The Basics of Applying *Daubert* and *Frye* in State Court

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I. INTRODUCTION

The Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[1], its progeny, and the subsequent amendment to Rule 702 of the Federal Rules of Evidence, streamlined the framework for challenging and offering expert testimony, resulting in a defined method for analyzing the admissibility of expert testimony in federal court. While *Daubert* and the Federal Rules of Evidence rejected the "general acceptance" test set forth in *Frye v. United States*[2], not all state courts have followed suit. Many states have rejected *Frye* and adopted *Daubert*, or some form thereof, for the admission of expert testimony, but a number of states have retained the *Frye* test, or some form thereof, for analyzing the admissibility of novel scientific evidence[3].

Practitioners faced with representing a defendant in a jurisdiction which uses an unfamiliar standard for determining the admissibility of expert testimony should not be overly concerned. Although *Frye* courts maintain their adherence to that dated standard, the reported decisions from many *Frye* jurisdictions reveal that the lines between *Frye* and *Daubert* are becoming less distinct. Many *Frye* courts rely on a *Daubert*-like reliability analysis to evaluate proposed expert testimony, and *Daubert*-like arguments may prove useful in a *Frye* jurisdiction.

This article identifies the states that still adhere to *Frye*, and the states that have rejected *Frye* in favor of *Daubert,* or a *Daubert*-like analysis[4]. For the practitioner defending a case in a jurisdiction whose requirements for the admissibility of expert testimony are different than his own, it will also suggest some fundamental considerations, both procedural and substantive, for parties seeking to challenge and/or offer expert testimony in both *Frye* and *Daubert* jurisdictions.

II. PROCEDURAL CONSIDERATIONS

Regardless of which test the state in question applies, there are some basic procedural considerations that should be addressed in any case in which the parties will likely rely on expert testimony to establish their claims or defenses[5]. Practitioners should consider these guidelines when preparing a framework for depositions, assisting an expert with formulating his opinions to refute the plaintiff's expert, and other related issues. It is important to be proactive about challenging the plaintiff's expert witness(es) from the outset, so consider which of the multiple opportunities available are most advantageous for your client to challenge the plaintiff's expert witness throughout the case.

Initially, at the initial scheduling conference, propose a provision in the case scheduling order setting forth deadlines for disclosing expert witnesses, as well as deadlines for submitting any challenges to the parties' expert disclosures in advance of trial. It may be possible to combine the deadline for challenging experts with the deadline for filing dispositive motions, because a successful challenge to the plaintiff's expert's opinions may be fatal to his claims.

Likewise, consider including a challenge to the plaintiff's expert's testimony in a motion for summary judgment. A challenge to the plaintiff's expert provides an alternate ground for the court to consider granting the motion, and may result in a dismissal of the plaintiff's claims. The proponent of the evidence typically bears the burden of establishing the evidence's admissibility; therefore, a challenge to the admissibility of an expert's testimony will pressure the plaintiff to establish that the evidence satisfies that state's test for admissibility. Because many courts rarely grant a hearing in connection with a motion for summary judgment, including a challenge to the plaintiff's expert in the motion may be grounds for obtaining a hearing that would otherwise be unavailable.

Additionally, if the court will not permit a provision for challenging expert testimony in its scheduling order, consider filing a motion seeking to exclude the plaintiff's expert testimony at the appropriate time. For instance, following the expiration of the deadline for fact discovery and designating expert witnesses, file a motion to exclude. This tactic serves several functions. First, it may result in the ultimate dismissal of the plaintiff's case, or at least portions of it, which can significantly streamline the case for trial. The streamlined case may also reduce unnecessary trial preparation costs that may ultimately result in a defense verdict through the exclusion of inadmissible expert testimony. Second, making the challenge at the appropriate time (*i.e.,* after the close of discovery) may preclude the plaintiff from retaining another, more qualified, expert. Courts will often grant a separate *Daubert* or *Frye* hearing to assess the validity of the expert testimony in question, if a party requests one.

If appropriate, indicate an intent to challenge the plaintiff's expert in a proposed pretrial order, and request the opportunity to address the issue at the pretrial conference. Alternatively, file a motion *in limine*, and request a hearing before trial.

These procedural considerations not only offer alternatives for pressuring the plaintiff, but they also provide a means for avoiding unnecessary expenses in preparing for and trying cases that may result in a defense verdict. Mounting a successful challenge to an expert may buy additional leverage in settlement negotiations that otherwise would not exist. If the exclusion of the plaintiff's expert will eliminate some, but not all, of his claims, this may well reduce the value of the plaintiff's case, making settlement a more attractive and viable alternative.

III. SUBSTANTIVE CONSIDERATIONS FOR EXPERT TESTIMONY IN *DAUBERT* JURISDICTIONS

After December 1, 2000, amended federal rule of evidence 702 became effective. It adopted and incorporated the United States Supreme Court's holdings in *Daubert v. Merrill Dow Pharmaceuticals, Inc.*[6], *General Electric Co. v. Joiner*[7], and *Kumho Tire Company, Ltd. v. Carmichael*[8]. Under amended Rule 702, a trial court's gatekeeper function applies to all expert testimony, and trial courts are required to inquire "...into the sufficiency of the testimony's basis and the reliability of the methodology's application...."[9] Pursuant to amended Rule 702, trial courts must assure themselves that the proffered testimony:

1. is based on sufficient facts or data;

2. is the product of reliable principles and methods; and

3. that the witness has applied the principles and methods reliably to the facts of the case.[10]

Amended Rule 702 can serve as a guidepost for practitioners in *Daubert* and *Daubert*-like jurisdictions, because it adopts the *Joiner* and *Kumho* principles, which extend and clarify the United States Supreme Court's holding in *Daubert.*

Those jurisdictions that have adopted *Daubert* focus the courts

inquiry on two issues that practitioners must bear in mind. These issues are:

1. whether the reasoning and methodology underlying the scientific theory or technique is scientifically valid (i.e., is it reliable?);

2. whether that reasoning or methodology can be properly applied to the particular facts at issue (i.e., is it relevant?).[11]

Although the *Daubert* Court emphasized that this approach is "flexible," it identified the following four, non-exclusive factors to serve as guideposts for trial courts:[12]

1. whether the theory or technique can be, and has been, tested;

2. whether the theory or technique has been subjected to peer review and publication;

3. the known or potential rate of error, including the existence and maintenance of standards controlling the technique operations; and

4. whether the technique is, in fact, generally accepted in the relevant scientific community.[13]

As of this publication, the following states have adopted *Daubert,* or a *Daubert*-like, standard for determining the admissibility of expert testimony: Alaska[14], Arkansas[15], Colorado[16], Connecticut[17], Delaware[18], Idaho[19], Indiana[20], Iowa[21], Kentucky[22], Louisiana[23], Maine[24], Massachusetts[25], Montana[26], Nebraska[27], New Hampshire[28], New Mexico[29], North Carolina[30], Ohio[31], Oklahoma[32], Oregon[33], Rhode Island[34], South Carolina[35], South Dakota[36], Tennessee[37], Texas[38], Utah[39], Vermont[40], Virginia[41], West Virginia[42], and Wyoming[43].

The *Daubert* analysis allows practitioners to place the proponent of scientific evidence on the defensive, because "[o]nce the party opposing the evidence objects, the proponent bears the burden of demonstrating its admissibility." However, the proponent of challenged evidence must not lose sight of the fact that questions about the validity of the methodology or application of the evidence generally go to evidence's weight, not its admissibility[45].

When dealing with experts in a *Daubert,* or *Daubert*-like, jurisdiction it is critical to keep in mind that opponents of expert evidence have three opportunities to discredit the proffered evidence[46]. The facts or data upon which the expert bases his opinion are subject to attack, as well as, the principles and methods the expert employs and the application of those principles and methods to the facts of the case. Even a methodology that is reliable in the abstract can be so flawed when applied to a given case that its application makes it unreliable[48]. Specifically, "[n]ot every error in the application of a particular methodology should warrant exclusion [, but] an alleged error in the application of a reliable methodology should provide the basis for exclusion of the opinion [when] that error negates the basis for the reliability of the principle itself.[49]"

Practitioners must also remember that, even if the evidence at issue satisfies the *Daubert* criteria, that is not the end of the analysis. The proffered evidence must still clear the hurdles set forth in other rules of evidence. Specifically, trial courts must insure that the evidence's probative value is not substantially outweighed by its danger of unfairly prejudicing the trier of fact[50].

Of course, there are a litany of other factors practitioners dealing with expert evidence in *Daubert*, or *Daubert*-like, jurisdictions will want to consider[51]. Among these considerations are the following:

1. Whether to obtain outside experts or rely on in-house experts: As products become more specialized and numerous, it is not uncommon to find situations where a client's in-house scientists are the most qualified people to provide expert testimony. Cost-conscious clients often see this situation as an opportunity to reduce litigation costs. However, using an in-house expert can backfire by giving the plaintiff's lawyer an opportunity to argue to the jury that the in-house expert's testimony is not believable by making a "the fox is watching the hen house" type of argument.

2. Work with the court to establish procedures for handling a *Daubert/Frye* hearing: A *Daubert,* or Rule 104 hearing can easily turn into a mini-trial. The parties should work with the court to try to streamline the process as much as possible. Practitioners should also note that, in jurisdictions that have a rule substantially similar to federal rule of evidence 104, the trial court is not bound by the rules of evidence at a *Daubert* hearing (with the exception of privileges)[52].

3. Make sure the expert at issue employs the same methodology or technique outside the courtroom: Showing that the expert is advocating a technique or methodology in the courtroom that he/she does not employ outside the courtroom can be a highly effective way to show that the evidence is unreliable, or has been applied unreliably[53].

4. Does the jurisdiction only apply *Daubert* to "novel scientific evidence"?: Just because a jurisdiction has adopted *Daubert,* or a *Daubert*-like standard, does not mean that the jurisdiction applies that standard in all cases. Therefore, practitioners must keep in mind that some jurisdictions only apply *Daubert* to certain cases[54].

5. Has your opponent complied with Rule 26 (a)?: In jurisdictions employing a rule of civil procedure similar to Federal Civil Procedure 26 (a), if your opponent has failed to provide adequate disclosures under that rule, the trial court can prohibit him from using the undisclosed evidence[55]. If you find yourself being accused of failing to make an adequate expert disclosure, you can argue that the failure (if any) was substantially justified under the circumstances, or that it was "harmless"[56]. In addition, some courts, when confronted with a party's non-disclosure, have held that one factor to consider is whether a continuance will cure the non-disclosure[57].

6. Is the expert's body of knowledge well suited to *Daubert* criteria?: Since the *Joiner*[58] and *Kumho*[59] decisions have clarified the breadth of *Daubert's* application, some fields of expertise are more conducive to satisfying *Daubert* criteria than others[60]. For example, although certain aspects of economic and valuation theory are based upon well settled financial theories, applying these theories to closely held businesses usually depends on the expert's special skill, knowledge, and experience rather than on a concrete scientific theory or technique[61]. Thus, practitioners should seize every opportunity to demonstrate to the court areas where the challenged expert must "jump" from concrete scientific theories or techniques to a conclusion.[62]

7. Look beyond the non-exclusive factors set forth in *Daubert*: Just because a jurisdiction does not follow the *Frye* "general acceptance" test for reliability does not mean that showing

that your opponent's expert evidence is not widely accepted is useless[63]. For instance, will the evidence at issue add to the jury's common understanding?[64] How often has an expert's methodology produced erroneous results?[65]

IV. SUBSTANTIVE CONSIDERATIONS FOR EXPERT TESTIMONY IN *FRYE* JURISDICTIONS

Despite the Supreme Court's litany of cases delineating a framework for analyzing the admissibility of expert testimony, as well as the recent amendments to the Federal Rules of Evidence, many states still adhere to the *Frye* test when addressing the admissibility of novel scientific evidence. As originally formulated, *Frye* states that, "while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.[66]" Of course, many states have general acceptance tests that include additional criteria, such as a reliability requirement.[67]

As of this publication, the following states continue to adhere to *Frye*, or some form of the general acceptance test, when considering the introduction of novel scientific evidence: Alabama[68], Arizona[69], California[70], the District of Columbia[71], Florida[72], Illinois[73], Kansas[74], Maryland[75], Michigan[76], Minnesota[77], Mississippi[78], Missouri[79], New Jersey[80], New York[81], North Dakota[82], Pennsylvania[83], and Washington[804].

However, commentators and practitioners alike have called for the rejection of *Frye* and the general acceptance test, and they have suggested that since the inception of *Daubert*, not only has the rationale for adhering to *Frye* been severely undermined, but more importantly, courts are simply paying lip-service to *Frye*, and instead are relying on a *Daubert*-like reliability analysis to address the admissibility of novel scientific evidence[85]. While *Frye* may be the law of the land in many states, practitioners more familiar with *Daubert* may nevertheless apply its logic and lessons when seeking to exclude or offer expert testimony in a *Frye* jurisdiction.

For lawyers defending cases in jurisdictions that adhere to the *Frye* standard, the following are some considerations to keep in mind when challenging or offering expert testimony:

1. <u>The expert's conclusion, methodology, and reasoning</u>: Courts in states that still adhere to *Frye* are split on whether the proponent of the evidence must establish general acceptance of the proffered expert's conclusion[86], methodology/technique/theory[87], and/or his reasoning or application of the methodology to the facts at issue[88]. While the theory itself may be generally accepted, its application to the facts of the case may be novel, as well as the conclusion reached. Courts seem more concerned with the theory and its application than with the conclusion drawn[89]. Not surprisingly, when evaluating the application of an expert's testimony to the facts, many *Frye* jurisdictions have also assessed the expert's reasoning or his application of the theory in question to the facts of the case, adding a reliability requirement to general acceptance[90].

2. <u>Scientific community</u>: Identify the scientific community that has or has not recognized the theory in question as "generally accepted." It may be that the challenged expert has too narrowly defined the community in question, and a broader group of scientists believe the theory lacks any scientific foundation.

3. <u>General acceptance</u>: The *Frye* court failed to define general acceptance, but other courts have stated that it need not be "unanimous."[91] After defining the relevant scientific community, consider what portion of that community considers the theory in question generally accepted. It may be that defining the scientific community determines the degree to which the challenged theory is generally accepted. When considering this factor, look to both the quality and the quantity of the evidence supporting the theory or technique[92], including court opinions, scientific publications, and other expert opinions.[93]

4. <u>Is the proposed testimony "novel"?</u>: Some *Frye* jurisdictions only apply the general acceptance test to novel scientific testimony, while others maintain that the general acceptance test applies to all expert testimony that enters the courtroom.[95]

5. <u>Is the proposed testimony "scientific"?</u>: Ostensibly, *Frye* only applies to scientific evidence, such as DNA analysis, and some courts limit their general acceptance tests to "scientific" evidence only, declining to apply *Frye* to such evidence as expert testimony on economics.[96]

6. <u>"Pure opinion" exception</u>: In some instances, courts will not apply *Frye* where the proposed expert has reached his conclusions solely through the application of his own research, observations, and experience to the facts at issue.[97] However, to gain the benefit of this exception, the theories, methodologies, or techniques utilized by the expert, if any, must pass muster under *Frye*.

7. <u>Rules of Evidence 403 & 702</u>: Even if the expert testimony in question still passes scrutiny under general acceptance, the expert typically must (1) still be qualified to testify; and (2) his testimony must be helpful to the trier of fact. Likewise, the evidence must not lead to unfair prejudice, confusion of the issues, misleading the jury, or wasting of time.

8. <u>The proponent bears the burden</u>: It is typically the proponent of the expert testimony or evidence that bears the burden of proving its admissibility. Practitioners should keep this in mind when retaining an expert, fending off a motion to exclude, and/or mounting a challenge to novel scientific evidence. Likewise, the court will not typically act *sua sponte* to exclude proffered expert testimony; consequently, practitioners should make every effort at the outset of a case to consider how and when to challenge proposed expert testimony.

V. CONCLUSION

It is fairly clear that modern courts still adhering to the *Frye* standard, in many instances, apply standards similar to those articulated in *Daubert* and its progeny when considering the admissibility of scientific evidence. With the distinction between the *Frye* and *Daubert* standards fading, practitioners faced with defending cases in states employing standards different from their own are likely to be well-suited to offer or challenge expert testimony by considering the basic criteria set forth under both standards.

Endnotes

[1] 509 U.S. 579 (1993).
[2] 93 F. 1013 (1923).
[3] *See* Alice B. Lustre, Annotation, *Post Daubert Standards for Admissibility of Scientific and Other Expert Evidence in State Courts,* 90 A.LR. 5th 453 (2001).
[4] A number of states have adopted their own standards that purport to fall under the guise of neither *Frye* nor *Daubert*. *See, e.g., Orkin Extermin. Co. v. McIntosh*, 452 S.E.2d 159 (Ga. Ct. App. 1994); *State v. Fakusaku*, 946 P.2d 32 (Haw. 1997); *The Dow Chemical Company v. Mahlumy*, 970 P.2d

98 (Nev. 1998), *overruled in part*, 21 P.3d 11 (Nev. 2001); *State v. Peters*, 534 N.W. 2d 867 (Wis. Ct. App. 1995). This article makes no attempt to address considerations associated with seeking to exclude or admit expert testimony in these jurisdictions.

[5] *See generally,* Mark E. Gebauer, *The "What" and the "How" of Challenges to Expert Testimony Under Rule 702*, For the Defense (July 2002).
[6] *Daubert v. Merrill Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993).
[7] *General Electric Co. v. Joiner*, 522 U.S. 136 (1997).
[8] *Kumho Tire Company, Ltd. v. Carmichael*, 526 U.S. 137 (1999).
[9] *Rudd v. General Motors Corporation*, 122 F. Supp. 2d 1330, 1337 (M.D. Ala. 2001).
[10] Fed. R. Evid. 702 (*advisory committee notes*).
[11] *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. at 592-593.
[12] *Daubert*, 509 U.S. at 593-594.
[13] *Daubert,* 509 U.S. at 593-594.
[14] *See, e.g., State v. Coon,* 974 P.2d 386 (Alaska 1999).
[15] *See, e.g., Farm Bureau Mart Ins. Co. of Arkansas, Inc. v. Foote,* 14 S.W.3d 512 (Ark. 2000)
[16] *See, e.g., People v. Shreck*, 22 P.3d 68 (Colo. 2001).
[17] *See, e.g., State v. Porter*, 698 A.2d 739 (Conn. 1997).
[18] *See, e.g., Nelson v. State,* 628 A.2d 69 (Del. 1993).
[19] *See, e.g., State v. Konechmy*, 134 Idaho 410 (Idaho Ct. App. 2000).
[20] *See, e.g., Harrison v. State*, 644 N.E.2d 1243 (Ind. 1995).
[21] *See, e.g., Hutchison v. American Family Mut. Ins. Co.* 514 N.W.2d 882 (Idaho 1994).
[22] *See, e.g., Mitchell v. Commonwealth*, 908 S.W.2d 100 (Ky. 1995).
[23] *See, e.g., State v. Foret*, 628 So. 2d 1116 (La.1993).
[24] *See, e.g., Green v. Crssia Aircraft Co.,* 673 A.2d 216 (Me. 1996).
[25] *See, e.g., Commonwealth v. Lanigan*, 641 N.E.2d 1342 (Mass. 1994).
[26] *See, e.g., State v. Moore*, 885 P.2d 457 (Mont. 1994).
[27] *See, e.g., Schafersman v. Agland Co-Op*, 631 N.W. 2d 862 (Nev. 2001).
[28] *See, e.g., State v. Hungerford*, 697 A.2d 916 (N.H. 1997).
[29] *See, e.g., State v. Albersco*, 861 P.2d 192 (N.M. 1993).
[30] *See, e.g., State v. Goode*, 461 S.E.2d 631 (N.C. 1995).
[31] *See, e.g., Miller v. Bike Athletic Company*, 687 N.E. 2d 735 (Ohio 1998).
[32] *See, e.g., Taylor v. State*, 889 P.2d 319 (Okla. Crim. App. 1995).
[33] *See, e.g., State v. Lyons,* 924 P.2d 802 (Or. 1996)
[34] *See, e.g., DiPetrillo v. Dow Chemical Company,*729 A.2d 677 (R.I. 1999).
[35] *See, e.g., State v. Council*, 515 S.E.2d 508 (S.C. 1999).
[36] *See, e.g., State v. Hofer*, 512 N.W.2d 482 (S.D. 1994).
[37] *See, e.g., Daniel v. CSX Trans., Inc.*, 955 S.W.2d 257 (Tenn. 1997).
[38] *See, e.g., E.I. duPont de Nemours & Co., Inc. v. Robinson*, 923 S.W.2d 549 (Tex. 1995).
[39] *See, e.g., State v. Crosby,* 927 P.2d 638 (Utah 1996).
[40] *See, e.g., State v. Brooks*, 643 A.2d 226 (Vt. 1993).
[41] *See, e.g., John v. IM,* 559 S.E.2d 694 (Va. 2002).
[42] *See, e.g., Wilt v. Buracker*, 443 S.E.2d 196 (W.V. 1993).
[43] *See, e.g., Bunting v. Jamieson,* 984 P.2d 467 (Wy. 1999).
[44] *See, e.g., E.I. duPont de Nemours & Co., Inc. v. Robinson*, 923 S.W.2d 549, 557 (Tex. 1995).
[45] *See, e.g., Porter*, 698 A.2d at 753.
[46] Fed.R.Evid. 702; *See also Rudd v. General Motors Corporation*, 127 F.Supp. 2d 1330 (M.D. Ala. 2001); *In re Paoli Railroad Yard PCB litigation*, 35 F.3d 717, 745 (3rd Cir. 1994)(stating that, "any step that renders the analysis unreliable... renders the expert's testimony inadmissible.").
[47] Fed.R.Evid. 702 (advisory committee notes).
[48] *Porter*, 698 A.2d at 756.
[49] *Porter*, 698 A.2d at 756.
[50] *Taylor,* 889 P.2d at 334; *See also Christophersen v. Allied-Signal Corp.*, 939 F.2d 1106, 1119 (5th Cir. 1991); *In re Agent Orange Product liability litigation*, 611 F.Supp. 1223, 1256 (E.D. NY 1985)).
[51] Because the analytical distinctions between *Frye* and *Daubert* are becoming less clear, practitioners in *Daubert* jurisdictions should also consider the factors set forth in the *Frye* portion of this article.
[52] Fed.R.Evid. 104.
[53] *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137, 152 (1999).
[54] *See, e.g., Gilkey v. Schweiltzer*, 983 P.2d 869 (Mont. 1999); *Torres v. State*, 962 P.2d 3 (Okla. Crim. App. 1998); *Turner v. State*, 746 So. 2d 355 (Ala. 1998).
[55] Fed.R.Civ.P. 37(c).
[56] Fed.R.Civ.P. 37(c).
[57] *See, e.g., Trilogy Comm., Inc. v. Times Fiber Comm., Inc.*, 109 F.3d 739, 744 (Fed.Cir. 1997).
[58] *See, e.g., General Electric, Co. v. Joiner*, 522 U.S. 136 (1997).
[59] *See, e.g., Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).
[60] Deidre Russell and Steven F. Schoeder, *Kumho Broadens Gatekeeper's Criteria to Evaluate Experts,* Judges' and Lawyers' Business Evaluation Update, Vol. 1, issue 6 (June 1999).
[61] *Id.*
[62] *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1977).
[63] *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137, 151 (1999).
[64] *State v. Ito*, 978 P.2d 191, 201 (Haw. 1999).
[65] *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 151 (1999).
[66] *Frye*, 293 F. at 1014.
[67] *See, e.g., People v. Kelley*, 549 AP2d 1240 (Cal. 1976); *Goeb v. Tharaldson*, 615 N.W.2d 800 (Minn. 2000); *Harris v. Cropmate Co.*, 706 N.E.2d 55 (Ill. Ct. App. 1999).
[68] *See, e.g., Energy Homes, Inc. v. Washington*, 774 So. 2d 505 (Ala. 2000).
[69] *See, e.g., State v. Tankersley*, 956 P.2d 486 (Ariz. 1998).
[70] *See, e.g., People v. Leahy*, 882 P.2d 321 (Cal. 1994).
[71] *See, e.g., Bahura v. S.E.W. Investors*, 754 A.2d 928 (D.C. 2000).
[72] *See, e.g., Hadden v. State*, 690 So. 2d 573 (Fla. 1997).
[73] *See, e.g., People v. Miller,* 670 N.E.2d 721 (Ill. 1996).
[74] *See, e.g., State v. Warden,* 891 P.2d 1074 (Kan. 1995).
[75] *See, e.g., Reed v. State,* 391 A.2d 364 (Md. 1978).
[76] *See, e.g., People v. Davis,* 72 N.W.2d 269 (Mich. 1955).
[77] *See, e.g., Goeb v. Tharaldson,* 615 N.W.2d 800 (Minn. 2000).
[78] *See, e.g., Gleeton v. State,* 716 So. 2d 1083 (Miss. 1998).
[79] *See, e.g., Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852 (Mo. 1993).
[80] *See, e.g., State v. Harvey,* 699 A.2d 596 (N.J. 1996).
[81] *See, e.g., City of Fargo v. McLaughlin*, 512 N.W.2d 700 (N.D. 1994).
[82] *See, e.g., People v. Wesley,* 633 N.E.2d 451 (N.Y. 1994).
[83] *See, e.g., Commonwealth v. Blasioli*, 713 A.2d 1117 (Pa. 1998).
[84] *See, e.g., State v. Copeland,* 922 P.2d 1304 (Wash. 1996).
[85] *See, e.g.,* David E. Bernstein, *Frye, Frye Again: The Past, Present, and Future of the General Acceptance Test,* 41 Jurimetrics J. 385 (Spring 2001); E. Kelley Bittick, et al., *Challenging The Reliability of Expert Testimony,* 75 Fla. B.J. 48 (July/August 2001); Penelope Harley, *Minnesota Decides: Goeb v. Tharaldson and the Admissibility of Novel Scientific Evidence,* 24 Hamline L. Rev. 460 (2001)
[86] *See, e.g., McKenzie v. Westinghouse Elec. Corp.,* 674 A.2d 1167, 1172 (Pa. Comm. Ct. 1996).
[87] *See, e.g., Goeb v. Tharaldson*, 615 N.W. 2d 800, 814 (Minn. 2000); *Berry v. CSX Trans., Inc.*, 709 So. 2d 552, 567 (Fla. Dist. Ct. App. 1998).
[88] *See, e.g., Ramirez v. State,* 651 So. 2d 1164, 1168 (Fla. 1995).
[89] *See, e.g., Berry v. CSX Trans., Inc.*, 709 So. 2d 552, 567 (Fla. Dist. Ct. App. 1998).
[90] *See, e.g., Hadden v. State,* 690 So. 2d 573, 578 (Fla. 1997); *Goeb v. Tharaldson*, 615 N.W. 2d 800, 814 (Minn. 2000); *Harris v. Cropmate Co.,* 706 N.E.2d 55, 59-65 (Ill. Ct. App. 1999).
[91] *See, e.g., People v. Leahy*, 882 P.2d 321, 329 (Cal. 1994); *Brimm v. State*, 695 So. 2d 268, 272 (Fla. 1997).
[92] *See, e.g., Brimm v. State,* 695 So. 2d 268, 272 (Fla. 1997).
[93] *See, e.g., Selig v. Pfizer, Inc.,* 713 N.Y.S. 2d 898, 902 (N.Y. Sup. Ct. 2000).
[94] *See, e.g., State v. Meador,* 674 So. 2d 826, 834 (Fla. Dist. Ct. App. 1996); *Owens Corning v. Bauman*, 726 A.2d 745, 767 (Md. Ct. App. 1999).
[95] *See, e.g., Thomas v. West Bend Co.*, 760 A.2d 1174, 1179 (Pa. Super. Ct. 2000); *Selig v. Pfizer, Inc.*, 713 N.Y.S. 2d 898, 902 (N.Y. Sup. Ct. 2000).
[96] *See, e.g., Harris v. Cropmate Co.,* 706 N.E.2d 55, 60-62 (Ill. Ct. App. 1999); *Long v. Missouri Delta Med. Ctr.*, 33 S.W.3d 629, 642-43 (Mo. Ct. App. 2000).
[97] *See, e.g., Logerquist v. McVey*, 1 P. 3d 113, 123 (Ariz. 2000); *Kuhn v. Sandoz Pharm. Corp.*, 14 P. 3d 1170, 1179-80 (Kan. 2000); *Florida Power & Light Co. v. Tursi*, 725 So. 2d 995, 997 (Fla. Dist. Ct. App. 1999).

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