his hair, wear a tweedy jacket and smoke a pipe.” Samuel Gross, *Expert Evidence*, 1991 Wis. L. Rev. 1113, 1133
- **The Difficult Balance** – presentation skills or subject competence
 - Research publications, prior cases
- **Difficult Balance II** – Retain early (higher cost) or Retain late (lower value)
 - *Corey Airport Svcs. v City of Atlanta*, 2008 WL 4452386 (N. D. Ga.) – expert “completed his research, conducted his economic analysis and drafted his report in just eleven days.”

Disclosure/Designation

- Rule 26(a)(1), (a)(2)(A)
 - Name, address, telephone no.
 - Subject of discoverable information
- Non-report experts:
 - Rule 701 “lay experts” [26(a)(1)]
 - Treating Physicians
 - Witness not retained or specially employed
- Blanket Designations
 - *Bullock v. Alcoa*, 843 S.W.2d 640 (Corpus Christi 1992) – “all experts designated by other parties”
 - *North American Refractory v. Easter*, 988 S.W.2d 904 (Corpus Christi 1999) – “any physician who treated”

The Expert Report – Rule 26(a)(2)(B)

- Trial Lawyer’s Dilemma – How Complete?
- Advisory Committee – “detailed and complete”
- Court can rule on report alone.
 - *Taylor v. Evans*, 1996 U.S. Dist. LEXIS 10753, 94 Civ. 8425 (S.D.N.Y. July 30, 1996). Report did not satisfy Rule 26(a)(2)(B), and testimony would not assist trier of fact. Court need not wait for a deposition: “Where the report is inadequate, the sanction of preclusion is appropriate.”
- Who can write report?
 - *Isom v. Howmedica*, 2002 WL 1052030 (N.D. Ill. 2002). Attorney allowed to draft report after extensive discussions with expert.
 - *Traharne v. Fetzer Co.*, 156 F. Supp.2d 690 (N.D. Ill. 2001). Improper for counsel to prepare report and present for expert’s signature.
- What not to do: *Sierra Club v. Cedar Point Oil*, 73 F.3d 546, 571 (5th Cir. 1996) –
 - 1 ½ page outline listing “points of testimony”
 - 1-paragraph statements of opinion
 - Statement of subjects expert “intended to research and discuss at trial”
- *Loeffel Steel Products, Inc. v. Delta Brands, Inc.*, 387 F. Supp.2d 794 (N. D. Ill. 2005) –
 - Expert’s report offered no explanation or details, failed to list other cases with specificity so as to allow investigation, failed to list a case in which the expert was excluded, failed to reveal where he obtained the information he relied upon

What is discoverable?

- All communications
- Report drafts

Rule 26 Amendments

- **Report** must set out “facts or data” considered by expert
- **Non-report witnesses** – subject matter and summary of facts and opinions
- **Privilege** for
 - Drafts of Reports
 - Communications with attorney, except for
 - Compensation
 - Facts or data provided and considered
 - Assumptions provided and relied upon
- **Timetable:**
 - 5/10 – Supreme Court must act
 - 12/10 – Effective if no act by Congress

Protecting Your Expert– The *Daubert* Challenge

- Provide all material to expert
- Assure all opinions/bases disclosed in designation and report
- Double check the work
 - *Munoz v. Orr*, 200 F.3d 291 (5th Cir. 2000)(expert relied on table of percentages that did not add up to 100%).
- Prepare expert for *Daubert* criteria/challenge
 - Reliability factors
 - Standards of profession
 - Magic words
- Get express ruling of reliability.
 - *Mukhtar v. California State University*, 299 F.3d 1053, 1066 (9th Cir. 2002)(‘[T]he only indication we have that the district court found [the expert’s] testimony reliable is the fact that it was admitted. . . Surely *Daubert* and its progeny require more.’).

Effect of Prior Rulings

- **Limited preclusive effect for admission or exclusion:**
 - *Chan v. Coggins*, 2008 WL 4441941 (5th Cir. 2008) – “being qualified as an expert in the circumstances of one case does not qualify one as an expert in all future cases.”
 - *Ferrara & DiMercurio v. St. Paul*, 240 F.3d 1, 8n.4 (1st Cir. 2001) - Views of prior judges are “largely irrelevant,” since presiding judges have broad discretion regarding expert qualifications. “Circumstances change from trial to trial, and admissibility rulings may also change from judge to judge and trial to trial.”
 - *Zaremba v. Gen’l Motors Corp.*, 360 F.3d 355 (2nd Cir. 2004). Fact that expert’s testimony re alternative design of a Pontiac T-top was admitted by a New Jersey state court, did not establish reliability.

Planning for the Worst

- Use well-defined pretrial schedule for early warning.
- Decision: multiple experts?
- The risk: *Christophersen v. Allied Signal*, 939 F.2d 1106 (5th Cir. 1991) – Summary judgment when sole expert found unreliable
- Continuance – typically a long shot
 - *Anderson v. Raymond Corp.*, 340 F.3d 520 (8th Cir. 2003) – rejecting continuance when plaintiff had 3 years to get qualified expert.
- But see:
 - *Betzel v. State Farm Lloyds*, 480 F.3d 704 (5th Cir. 2007) – Continuance should have been granted to allow designation of new experts.

Strafford's *Daubert* Teleconference/Webinar

Strategic and Tactical Considerations & Toxic Tort and Product Liability Update

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Daubert: Strategic Considerations

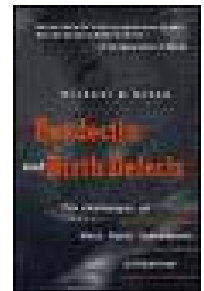
Knowing when and when not to file a *Daubert* motion

- evaluating the risks of filing
- balancing relevant factors
- pre-trial motion vs. cross examination?



Daubert

- Federal Rules of Evidence 701-703 govern the admissibility of expert opinion evidence
- In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), Court re-emphasized the trial court's role as gatekeeper of proper scientific evidence
- Adopted new test for admissibility focused on relevancy, reliability, fit
- Factors include whether technique has been tested; peer review and publication; potential error rates; standards and controls applicable; degree of acceptance in scientific community



Daubert

Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999):

- Daubert applies not only to “scientific” evidence, but also to technical or other specialized knowledge
- Daubert factors are flexible, not rigid
 - may or may not be pertinent
 - depending on issue, expert, opinion
- standard of review remains abuse of discretion



Daubert

- Why not make a valid motion? What's the harm?
- Risks May Exist
 - showing your hand too soon?
 - losing surprise; loss of effectiveness?
 - chance to cure



Daubert

- Opportunity To Cure

- ATLA CLE

- “ask the court to schedule *Daubert* motions before the discovery cut-off so that if there is a curable deficiency, there is time to cure it.”

Ann.2003 ATLA-CLE 851 (July, 2003)



Daubert

- Balancing Factors

- Chances of success?
 - Know your judge:
 - Track record on *Daubert*
 - How attentive to motions?
 - How are hearings handled?
 - Does the court devote time, read briefs, asks questions?
 - Expert's own track record?



Daubert

- Balancing Factors

- Chances of success?

- Know your jurisdiction:

- What is the relevant legal standard?

- E.g., requirement of relative risk >2

- E.g., differential diagnosis

- E.g., In re Welding Fume Products Liab. Litig., MDL No. 1535 (warning expert mis-stated legal standards and invaded province of jury)



Daubert

- Balancing Factors

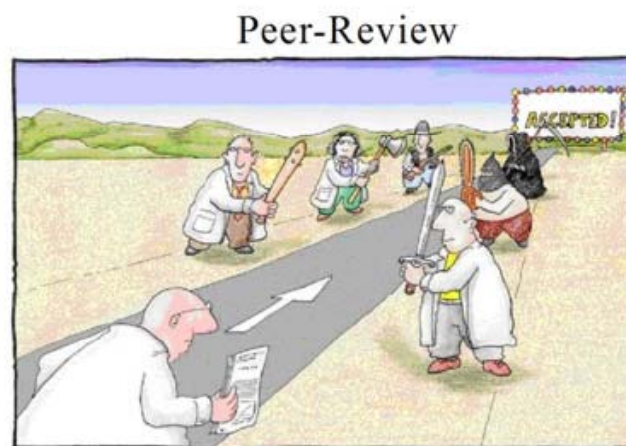
- Other court-related issues

- How important is it to “educate” the judge?
- And sooner rather than later?
- What other opportunities will you have?
- Will judge have expected you to do it before so that voir dire, motions in limine, trial objections not well received?



Daubert

- Balancing Factors
 - Is the expert's deficiency correctable? In time?
 - What are the issues?
 - incomplete analysis could be fixed. *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 423 (5th Cir. 1987)(oral history taken by expert of plaintiff was incomplete).
 - no peer review probably can't be fixed. *Valentine v. Pioneer Chlor Alkali Co.*, 921 F. Supp. 666 (D. Nev. 1996)(discussing meaning of peer review)



Daubert

- Balancing Factors

- Is the expert's deficiency correctable? In time?
- What are the issues?
 - expertise too far removed from testimony can be fixed only by substitution. *Whiting v. Boston Edison Co.*, 891 F. Supp. 12 (D. Mass. 1995)(doctor with epidemiology experience excluded from opining on dose reconstruction)



Daubert

- **Balancing Factors:** Is the expert's deficiency correctable? In time?
- *E.g. In re Bausch & Lomb Inc. Contact Lens Solution Prod. Liab. Lit.*, 2009 WL 2750462 (D.S.C. 8/26/09)
 - Bausch & Lomb sought to strike testimony by plaintiffs' expert who had initially set forth opinions about a number of mechanism-of-action theories to link product and infections.
 - After Daubert motions filed - and 2 weeks before Daubert hearing - expert abandoned mechanism-of-action theories and offered new opinions based on seven in vitro studies.
 - Court held that experts opinions were "fundamentally flawed and must be excluded."
 - One problem cited by Court: expert's opinions were a "Moving Target" that changed in response to defendant's motion practice.

Daubert

- Balancing Factors

- Contrast *In re Welding Fume Products Liab. Litig.*, MDL No. 1535, 2005 WL 1868046 (plaintiff expert on mechanisms of absorption of manganese particles and distribution and effects of those particles in the body permitted to testify; defense challenge “are grist for cross examination”)



Daubert

- Balancing Factors
 - Some issues may be more appropriate for judge vs. jury?
 - e.g., statistical analysis vs. an opinion inconsistent with his clinical practice
 - e.g., *In re Welding Fume Products Liab. Litig.*, MDL No. 1535 (plaintiff's business ethics expert excluded)



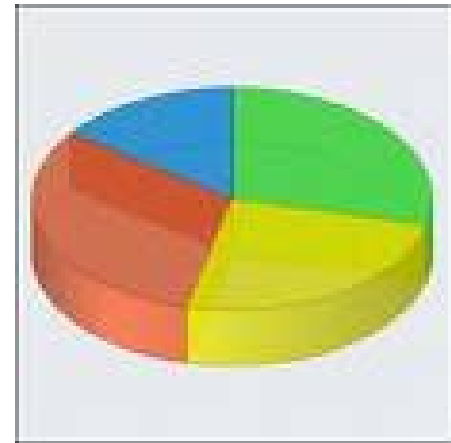
"I'd say it's your gallbladder, but if you insist on a second opinion, I'll say kidneys."



Daubert

- Balancing Factors

- Is the challenge to all or part of the opinion?
- If some opinion will survive, do you want the weak opinion left in to discredit the other?
- If some opinion will survive, will exclusion of weak opinion make expert more credible at trial?



Daubert



- Other Factors
- What are you revealing?
 - Are you showing a hand they have seen; or will see soon in MILs; or in defense reports or in the depositions of your experts
- Is it an issue on which you can effectively lock in the expert before trial?
 - will the judge ask questions and lock in the witness?
 - cross is weak on “no knowledge on a key issue,” once repaired

Daubert- Toxic Tort/Product Liability Update

Seroquel

- *Scaife v. AstraZeneca LP*, 2009 WL 1610575 (Del. Super. Ct., 6/9/09)
- *In Re: Seroquel Products Liability Litigation*, MDL No. 1769, (Guinn, 598 F.Supp.2d 1239 (M.D. Fla. 2009))
- Plaintiff's expert failed to "rule out" other causes of the plaintiff's diabetes, improperly relied on the temporal proximity between the plaintiff's Seroquel use and the onset of diabetes, and failed to explain how the medical literature supported her conclusion.
- Expert did not account for plaintiff's long history of weight fluctuation before taking Seroquel, clinical obesity



Daubert-Toxic Tort/Product Liability Update

Seroquel

- expert supplemented subjective differential diagnosis with data she found in the medical literature addressing general causation; prominently featured her literature review in a post-deposition affidavit
- employed no process in doing her eleventh-hour literature review
 - subjectively selecting items from the medical literature without explanation of the process for selection
 - cannot accept some but reject other data from the medical literature without explaining the basis for her acceptance or rejection
 - almost none of which she confirmed or even accented with her own research
 - could not meaningfully discuss the medical literature at either of her discovery depositions
 - chose to incorporate the medical literature into her opinion only after *Daubert* motion practice was initiated

Daubert- Toxic Tort/Product Liability Update

Zyprexa

- ***In Re: Zyprexa Products Liability Litigation*, MDL No. 1596, 2009 WL 1357236** (E.D.N.Y. May 12, 2009)
- Judge Weinstein disqualified Plaintiffs' causation expert in 13 cases
 - opined Zyprexa has a direct adverse effect on cells essential to the body's production of insulin, even in cases in which there was no documented weight gain. This opinion was not based on sufficient facts or data, nor was it the product of a reliable method.
 - criticized application of general conclusions to the facts of each case
 - “shockingly careless” about the facts in the cases he proposes to opine about
 - whether weight gain preceded or followed use of Zyprexa,
 - whether there was weight gain at all,
 - the scientific basis for the claimed causal link between Zyprexa intake and medical injury.



Daubert- Toxic Tort/Product Liability Update

Zyprexa

- ***In Re: Zyprexa Products Liability Litigation*, MDL No. 1596, 2009 WL 2762170** (E.D.N.Y. Aug. 28, 2009)
- Judge Weinstein denied defendant's motion to exclude Plaintiffs' causation expert
 - Expert contended that use of Zyprexa caused weight gain leading to diabetes and also could cause direct damage to pancreas and beta cells, leading to diabetes and death
 - Expert's diabetes opinion with respect to weight gain and diabetes satisfied *Daubert*
 - Judge Weinstein commented that defendant's challenge to expert's direct damage thesis was "compelling, but ... not decisive"



Daubert- Toxic Tort/Product Liability Update

Jeannine Presley, et al. v. Lakewood Engineering and Manufacturing Co., 553 F.3d 638 (8th Cir. 2009)

- Plaintiff fire cause and origin expert; opined defendant's heater caused fire
- District court excluded plaintiff's expert opinion because failed to apply reliably the standards of NFPA 921 to his theory
- What level of testing needed to show reliability, especially in fire case?
 - is testing required at every step in fire cases?
 - will court allow observation and expertise to be bases for reliability?
- 8th Circuit: In certain circumstances, a fire expert can offer a reliable opinion based upon specific observation and expertise.



Daubert- Toxic Tort/Product Liability Update

Jeannine Presley, et al. v. Lakewood Engineering and Manufacturing Co., (cont.)

- But district court did not abuse its discretion when it found expert had failed to apply the standards of NFPA 921 reliably to the facts of this case.
- NFPA 921 requires appropriate data analysis and testing. Further, NFPA 921 suggests that fire theories involving an appliance be substantiated by testing of exemplar appliances.
 - Expert testified he did not perform, and was not privy to, any testing showing conditions for ignition.
 - Did not test either the amount or rate of gas produced by heated wire insulation from the exemplar heaters.
 - Fire spread theory was inconsistent with NFPA 921. Expert testified his theory of fire spread inside the heater involved no specific testing.



Daubert- Toxic Tort/Product Liability Update

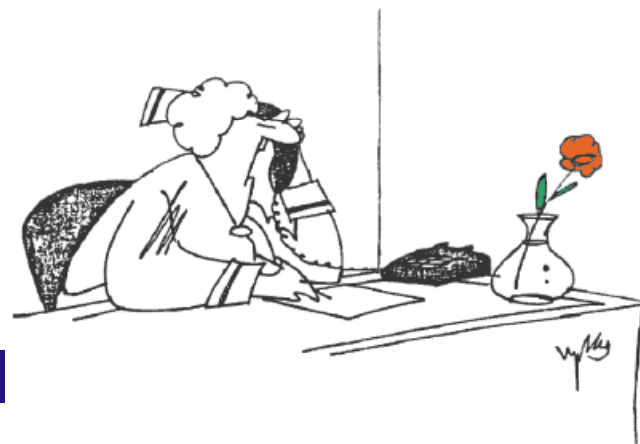
Best v. Lowe's Home Centers, Inc., 563 F.3d 171 (6th Cir. April 16, 2009)

- Sixth Circuit reverses, pointing out that district court failed to recognize that differential diagnosis is accepted methodology for establishing causation
- established the following test for the admissibility of expert opinions based on a differential diagnosis:
 - medical causation opinion in the form of a doctor's differential diagnosis is reliable and admissible where the doctor (1) objectively ascertains, to the extent possible, the nature of the patient's injury, (2) "rules in" one or more causes of the injury using a valid methodology, and (3) engages in standard diagnostic techniques by which doctors normally rule out alternative causes to reach a conclusion as to which cause is most likely.

Daubert-Toxic Tort/Product Liability Update

Best v. Lowe's Home Centers, Inc., (cont.)

- Appeals court concluded that the expert had adequately “ruled in” the chemical as a potential cause of the injury; “no requirement that a medical expert must always cite published studies on general causation in order to reliably conclude that a particular object caused a particular illness.”
- court concluded that the expert adequately “ruled out” other potential causes since expert eliminated medicines the plaintiff took as potential causes of a loss of smell.
- an expert “need not rule out every conceivable cause in order for the differential-diagnosis-based opinions to be admissible.”



"The doctor isn't in right now. When you hear the beep, please leave your name, number and a short diagnosis."

Daubert- Toxic Tort/Product Liability Update

Plaintiffs' attempts to cure backfire – fool me once...

- *In re Viagra Prod. Liab. Litig.*, MDL No. 06-1724, 2009 WL 2899889 (D. Minn. Aug. 19, 2009)
 - General causation expert based opinions on his own 2006 article that linked Viagra and Cialis to loss of vision
 - Expert survived first Daubert hearing
 - But additional depositions spur repeated amendments to expert report and a letter to his editor admitting that his article required modification.
 - Plaintiffs try to cure with a reanalysis of data from 2006 article
 - Court reject the reanalysis and excludes witness, effectively ending litigation:
 - Lack of peer review and publication “particularly important because the reanalysis ... [was] produced in response to concerns raised in litigation”

Daubert- Toxic Tort/Product Liability Update

Plaintiffs' attempts to cure backfire

- *Cochran v Brinkman Corp.*, 2009 WL 4823858 (N.D. Ga. Dec. 2009) – turkey fryer tipped over injuring a child
 - Expert opinion = Moving target:
 - Design defect expert submits report on 12/4/08
 - 12/17/08 expert conducts physical testing on the product
 - 12/19/08 produces test results at his deposition
 - Following close of discovery - and a month after deposition - still more testing to answer concerns raised at deposition
 - May 2009 supplemental expert report filed, adding new expert opinion that fryer did not meet ANSI standards
 - Court rejects supplemental report and excludes expert: Federal Rule 26(e) “is not a device to allow a party’s expert to engage in additional work, or to annul opinions of offer new ones to perfect a litigation strategy.”

Daubert- Toxic Tort/Product Liability Update

- *In re Prempro Prod. Liab. Litig.*, 586 F.3d 547 (8th Cir. 2009)
 - Plaintiff's specific causation witness used differential diagnosis to link hormone therapy to plaintiff's breast cancer
 - Jury award for compensatory and punitive damages
 - On appeal: defendants argue specific causation testimony should have been excluded
 - Defendants did *not* challenge differential diagnosis as a theory - instead challenged whether it was properly applied:
 - No one knows the cause of breast cancer
 - Expert did not properly account for other risk factors: familial history, smoking, age weight, etc.
 - Court concluded that defendants' challenges went to weight, not admissibility

Daubert- Toxic Tort/Product Liability Update

- But under Minnesota/*Frye* law – differential diagnosis in HRT case is rejected: *Zandi v. Wyeth*, 2009 WL 2151141 (Minn. Ct. App. July 21, 2009)
 - Plaintiff’s specific causation witness used epidemiology and differential diagnosis to link hormone therapy to plaintiff’s breast cancer.
 - Court holds: “Zandi fails to establish that the relevant scientific community generally agrees that there is a method of diagnosing the cause of breast cancer in a particular person.”
- *Zandi* was distinguished by Eighth Circuit/*Prempro* decision
 - *Zandi* relies on “variant of the standard abandoned in *Daubert*”

Research

- Thanks also to Greg Marsano, Esq. for his research on these slides.

Daubert

Mechanics of a Challenge Strategic and Tactical Considerations

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Deciding Whether to Challenge

Factors to consider:

- Jury trial v. trial to the court
- Nature of expert opinion at issue
- Case-specific information about expert, his/her work and data
- Other available information about expert
- Judge's practices and *Daubert* record
- Likely effect of successful challenge on case
- Not suitable for voir dire

Preparing for Challenge

- Whether adequate grounds on face of expert's FRCP 26(a)(2) disclosure
- Whether deposition of expert required for adequate grounds
 - Use of “considered by” lists
 - Confirmation of data/information considered
 - Prior similar cases
 - Prior publications
- Whether need affidavit of own expert
 - Use expert for case?
 - Use specially retained expert?

Presenting to the Court

- Manner
 - Motion in limine
 - Motion for summary judgment
 - Judge-specific procedures for FRE 702 motions
- Timing
 - Individual judge's practice standards
 - Scheduling orders or case management orders
 - Local rules
 - Other

Contents of Motion

- Clear statement of reasons why court should exclude or limit expert's testimony
- Focused case-specific articulation of flaws v. standards
 - Avoid rambling or lengthy historical discussion of *Daubert* and subsequent cases
- Clear support for accuracy of your characterization of expert's work from FRCP 26(a)(2) disclosure and deposition
 - Avoid overreaching

Contents of Motion (cont'd)

- Support for challenge
 - Authoritative sources rejecting method or application of method in this circumstance
 - Data which was ignored
 - Other similar situations where specific expert was excluded
 - Affidavit of another expert
 - Your expert for case?
 - Specially retained expert?
 - Other

Court's Process

- Check judge's practice standards
- Hearing? Evidentiary or argument?
 - Not mandatory
 - Vary by judge, case and consequence of decision
 - Should party request one?
- Appointment of court expert
- Reference to magistrate or special master

Court's Decision

- Format varies with judge and case
 - Written opinion
 - Detailed findings and conclusions on record at close of hearing
 - Bare bones ruling

Appeal

- Deferential standard of review – abuse of discretion. *Kumho Tire v. Carmichael*, 119 S. Ct. 1167 (1999) *citing General Electric v. Joiner*, 522 U.S. 136, 143 (1997).
- Bare bones ruling is most vulnerable on appeal

Case-Specific Examples

- Oil and Gas or Other Minerals
 - Lawsuits about valuation of product for royalties or taxes
 - Is value = price?
 - Can actual market data be ignored? If so, when?
 - Is value opinion reliable if it ignores all actual market data?

Smallwood v. Atlantic Richfield, 226 F.3d
1138 (10th Cir. 2000)

Case-Specific Examples

- Environmental Property Damage
 - Expert ignores actual sales on grounds that buyers and sellers not adequately informed
 - Well-established economic principle that market as whole may be adequately informed even if individual participants are not – cannot ignore actual sales

Case-Specific Examples

- Environmental Property Damage
 - Use of surveys to support valuation opinion
 - Strong potential for successful Daubert challenge because procedures for reliable survey well-established and plaintiffs' experts rarely follow them

Examples: *Baker v. Motorola*, CV 92-02603, Superior Court Arizona (Maricopa County); *Player v. Motiva Enterprises*, No. 02-CV-03216 (D. N.J.)

Case-Specific Examples

RCRA imminent & substantial endangerment or common-law claim for fear of increased risk

- Expert uses conservative regulatory assumptions – not predict actual harm but only identify a level at which risk not occur
- Alternatives:
 - *Daubert* challenge on “fit” grounds or
 - Cross-examination highlighting extreme and unrealistic assumptions

Case-Specific Examples

- Causation
 - Claim that person ill because of environmental contamination
 - Well-established scientific method
 - Source → exposure → dose → health effect
 - Were data ignored?
 - Were other explanations ignored?

Must Reads

- Federal Judicial Center's Reference Manual on Scientific Evidence
- Cases in your jurisdiction discussing or applying *Daubert*, *Joiner*, and *Kumho Tire*
- Ask your experts for background material on scientific or technical issues in case