DAUBERT BOOK CHAPTER

1. A Short History of Expert Testimony in Federal Courts

For seventy years the case of *Frye v. United States*[i] controlled the admissibility of expert scientific evidence in federal courts. Courts applying *Frye* typically limited its application to so-called "black box" testimony, i.e. machines, devices, or techniques that authoritatively and automatically decide outcome-determinative "truths,"[ii] since such testimony has the aura of infallibility and thus the potential to overawe the jury.[iii]

The *Frye* court affirmed the trial court's refusal to allow a scientist's testimony about a criminal defendant's test results from a predecessor of a polygraph machine stating that before admitting expert scientific testimony "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." For the most part, U.S. courts only applied the *Frye* test in criminal cases.[iv] And *Frye* did not stand as a roadblock to the admissibility of scientific expert testimony, being cited less than one hundred times in federal and state cases until 1975.[v] But as the litigation use of diverse kinds of expert testimony dramatically increased, business and industry groups clamored for additional screening of expert scientific testimony.

In the 1993 case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.,*[vi] the United States Supreme Court considered whether *Frye* survived the 1975 adoption of Federal Rule of Evidence 702. The rule, since changed, provided:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

The court held Rule 702 superceded *Frye's* "rigid" requirement that testimony based on a scientific methodology or technique was admissible only if it had achieved "general acceptance" in the relevant field. The *Daubert* decision recognized Rule 702's "liberal thrust" and its "general approach of relaxing the traditional barriers to opinion testimony." The decision directs trial courts to assess whether proffered testimony or evidence admitted at trial is not only relevant but reliable.[vii]

According to *Daubert*, trial courts should make a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue."[viii] The court referenced five factors that should guide the trial court's decision. It emphasized none of the factors was indispensable and the overall inquiry is a flexible one. The "nondefinitive checklist" directs trial courts to evaluate:

> (1) whether the expert's technique or theory can be or has been tested - that is, whether the expert's theory can be challenged in some objective sense, or

whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability;

(2) whether the technique or theory has been subject to peer review and publication;

(3) the known or potential rate of error of the technique or theory when applied;

(4) the existence and maintenance of standards and controls; and

(5) whether the technique or theory has been generally accepted in the scientific community.

Over the next seven years, the U. S. Supreme Court addressed the admissibility of expert testimony three more times. In *General Electric Co. v. Joiner*[ix] the court held that appellate courts must apply the highly deferential "abuse of discretion" standard to trial court rulings admitting or excluding scientific evidence. The *Joiner* court also allows federal trial courts to examine the relationship between an expert's methodologies and conclusions, stating that they "are not entirely distinct from one another." The court concluded that a trial court must not "admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert."[x]

The supreme court concluded in *Kumho Tire Co. v. Carmichael*[xi] that Rule 702 mandates all types of expert evidence are subject to the "gatekeeping" requirements of *Daubert. Kumho* contains language helpful to plaintiffs in that it reemphasized the five *Daubert* factors could not always be used to evaluate the reliability and admissibility of all types of expertise. Trial courts should have broad discretion to devise alternative tests for "determining whether particular expert testimony is reliable."[xii] It is not necessary that all, or even one, of the *Daubert* factors be satisfied for the testimony to be admissible. Expert testimony from historically reliable disciplines which conforms to the standards associated with those disciplines shall be freely admitted. Conclusions consistent with commonly used methodologies will be admissible when drawn "from a set of observations based on extensive and specialized experience."[xiii] And most significantly, trial courts may use discretion "to avoid unnecessary 'reliability' proceedings in ordinary cases when the reliability of the expert's methods is properly taken for granted."[xiv] The court emphasized that the best gauge for assessing whether expert testimony is reliable is whether the expert employs in the courtroom the "same level of intellectual rigor that characterizes the practice of an expert in the relevant field."[xv]

In *Weisgram v. Marley Co.,*[xvi] the court ruled that an appellate court reversing a trial court's decision to admit an expert's testimony need not remand the case to allow that party a second chance to cure what the appellate court regarded as unreliable evidence. Thus, the party affected by the exclusion of the evidence may not be permitted to reexamine the disqualified expert so as to provide a satisfactory explanation of his methodologies' reasonings and conclusions. Further, the party harmed by the appellate decision to exclude testimony may not be permitted to find other experts who can validate or cure the excluded expert's work.

Rule 702 was amended in 2000 in response to *Daubert* and *Kumho.*[xvii] Rule 702 now provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, *if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.*

The italicized language "affirms the trial court's role as gatekeeper and provides some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony."[xviii] The committee notes on amended Rule 702 make plain that the rejection of expert testimony is the exception rather than the rule. *Daubert* did not work a "seachange over federal evidence law," and "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system."[xix]

2. *Daubert* as Applied in Louisiana State Courts

The Louisiana Supreme Court adopted the principles set forth in *Daubert* in *State v. Foret.*[xx] In applying these principles, the trial court is vested with vast discretion.[xxi]

Whether a person meets the qualifications of an expert witness and is competent to testify in a specialized area is within the discretion of the trial court.[xxii] A district court's decision to qualify an expert will not be overturned absent an abuse of discretion.[xxiii] Louisiana Code of Evidence Article 104 allows the court to conduct a preliminary hearing to determine whether the qualifications and/or opinions of an expert are reliable enough to allow them to be heard by the jury.

Foret establishes that Article 702, which is based upon former federal Rule 702, controls the admissibility of expert scientific evidence in Louisiana. For the testimony of an expert to be admissible, the court must first determine whether the expert's reasoning or methodology embodies "the knowledge and experience of his discipline." In making this reliability determination, the applicability of the five "*Daubert"* factors may be considered by the court.[xxiv] The *Daubert* factors are flexible and do not represent a definitive checklist. Some or none of the factors may be readily applied in a particular case.[xxv]

Note that the court must proceed under Article 702 (identical to former federal Rule 702) as opposed to present federal Rule 702. Despite an attempt in the 2001 Regular Session, the Louisiana Legislature has refused to follow the new federal Rule 702 approach.[xxvi]

While former federal Rule 702 and current state Article 702 focus on the methodology of the expert, amended federal Rule 702 allows further gatekeeper inquiry into the expert's conclusions as well by testing whether the expert had sufficient facts (step 1 - "the testimony is based upon sufficient facts or data") and whether the expert reliably applied the methodology to

those facts (step 3 - "the witness has applied the principles and methods reliably to the facts of the case.") *Daubert*, 509 U.S. at 595, clearly limited the relevant inquiry to methodology only - "the focus, of course, must be solely on principles and methodology, not on the conclusions they generate." The Louisiana Supreme Court has endorsed this focus on methodology only.[xxvii]

Louisiana appellate courts have repeatedly emphasized that the sole focus is the expert's methodology, not the expert's conclusions. Two cases from the Fourth Circuit clearly articulate the narrower Louisiana rule.

> Recently, this Court decided[xxviii] that *Daubert* comes into play only when the methodology used by the expert is being questioned. This court found it improper to use Daubert analysis when questioning the conclusions reached by applying the methodology to the facts.[xxix]

The Fifth Circuit agreed in *Keener v. Mid-Continent Casualty*:[xxx]

> We find that the trial court did not err in admitting [the doctor's] testimony. The requirements of *Daubert* and *Foret* were satisfied. The focus of the gatekeeper under C.E. art. 702 "must be solely on principles and methodology, not on the conclusions that they generate." *Daubert*, 509 U.S. 579, 595.

The First Circuit supports this view.

> The *Daubert/Foret* guidelines require "only that the proponent of the evidence show that the expert's conclusion has been arrived at in a scientifically sound and methodologically reliable fashion."[xxxi]

Thus, in Louisiana, as long as the expert's methodology is acceptable, cross-examination at trial is the means by which the facts and application are tested whereas federal courts now test facts and application at the gatekeeper hearing before allowing the expert to testify at all. While one can argue whether the new federal approach is helpful or impermissibly invades the province of the trier of fact, it is inarguable that the new federal approach goes beyond Louisiana Article 702. Focusing on methodology only, the experts qualified in Louisiana should only be excluded if they violate fundamental principles of their disciplines' methodologies. Of course, the testimony must "fit" the facts of the case by assisting the trier of fact to understand the fact in issue.[xxxii]

3. Protecting Your Expert's Opinion

Retaining the Expert

Anticipate and evaluate *Daubert* issues from the first time a case is screened for acceptance. You must use care in choosing the right experts and inoculating them to a *Daubert* attack.

When considering an expert for retention in a case, no matter what the referral source,

you should conduct a Westlaw or similar legal database search on all reasonable iterations of the expert's name. This provides some insight into the expert's familiarity with the legal system; it may also reveal the expert's involvement with a *Daubert* motion or hearing. While an expert's ability to present testimony in an effective fashion and her credentials are obviously important factors to consider, those abilities are not enough to justify selection. An expert must be able to explain, support, and defend her methods and conclusions at deposition, hearing, and trial and work with you on how to accomplish that.

You must ask the expert about her prior experience with *Daubert* issues. If multiple courts have rejected the expert's previous testimony, that does not mean she should never again be hired. It does mean you can expect defendants to attack the expert's opinion in the present case, so be prepared to explain why this case testimony is distinguishable from those past cases.

Educating the Expert

After retention of the expert, you should lay the groundwork to protect the expert's opinions to be expressed in the case. This is true for all experts except those using a standardized methodology routinely accepted by the courts; for example, an economics professor calculating wage loss. Some commentators suggest sending an expert package including disclosure rules, evidence rules, the *Daubert/Kumho* decisions, other cases involving experts in the witness's field, examples of a good expert report in other cases, and the like. However, some courts may view such an expert package as an attempt to control the expert's opinion, precisely the opposite impression you want to make. The best practice may be for you to timely inform the expert in writing of disclosure requirements, deadlines, report and deposition requirements, and take the time to educate her by explaining *Daubert* considerations in the jurisdiction where suit will be tried.

Scheduling Orders and Expert Disclosures

Pre-trial scheduling orders[xxxiii] or case management orders[xxxiv] ought to give special consideration to *Daubert* issues. In fact, the federal rules specifically authorize the trial court in setting schedules for pre-trial proceedings to consider "limitations or restrictions on the use of testimony under Rule 702."[xxxv] You should request the court require in the scheduling order that any evidentiary material on which a movant intends to rely in support of any *Daubert* motion be served with the motion and not held for reply. Also, ask the court to require that a movant designate by specific citation of the source each portion of any expert testimony which a movant means to challenge, listing all factual and legal grounds on which the challenge rests.[xxxvi] If the case warrants, ask the court to schedule *Daubert* motions before the discovery cut-off, so if a deficiency can be cured there is enough time to do it.

Federal courts typically require a plaintiff to disclose experts and provide their reports a month or so before defendant, a pre-*Daubert* custom presumably based on the plaintiff bearing the burden of proof at trial. Although often requiring the plaintiff to disclose the identity of experts earlier than defendant, state courts frequently allow a contemporaneous exchange of expert reports. In this regard state court practice discourages defendant experts from cheating off plaintiff experts' work or writing a report that simply reacts to plaintiff experts' opinions and requires defendant experts to form their own opinions based on the facts of the case.

Independently derived expert opinions allow the court to more properly perform its mandated gatekeeping function pursuant to *Daubert.* Thus, you should always seek contemporaneous exchange of expert reports in the scheduling order whenever possible. In state court, expert disclosures contained in a report shall be made at the times and in the sequence directed by the court.[xxxvii]

Reports

Pursuant to Rule 26 of the Federal Rules of Civil Procedure, expert witnesses in federal court must provide a written report as part of discovery. Such a report is due in state court only if the court orders it upon contradictory motion of any party or on the court's motion.[xxxviii] Regardless of the forum in which it is produced, the expert should take extreme care in writing his expert report.

The written report should be detailed and discuss the expert's understanding of the facts, methods, and conclusions necessary to explain his opinion. You should spend the money required for the expert's best effort in preparing the report. Citations of authoritative sources, peer-review publications, and standard texts which support and explain methodologies and conclusions consistent with those of the expert should be referenced in the report. If the expert is applying a specific technique or methodology to his analysis it should be mentioned. It is particularly helpful for the expert to explain how the methodology he employs in his analysis applies to the facts of the case to reach his conclusion.

In federal court, expert reports must be accompanied by the expert's qualifications or a current resumé, a list of all publications authored by the witness in the last ten years, a testimony log for deposition or trial from the last four years, any exhibits to be used as a summary of or support for the opinions, and the compensation to be paid for the study and testimony.[xxxix] The same is true in state court, if agreed to by the parties, or if ordered by the court.[xl]

The report must contain the data or other information considered by the witness in forming the opinions, a complete statement of all opinions to be expressed and the basis and reasons for the opinions, and the witness must sign it.[xli]

In state court, a report "shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor and the data or other information considered by the witness in forming the opinions."[xlii] The expert's drafts of a report that would reveal the mental impressions, opinions, or trial strategy of the attorney for the party who has retained the expert to testify, shall not be discoverable except on a showing of exceptional circumstances.[xliii] But opposing counsel may inquire fully into the facts or data underlying the expert's opinion.[xliv]

Depositions

If care has been taken in preparing the expert's report, defending the deposition will be much easier. Assuming the expert possesses proper qualifications for his opinion and his testimony applies to the case facts, defense of the deposition should be built around the expert report. This is the payoff for the hard work done to produce it.

You should encourage the expert to refer to his report at his deposition. If defense counsel rephrases, partially cites, or takes a portion of the expert's report out of context, the opportunity for inconsistency and misunderstanding increases. Accordingly, to the extent defense counsel's questions are answered in the report, the expert witness should say so and refer to that portion of his report which is responsive.

If the plaintiff's expert witness has not fully explained his sources, methodologies, techniques, analyses, or conclusions in his report, you should request he do so at his deposition during your direct examination. Otherwise, supplementation of the opinion by affidavit or live testimony may be necessary if a *Daubert* hearing is held. At a minimum, you should make sure the report, deposition or both contain a statement of the expert's methodology and his application of that methodology to the facts of the case. This will provide the foundation for protecting the opinion if a court reviews it for evidentiary sufficiency.

4. *Daubert* and Motion Practice

Triggering a Hearing

A *Daubert/Foret* challenge is a given in complex litigation and is becoming all too common in even simple cases. Many defendants choose to abuse *Daubert* in motion practice because even if the challenge is unsuccessful, it will be time-consuming and costly.

The trial judge decides whether to admit or exclude expert testimony.[xlv] But there is little guidance as to when an evidentiary hearing is required or what procedures a court should employ in deciding whether to admit expert testimony. *Kumho* states "[t]he trial court must have the same kind of latitude in deciding how to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides whether or not that expert's relevant testimony is reliable."[xlvi] And *Kumho* advises that the trial judge has discretion to avoid "unnecessary 'reliability' proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted."[xlvii] But the threshold showing required for a *Daubert* hearing is unclear and varies depending upon the court and jurisdiction.

It is plain that trial courts are more likely to conduct a *Daubert* hearing on "less usual or complex cases,"[xlviii] once the opposition has called the expert's proffered testimony "sufficiently into question."[xlix] In civil cases, a court might refuse "to undertake any reliability-relevancy determination until the movant has made a prima facie showing of specific deficiencies in the opponent's proposed testimony.[l] The Fifth Circuit has concluded that the issue was raised "by providing conflicting medical literature and expert testimony."[li] Other federal circuit courts of appeal have specifically found that district courts are not required to hold a pretrial evidentiary reliability hearing in carrying out their trial court gatekeeping function.[lii]

Louisiana appellate courts will support a trial court's denial of a motion in limine to conduct a *Daubert* hearing as being within the trial court's discretion.[liii] But the Louisiana Supreme Court has granted writs to overturn the trial court's refusal to conduct an evidentiary hearing to determine whether proposed expert testimony is scientifically reliable.[liv] And an

appellate court has held that the trial court was required to hold a *Daubert* hearing to determine the admissibility of an expert opinion.[lv]

In federal court, threshold factors for the hearing could presumably include defects in the expert testimony's (1) factual basis; (2) data; (3) principles; (4) methods; or (5) their application, although Louisiana state courts may properly limit an attack to methods only. Whatever the approach there appears to be a two step trial court inquiry that first requires an initial showing of unreliability and then an ultimate determination of reliability involving application of *Daubert* factors or any factors the trial court deems appropriate.[lvi]

There is no specific rule as to when a *Daubert* hearing should occur. In federal court, a *Daubert* hearing is typically filed as a motion to strike; in state court, such a hearing is usually triggered by a rule to show cause as to why a motion in limine should not be granted. In whichever court you are filing, your motion should 1) clearly identify the specific portions of the testimony to which objections pertain; (2) state the grounds for objection in detail with supporting analysis; and (3) attach evidentiary material relied upon in support of the motion.

An objection to the admissibility of evidence is not preserved for appellate review unless a contemporaneous objection to the evidence is made on the record at the trial or hearing.[lvii] When the objecting party fails to request a *Daubert* hearing, objections to the admissibility of an expert witness's testimony under *Daubert* are not preserved for appeal.[lviii]

At The Hearing

If a *Daubert* hearing takes place, the court "is not bound by the rules of evidence except those with respect to privileges."[lix] In other words, expert testimony may be challenged by inadmissible evidence. "When expert testimony is challenged under *Daubert*, the burden of proof rests with the party seeking to present the testimony."[lx] The proponent of expert testimony "need not prove to the judge that the expert's testimony is correct, but she must prove by a preponderance of the evidence that the testimony is reliable."[lxi] For the trial court to overreach in the gatekeeping function and determine whether the opinion evidence is correct or worthy of credence is to usurp the jury's right to decide the facts of the case. All the trial judge is asked to decide in a *Daubert* hearing is whether the proffered evidence is based on "good grounds" tied to a sufficient methodology.[lxii] A trial court "must take care not to transform a *Daubert* hearing into a trial on the merits."[lxiii]

When you are faced with a *Daubert* hearing your challenged expert should get involved right away - she is the best source for defending her methodology. If the case warrants, your challenged expert can suggest another expert - perhaps a colleague or co-author - to provide a supporting affidavit after review of your challenged expert's report or deposition for methodology and reasoning. You should typically resist a moving party's request for a live hearing since it 1) provides another cross-examination opportunity of plaintiff's expert; 2) increases your burden and expense; and 3) consumes court resources listening to defense lawyers manufacture attacks on plaintiff's expert which could otherwise be used to try the case. If the court allows a live hearing, make sure your opponent identifies which experts will be called to challenge your expert's methodology. And ask to go first since you have the burden of proof. Whether the hearing is live or on paper, you should prepare an exhibit list which involves

authoritative texts, peer review articles, learned books, and similar material so as to provide the court with independent methodological support for your expert's opinion.

A paper-only hearing is usually advisable when the *Daubert* hearing involves complex scientific matters. Remember the court is not supposed to decide the merits of the matter, only that the expert's methodology and its relevance to the case is acceptable. Courts usually benefit from being able to review specialized scientific material in written form at their leisure since credibility of the witness is not at issue.

Offensive Use of Daubert

Getting the defense expert to validate plaintiff expert's methodology, or exposing flaws in the defense expert's analysis, is attainable and worth the effort. For example, if the defense doctor refuses to analyze the medical causation issue through the legally correct "more likely than not" burden of proof, reverse his overly rigorous scientific requirements against him. The defense doctor may state the cause of your client's condition is most consistent with some predisposing genetic or unknowable factor - its anything but the actions of the defendant. Have the defense doctor explain his analysis. Then make the defense doctor critique plaintiff doctor's causation theory in great detail, which may include his imposition of additional methodologies he considers necessary to comprise "good science". Then have the defense doctor apply that same analysis to his alternative causation theory. Almost always, the defense doctor's alternative causation theory will be unable to meet his unnecessarily stringent requirements for proof imposed on plaintiff doctor's opinion.

Another way to illustrate the same point is to have a defendant scientific expert explain his theory on a material issue and how he arrived at it. Then ask him to assume his opinion is wrong. Ask what process would the expert go through to analyze and assess the opinion to find the error? Usually the expert will not respond the same way to this question as to the initial explanation of how he arrived at his theory.

The court can readily infer the defense expert is not applying the same intellectual rigor to his alternative causation theory (or other theory) as he claims is required by "good science"; or, he is not as analytically critical of his own opinion as he is of plaintiff's expert. And if the defense expert is unable to meet his methodological requirements for alleged "good science" you may choose to exclude his alternative theory pursuant to a *Daubert* motion.

The decision to use *Daubert* offensively will depend, in large part, upon whether the defendant abuses *Daubert* in its motion practice and files ill-founded motions. This is not to suggest you file a *Daubert* motion to exclude a defense expert in retaliation for the defense provoking a *Daubert* hearing. But you may choose to file a *Daubert* motion seeking to exclude a defense expert to point out to the court flaws in the defense expert's methodology, or for additional reasons consistent with amended Rule 702 if you are in federal court. Also, assuming it's the case, filing a *Daubert* motion provides the opportunity for you to contrast the defense expert's flawed reasoning with the superior analysis of plaintiff's expert, thereby protecting the plaintiff expert's opinion.

Summary Judgment and Expert Testimony

Defendants frequently couple a Daubert motion with a motion for summary judgment, setting up colliding standards of review. Under both federal and state summary judgment standards, the district court has almost no discretion - if the nonmoving party produces admissible evidence that would sustain a jury verdict in its favor on the matter in dispute, the motion must be denied. And federal and state appellate courts review summary judgments *de novo*. *Daubert* challenges, unlike summary judgment proceedings, are not decided with all of the material disputed facts resolved in favor of the nonmoving party. And the court's evidentiary ruling in a *Daubert* motion is reviewable only for an abuse of discretion.[lxiv]

Pipitone v. Biomatrix[lxv] illustrates the Fifth Circuit's analysis in reversing the district court for applying an overly stringent standard of reliability to expert testimony in a summary judgment proceeding.[lxvi] The appellate decision rejected the rigid checklist approach of the district court in applying all the *Daubert* factors to a medical causation opinion. The Fifth Circuit cited *Kumho* in explaining why an expert may be unable to support his opinion with published peer review - "[i]t might not be surprising in a particular case, for example, that a claim made by a scientific witness has never been the subject of peer review, for the particular application at issue may never previously have interested any scientist."[lxvii]

After analyzing the expert's opinion through *Daubert's* "testing" and "peer review" factors, the court noted that the "error rate" factor "is not particularly relevant, where . . . the expert derives his testimony mainly from firsthand observations and professional experience in translating these observations into medical diagnoses." The court observed "this circuit has upheld the admission of expert testimony where it was based on the expert's specialized knowledge, training, experience, and first-hand observation while supported by solid evidence in the scientific community."[lxviii] As to the *Daubert* factor of "general acceptance," the court noted "[the expert] based his opinion on how [plaintiff] contracted [the disease] in large part on accepted medical knowledge of the ways in which [the disease] functions as an organism and how it infects humans." The district court abused its discretion in excluding the plaintiff expert's testimony and its grant of summary judgment was reversed.

In *Independent Fire Insurance Company v. Sunbeam Corporation*,[lxix] the Louisiana Supreme Court clarified the role of expert testimony in supporting and opposing a motion for summary judgment. In *Sunbeam*, the supreme court resolved a conflict among the circuits by deciding that expert opinion testimony, whether by affidavit or deposition, may be considered in support of or in opposition to a motion for summary judgment. Assuming the testimony would be admissible at trial, it must be considered at the summary judgment stage. The court stated that at the summary judgment stage, the admissibility of an expert opinion affidavit is "subject to challenge . . . by way of a *Daubert* hearing, a motion to strike, or counter affidavits."[lxx]

The Court emphasized four principles in its decision. The first is that the trial judge cannot make credibility determinations on a motion for summary judgment. Second, the court must not attempt to evaluate the persuasiveness of competing scientific studies. In performing its gatekeeping analysis at the summary judgment stage, the court must "focus solely on the principles and methodology, not on the conclusions they generate."[lxxi] Third, the court "must draw those inferences from the undisputed facts which are most favorable to the party opposing the motion."[lxxii] Fourth, and most importantly, summary judgments deprive the litigants of the

opportunity to present their evidence to a jury and should be granted only when the evidence presented at the motion for summary judgment establishes that there is no genuine issue of material fact in dispute. If a party submits expert opinion evidence in opposition to a motion for summary judgment that would be admissible under *Daubert* and the other applicable evidentiary rules, and is sufficient to allow a reasonable juror to conclude that the expert's opinion on a material fact more likely than not is true, the trial judge should deny the motion and let the issue be decided at trial.

5. Additional Sources

Reference Manual on Scientific Evidence, Second Edition (2000)

The reference manual may be purchased through Thompson-West. An electronic version can be found at the Federal Judicial Center's site on the World Wide Web. Go to http://www.fjc.gov/public/home.nsf/pages/16

A helpful source for understanding scientific concepts, this manual sits near the desk of every federal judge. According to the preface, the manual - published by The Federal Judicial Center to educate the judicial branch - "furthers the goal of assisting federal judges in recognizing the characteristics and reasoning of 'science' as it is relevant in litigation."

Daubert On the Web, www.daubertontheweb.com.

This website has been exclusively devoted to *Daubert* issues for many years. The focus is on federal decisions but the site is valuable to anyone having a *Daubert* issue. The site has its own blog - Blog 702 - and you can even buy a t-shirt.

i 293 F.1013, 1014 (D.C. Cir. 1923).

ii Prof. Michael H. Graham, *Scientific and Technological Evidence,* in Handbook Of Federal Evidence15 (4th ed., 1999 Pocket Part); Paul S. Milich, *Controversial Science in the Courtroom: Daubert and the Law's Hubris*, 43 Emory L.J. 913, 915 (1994).

iii Prof. Michael H. Graham, *The Expert Witness Predicament,* 54 U. Miami L.Rev. 317 (2000).

iv *Developments In The Law,* 108 Harv.L.Rev. 1423, 1529 n. 160 (1995).

v Prof. Michael J. Saks, Merlin and Solomon: *Lessons From The Law's Formative Encounters With Forensic Identification Evidence*, 49 Hastings L.J. 1069, 1076 (1998).

vi *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593-595, 113 S.Ct. 2786, 125 L.Ed.2d 469.

vii *Daubert,* 509 U.S. 579, 593-595.

viii *Daubert,* 509 U.S. 579, 592.

ix *General Electric Co. v. Joiner,* 522 U.S. 136, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997).

x *General Electric,* 118 S.Ct. 512, 517-519.

xi *Kumho Tire Company v. Carmichael,* 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999).

xii *Kumho,* 119 S.Ct. 1167, 1175-1176.

xiii *Kumho,* 119 S. Ct. 1167, 1178.

xiv *Kumho,* 119 S.Ct. 1167, 1176.

xv *Kumho,* 119 S.Ct. 1167, 1176.

xvi *Weisgram v. Marley Co.*, 528 U.S. 440, 120 S.Ct. 1011, 145 L.Ed.2d 958 (2000).

xvii Advisory Committee Notes, Fed. R. Evid., Rule 702, as amended.

xviii Advisory Committee Notes, Fed .R. Evid., Rule 702, as amended.

xix *United States v. 14.38 Acres of Land Situated in Leflore County, Mississippi,* 80 F.3d 1074, 1078 (5th Cir. 1996).

xx 628 So.2d 1116 (La. 1993).

xxi *Mistich v. Volkswagen of Germany, Inc.*, 666 So.2d 1073, 95 0939 (La. 1/29/96), and *Cheairs v. State,* 861 So.2d 536, 2003-0680 (La. 12/3/03).

xxii *Merlin v. Fuselier*, 789 So.2d 710, 718, 00-1862 (La.App. 5 Cir. 5/30/01), and *Cheairs v. State,* 861 So.2d 536, 2003-0680 (La. 12/3/03).

xxiii *Merlin v. Fuselier*, 789 So.2d 710, 718, 00-1862 (La.App. 5 Cir. 5/30/01), and *Cheairs v. State,* 861 So.2d 536, 2003-0680 (La. 12/3/03).

xxiv The five *Daubert* factors are listed in the section, "A Short History of Expert Testimony in Federal Courts."

xxv *Kumho,* 119 S. Ct. 1167, 1171, and *Independent Fire Insurance Company v. Sunbeam Corporation,* 755 So.2d 226, 234, 1999-2181 (La. 2/29/00).

xxvi Sen. Dardenne (R- EBR Parish) filed Senate Bill 446, it was referred to the Judiciary A Committee, but it never passed even that initial stage.

xxvii *Independent Fire Insurance Company v. Sunbeam Corporation,* 755 So.2d 226, 236, 1999-2181 (La. 2/29/00); and *Blank v. Sid Richardson Carbon & Gasoline Co.*, 762 So.2d. 1115, 2000-1025 (La. 6/2/00).

xxviii *Dinett v. Lakeside Hospital*, 811 So.2d 116, 2000-2682 (La.App. 4 Cir. 2/20/02).

xxix *Doe v. Archdiocese of New Orleans*, 823 So.2d 360, 2001-0739 (La.App. 4 Cir. 5/8/02).

xxx 817 So.2d 347, 355, 01-CA-1357 (La. 5 Cir. 4/20/02); *writ denied*, 825 So.2d 1175, 2002-1498 (La. 9/20/02).

xxxi *Wingfield v. La. DOTD*, 835 So.2d 785 (La.App. 1st Cir. 11/08/02), *writ denied*, 845

So.2d. 1059 (5/30/03), *cert. denied*, 124 S.Ct. 419 (10/14/03).

xxxii *Cheairs v. State*, 861 So.2d 536, 2003-0680 (La. 12/3/03).

xxxiii Fed. R. Civ. P.16(b).

xxxiv La. C. Civ. P. Art. 1551.

xxxv Fed. R. Civ. P. 16(c)(4).

xxxvi Fed. R. Evid. 103 and La. C. Evid. Art. 103.

xxxvii La. C. Civ.P. Art 1425 C.

xxxviii La.C. Civ. P. Art. 1425 B.

xxxix Fed. R. Civ. P. 26(a)(2)(B).

xl La. C. Civ. P. Art. 1425 B.

xli Fed. R. Civ. P. 26(a)(2)(B).

xlii La. C. Civ. P. Art. 1425 B.

xliii La. C. Civ. P. Art. 1425 E(1).

xliv La. C. Civ. P. Art. 1425 E(2).

xlv Fed. R. Evid.104(a) and La.C. Evid. Art 104(a).

xlvi *Kumho*, 119 S.Ct. 1167, 1176.

xlvii *Kumho*, 119 S.Ct. 1167, 1176.

xlviii *Kumho*, 119 S.Ct. 1167, 1176.

xlix *Kumho*, 119 S.Ct. 1167, 1174.

l Margaret Berger, *Supreme Court's Trilogy on Admissibility of Expert Testimony, Reference Manual on Scientific Evidence* 28-29 (Fed. Judicial Center 2000).

li *Tanner v. Westbrook*, 174 F.3d. 542, 546 (5th Cir. 1999).

lii *United States v. Alatorre*, 222 F.3d. 1098, 1102 (9th Cir. 2000) (quoting *Daubert*, 509 U.S. @ 592) and *United States v. Nichols*, 169 F.3d. 1255, 1262-1264 (10th Cir. 1999).

liii To the extent *Caubarreaux v. E. I. Dupont deNemours*, 714 So.2d. 67, 71 required a pretrial *Daubert* hearing in every instance, it is likely overruled by *Kumho*. See *Tadlock v. Taylor*, 857 So.2d 20, 2002-0712 (La.App. 4 Cir. 9/24/03).

liv *Benn v. Hilton*, 815 So.2d. 830, 2002-0620 (La. 5/10/02).

lv *Corkern v. T.K. Valve, et al.*, 934 So.2d 102, 2004-2293 (La.App. 1 Cir. 3/29/06).

lvi Robert J. Goodwin, *The Hidden Significance of Kumho Tire Co. v. Carmichael: A Compass for Problems of Definition and Procedure Created by Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 52 Baylor L. Rev. 603, 626 (Summer 2000).

lvii La. C.Evid. Art. 103(A); *Davis v. Kreutzer*, 633 So.2d 796, 803 (La.App. 4 Cir. 1994), and *Brown v. Schwegmann, et al.*, 958 So.2d 721, 2005-0830 (La.App. 4 Cir. 4/25/07). Fed. R. Evid. 103(a).

lviii *State v. Pickett*, 2003-1492 (La.App. 3 Cir. 5/26/04), 878 So.2d 722, and *Brown v. Schwegmann, et al.*, 958 So.2d 721, 2005-0830 (La.App. 4 Cir. 4/25/07). Fed. R. Evid. 103(a).

lix Fed. R. Evid.104(a) and La.C. Evid. Art 104(a).

lx *Moore v. Ashland Chemical, Inc.*, 151 F.3d 269 (5th Cir. 1998).

lxi *Tanner v. Westbrook*, 174 F.3d 542 (5th Cir. 1999).

lxii *Globetti v. Sandoz Pharmaceutical Corporation*, 101 F.Supp. 2d, 1174, 1177 (N.D. Ala. 2000).

lxiii *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239 (5th Cir. 2002).

lxiv *General Electric Co. v. Joiner*, 522 U.S. 136, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997); and *MSOF Corporation v. Exxon Corporation, et al.*, 934 So.2d 708, 2004-0988 (La.App. 1 Cir. 12/22/05)..

lxv *Pipitone*, 288 F.3d 239 (5th Cir. 2002).

lxvi *Pipitone,* 288 F.3d 239 (5th Cir. 2002).

lxvii *Kumho,* 119 S.Ct. 1167, 1175.

lxviii Citing *Skidmore v. Precision Printing and Packaging, Inc.*, 188 F.3d 618 (5th Cir. 1999) (holding that the district court properly admitted testimony of a psychiatrist who diagnosed plaintiff because the psychiatrist "testified to his experience, to the criteria by which he diagnosed [the plaintiff], and to the standard methods of diagnosis in his field"); *St. Martin v. Mobil Exploration & Producing U.S., Inc.*, 224 F.3d 402, 406-07 (5th Cir. 2000) (holding that ecologist's first-hand observation of flooded marsh at issue combined with his expertise in marshland ecology were sufficiently reliable bases of his opinion on causation under *Daubert* to admit the testimony).

lxix 755 So. 2d 226, 236, 99-2257 (La. 2/29/00).

lxx *MSOF Corporation v. Exxon Corporation, et al.*, 934 So.2d 708, 2004-0988 (La.App. 1 Cir. 12/22/05) discusses at length the use of affidavits in a Motion for Summary Judgment.

lxxi Citing *Daubert*, 509 U.S. 579, 595.

lxxii Citing Frank L. Maraist and Harry T. Lemmon, 1 Louisiana Civil Law Treatise, Civil Procedure, § 6.8, p. 145 (1999).