

Expert Q&A on Trends in *Daubert* Challenges

Expert witnesses are an important and frequently crucial part of establishing a claim or defense in litigation. However, since the US Supreme Court set the standard for assessing the admissibility of expert testimony in its seminal case, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, litigants increasingly have asserted challenges to exclude expert evidence under *Daubert* and its progeny. Practical Law asked Kenneth I. Schacter and Mary Gail Gearns of Morgan, Lewis & Bockius LLP to comment on key issues, trends and strategic considerations associated with *Daubert* challenges.



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What is the *Daubert* standard for determining the admissibility of expert testimony?

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the Supreme Court assigned to the trial judge the “gatekeeping” role of determining whether an expert witness’s testimony rests “on a reliable foundation” and is “relevant to the task at hand” (509 U.S. 579, 597 (1993)). The Supreme Court identified several factors that a court may consider in deciding whether the methodology underlying an expert’s opinion is sufficiently reliable, including:

- Whether it can be, and has been, tested.
- Whether it has been subjected to peer review and publication.
- Its known or potential rate of error.
- The existence and maintenance of standards controlling its operation.
- Whether it is generally accepted in the relevant scientific community.

(*Daubert*, 509 U.S. at 593-94.)

A few years later, in *Kumho Tire Co. v. Carmichael*, the Supreme Court held that the trial judge’s general gatekeeping obligation extends not only to experts who will testify on scientific issues, but also to testimony based on technical and other specialized knowledge (526 U.S. 137, 141, 147-49 (1999)).

Challenges to expert testimony under *Daubert* and *Kumho Tire* reached all-time highs last year. What are some reasons for this trend?

The increased use of *Daubert* challenges is largely attributable to the increased use of experts generally. Since the 1980s,

there has been exponential growth in the use of economic experts to address critical issues in litigation, such as damages in commercial cases, materiality in securities cases, market definition in antitrust cases and statistical analyses in employment discrimination cases. Experts are also being used increasingly to prove or rebut key elements of the plaintiff's case — for example, causation in products liability cases or likelihood of confusion in trademark cases. With more experts come more challenges to those experts.

In some cases, a successful challenge can eviscerate one side's case, providing a powerful incentive to make a *Daubert* challenge. Further, even if a challenge fails, it can be used to highlight the vulnerabilities of the other side's case, potentially paving the way for a more favorable settlement.

A number of widely-cited appellate decisions in recent years have reasserted the strength and validity of *Daubert* and its progeny, and the deference given to the decisions of district court judges on *Daubert* issues (see, for example, *Happel v. Walmart Stores, Inc.*, 602 F.3d 820, 826 (7th Cir. 2010) (upholding exclusion of the plaintiff's causation expert, whose testimony "would have amounted to an 'inspired hunch'"); *Zaremba v. Gen. Motors Corp.*, 360 F.3d 355, 358-60 (2d Cir. 2004) (upholding exclusion of two design defect experts proffered by the plaintiff for lack of reliability and qualifications)). Decisions like these further encourage *Daubert* challenges.

However, the trend toward greater judicial scrutiny of experts is not unabated. For example, in a high-profile patent case, *Apple Inc. v. Motorola, Inc.*, the Federal Circuit took a step back from prior opinions that set exacting standards for damages experts in intellectual property cases and reversed a decision by Judge Richard A. Posner, sitting by designation as a district court judge, excluding nearly all of both parties' expert evidence related to damages. The Federal Circuit observed, "A judge must be cautious not to overstep its gatekeeping role and weigh facts, evaluate the correctness of conclusions, impose its own preferred methodology, or judge credibility, including the credibility of one expert over another. These tasks are solely reserved for the fact finder." (757 F.3d 1286, 1313-14 (Fed. Cir. 2014).)

Has the number of *Daubert* challenges made at the class certification stage also increased and, if so, what impact will the Supreme Court's recent decision in *Halliburton Co. v. Erica P. John Fund, Inc.* have on this trend?

Parties are increasingly making *Daubert* challenges at the class certification stage and that trend is likely to continue, and even accelerate, in the wake of the Supreme Court's decision in *Halliburton*.

In the past, federal judges were often reluctant to consider *Daubert* challenges at the class certification stage. This concern was based on a perceived inconsistency with the Supreme Court's holding in *Eisen v. Carlisle & Jacquelin* that trial courts should not inquire into the merits of a case to determine whether it may be maintained as a class action (417 U.S. 156, 177 (1974)). The Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes* changed that view, however, by indicating support for *Daubert* review at the class

certification stage, thereby making parties' use of these pre-trial expert challenges more likely (see 131 S. Ct. 2541, 2553-54 (2011)).



Search [Class Actions: Certification](#) and [How Defendants Can Use Class Certification to Their Advantage](#) for more on the *Eisen* and *Dukes* decisions.

The Supreme Court's recent decision in *Halliburton* further reinforces the propriety of expert challenges in the class certification context. In *Halliburton*, the Supreme Court declined to overrule the presumption of reliance in private securities fraud class actions based on a fraud on the market theory of liability, but held that a defendant may rebut the presumption at the class certification stage through proof that the alleged misrepresentation did not actually affect the share price of the underlying stock (134 S. Ct. 2398, 2407, 2414-17 (2014)).

This ruling is widely expected to result in the increased use of expert testimony at the class certification stage in securities class actions, as defendants submit expert analyses (typically event studies) to demonstrate the absence of price impact and plaintiffs respond with their own expert studies to establish the opposite. An even greater number of *Daubert* challenges is virtually certain to result. Indeed, in post-Supreme Court proceedings in *Halliburton* itself, the plaintiff recently filed a *Daubert* motion to exclude an analysis by Halliburton's expert proffered to show the absence of price impact (*Lead Plaintiff's Corrected Motion to Exclude or Strike Expert Testimony*, No. 02-1152 (N.D. Tex. Nov. 3, 2014) (Dkt. No. 593)).



Search [The Rise and Reformation of Private Securities Litigation](#) and [Expert Q&A on the Fraud on the Market Presumption](#) for more on the fraud on the market presumption and the *Halliburton* decision.

How have courts been applying *Daubert* at the class certification stage?

While it seems clear that courts will apply some type of *Daubert* review at the class certification stage, the proper scope of the review remains an open question, and courts to date have not adopted a consistent approach.

Courts in the Seventh, Ninth and Eleventh Circuits have undertaken a full *Daubert* review and conclusively ruled on the admissibility of expert evidence before deciding whether the requirements of Rule 23 of the Federal Rules of Civil Procedure (FRCP) for class certification have been met (see, for example, *Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 815-16 (7th Cir. 2010); *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011); *Sher v. Raytheon Co.*, 419 F. App'x 887, 890-91 (11th Cir. 2011)).

Courts in the Third and Eighth Circuits, however, have conducted only a limited *Daubert* review, focusing on whether the expert evidence is sufficient to support class certification under FRCP 23 (see, for example, *Behrend v. Comcast Corp.*, 655 F.3d 182, 204 n.13 (3d Cir. 2011), *rev'd on other grounds*, 133 S. Ct. 1426 (2013); *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 611-14 (8th Cir. 2011)).

Do any states still adhere to the “general acceptance” standard set out by the DC Circuit in *Frye v. United States*?

Before *Daubert*, courts generally evaluated the admissibility of expert testimony under *Frye*, which held that an expert’s opinion based on a scientific technique is admissible where the technique is generally accepted as reliable in the relevant scientific community (see 293 F. 1013, 1014 (D.C. Cir. 1923)).

However, a majority of states have now rejected the *Frye* standard and embraced some form of a *Daubert* test, requiring trial judges to assume a gatekeeper role in admitting or excluding expert testimony. States have adopted *Daubert* through judicial decision, legislation, promulgation of an evidentiary rule, or a combination of these things (see, for example, *In re GlobalSanteFe Corp.*, 275 S.W.3d 477, 486 n.66 (Tex. 2008) (collecting Texas cases); *H.B. 7015*, 2013 Leg., Reg. Sess. (Fla. 2013); N.C. Gen. Stat. § 8C-1-702(a)).

While the general trend is toward adoption of *Daubert*, state courts have applied differing versions of the *Daubert* standard. For example, under Texas’s *Robinson/Daubert* test, a court may consider additional factors, such as the extent to which the technique at issue relies on the expert’s subjective interpretation and whether the technique is used outside the litigation context (see *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 557 (Tex. 1995)).

There are several notable holdouts, however, including New York, Illinois and California, which have steadfastly declined to adopt *Daubert* and continue to follow some variant of *Frye* (see, for example, *Giordano v. Mkt. Am., Inc.*, 941 N.E.2d 727, 733 (N.Y. 2010); *People v. Nelson*, 922 N.E.2d 1056, 1080-81 (Ill. 2009); *People v. Leahy*, 882 P.2d 321, 331 (Cal. 1994)). In fact, in a footnote in a lengthy August 2014 opinion, the Supreme Court of California seemed to go out of its way to say that it was not moving away from the *Kelly* test (California’s version of *Frye*), as some lower courts had inferred from its use of the term “gatekeeper” in a 2012 decision (see *People v. Lucas*, 333 P.3d 587, 662 n.36 (Cal. 2014) (clarifying the use of “gatekeeper” in *Sargon Enters., Inc. v. Univ. of S. Cal.*, 288 P.3d 1237, 1240, 1252 (Cal. 2012))).

Jurisdictions that follow *Frye* also have applied modified versions of that standard, including in California, Maryland, Pennsylvania and Washington, DC. California’s *Kelly* test is generally viewed as less stringent than the other variants, as this test applies only to cases involving novel scientific techniques and procedures and not, for example, to expert medical testimony (see *Roberti v. Andy’s Termite & Pest Control, Inc.*, 113 Cal. App. 4th 893, 900-903 (Cal. Ct. App. 2d Dist. 2003); *Wilson v. Phillips*, 73 Cal. App. 4th 250, 254-55 (Cal. Ct. App. 4th Dist. 1999)).

Are there certain jurisdictions where parties are more likely to successfully raise a *Daubert* challenge?

There is significant variation in the likelihood of success across jurisdictions. A PricewaterhouseCoopers study (PwC Study) of *Daubert* challenges to financial experts showed that litigants were most successful in excluding financial expert testimony in the Eleventh, Tenth and Second Circuits (in decreasing order of success), and least successful in the Third Circuit (see *PwC, Daubert Challenges to Financial Experts: A Yearly Study of Trends and Outcomes*, at 7 (2013), available at pwc.com). However,

statistics like these, while helpful, should be qualified. Most studies look only at published opinions, and the PwC Study focused on financial experts, not all experts.

The real answer to the question of which jurisdictions are best for a successful *Daubert* challenge is that it depends, and the variation between judges within any given jurisdiction may be more significant than any jurisdiction-wide trend.

What types of experts are most likely to survive a *Daubert* challenge?

Annual surveys of appellate decisions conducted several years ago indicated that experts in forensics, economics and the “hard sciences” were substantially more likely to survive a *Daubert* challenge than experts in “soft sciences” such as accident reconstruction, marketing and polygraphy. The admissibility rate for physicians was consistently around 50%. (See *Daubert Decisions by Field of Expertise*, available at daubertontheweb.com.) Recent case law suggests that these trends continue, perhaps because the subjective aspects of many soft sciences are out of sync with the *Daubert* factors.

For example, in *Elcock v. Kmart Corp.*, the Third Circuit excluded testimony by a vocational expert in a personal injury action, holding that it was inadmissible under *Daubert*. The expert had considered the plaintiff’s intelligence, aptitude, previous work experience, temperament and limitations and, after reviewing local job listings, opined that the plaintiff had suffered a 50-60% disability. On cross-examination, however, the expert was unable to explain how he had arrived at that range, other than to state that his consideration of these factors had produced the 50-60% figure. *Kmart* challenged the expert’s testimony on the grounds that it was “idiosyncratic or subjective.” The Third Circuit agreed, noting that the “gist” of the *Daubert* factors was implicated even though vocational rehabilitation is a social science, and held that the testimony was unreliable because it was “subjective and unreproducible.” (233 F.3d 734, 746-51 (3d Cir. 2000).)

There are notable differences in exclusion rates among financial experts as well. The PwC Study found that economists and accountants were the most frequently challenged financial experts during the years 2000 through 2013, with each accounting for almost one quarter of such challenges. They were also the most likely to survive *Daubert* challenges, however, with exclusion rates of 41% and 43%, respectively. (See *PwC Study*, at 9.)

Case type matters as well. Financial experts experienced the lowest exclusion rate in antitrust cases (36%), and the highest exclusion rates in cases involving claims of fraud (52%) and intellectual property (51%). (See *PwC Study*, at 10.)

Are challenges to the reliability of an expert’s testimony more likely to be successful than challenges to the expert’s qualifications?

The PwC Study also provides the best available data concerning the grounds for expert exclusions under *Daubert*. Although the data is generally limited to exclusions of financial experts, the results are compelling.

Challenges based on reliability are substantially more likely to be successful than challenges based on an expert's qualifications. Indeed, lack of reliability was the sole basis for exclusion in nearly half of all successful challenges to financial experts' testimony in 2013, and this pattern is consistent throughout the 14-year period studied by PwC. Conversely, exclusions based solely on expert qualification accounted for a mere 8% of exclusions during the same 14-year period, and exclusions based on qualification combined with other grounds accounted for only 20%. (See *PwC Study*, at 11.)

A likely reason for this disparity is that trial attorneys generally do a good job of engaging experts who will be deemed sufficiently qualified in their area of expertise, particularly in light of courts' liberal approach to assessing experts' qualifications (see, for example, *Tuf Racing Prods., Inc. v. Am. Suzuki Motor Corp.*, 223 F.3d 585, 591 (7th Cir. 2000); *Elcock*, 233 F.3d at 741). Experts are more vulnerable to attack regarding the analytical and other processes by which they arrived at their opinions. Accordingly, opposing counsel's goal should be to identify:

- One or more flaws in the expert's methodology.
- Problems with the underlying data or assumptions.
- Deviations from accepted methods.
- Methods that cannot be replicated or tested.

Proof of any of these problems with the expert's methodology provides strong ammunition to mount a credible challenge to admissibility.

When may a court consider appointing an independent expert, rather than admitting testimony from experts retained by the parties?

Under Rule 706 of the Federal Rules of Evidence (FRE), a court may appoint its own neutral expert on a party's motion or on its own. This power of appointment is rarely used, however, as judges are typically reluctant to interfere with the adversarial system.

A court-appointed expert is a high-risk proposition for litigants because an expert with no allegiance to either side who has the judge's approval may be given undue weight by a jury. Juries will almost always view a court-appointed expert as an impartial and authoritative "umpire" of some of the most important issues in a case. The judge herself is likely to share this view of the expert she appointed. This reality raises the concern that the opinion of a court-appointed expert may be almost impossible to overcome and case-dispositive.

Federal courts vary on the correct standard for court appointment of an expert. Some have observed that these appointments should be used only in rare instances, while others have embraced their use (compare *Monolithic Power Sys., Inc. v. O2 Micro Int'l Ltd.*, 558 F.3d 1341, 1348 (Fed. Cir. 2009) (stating that FRE 706 should be invoked only in rare and compelling circumstances and that the court was "troubled" by the "predicaments inherent in court appointment of an independent expert and revelations to the jury about the expert's neutral status") with *NEC Corp. v. Hyundai Elecs. Indus. Co.*, 30 F. Supp. 2d 546, 554 (E.D. Va. 1998) (court appointed experts where the parties' experts "understandably" became technical advocates for their respective causes)).

Further, appellate courts have sometimes closely scrutinized trial court appointments of experts, even though these appointments are reviewed under the deferential abuse of discretion standard (see, for example, *TechSearch, L.L.C. v. Intel Corp.*, 286 F.3d 1360, 1377-79 (Fed. Cir. 2002); *Ledford v. Sullivan*, 105 F.3d 354, 358-60 (7th Cir. 1997)).

The Ninth Circuit, for example, recently clarified its view of the proper use of court-appointed experts. In 2002, the Ninth Circuit approved the appointment of a technical advisor to assist the district court in the high-profile case, *A&M Records, Inc. v. Napster, Inc.* (284 F.3d 1091, 1097 (9th Cir. 2002) (district court did not improperly delegate its judicial authority because the technical advisor never unilaterally issued findings of fact or conclusions of law)). However, in September 2014, the Ninth Circuit held in *Armstrong v. Brown* that the district court had impermissibly delegated dispute resolution authority to its expert, distinguishing the case from *Napster*. The court noted that the expert in *Armstrong* had been permitted to make findings that "go to the very heart of [the] litigation" and there was no mechanism provided for review by the district court. (768 F.3d 975, 987-88 (9th Cir. 2014).)

What are some of the key strategic issues for counsel to consider when deciding whether to make a *Daubert* motion?

Like expert testimony itself, a *Daubert* motion can make or break a case. Counsel should consider several critical issues before making a *Daubert* motion, including:

- **The strength of the motion.** A *Daubert* motion must specify the purported deficiencies in the opinions, methodology or qualifications of the opposing party's expert. A successful motion may be case-determinative.
- **The likelihood that the case will go to trial.** Most complex civil cases are not tried, but instead are resolved on motions or settled. For those cases that are likely to go to trial, counsel must make a tactical decision: whether to detail flaws in the opinions or qualifications of the opposing party's expert in a *Daubert* motion or save the attack for cross-examination at trial. If the chance of success on the motion is slim and the case is unlikely to settle, it may be strategically better to wait until trial to spring the most effective material on the expert.
- **The available resources.** Making a persuasive *Daubert* motion is expensive and time-consuming. These motions typically are due at a very hectic stage in litigation, as the parties are preparing for trial, making *in limine* motions and responding to the other side's motions. However, in cases involving significant potential recovery (from the plaintiff's viewpoint) or significant exposure (from the defendant's viewpoint), the upside of winning the motion usually more than justifies the cost and time.
- **The specific judge's approach to *Daubert* motions.** Counsel should know how trial judges in their jurisdiction, and the assigned judge in particular, approach *Daubert* motions, especially those involving the same type of expert and issues as in the relevant case. There is not a one-size-fits-all approach. Therefore, counsel should research whether the assigned judge has a track record of granting *Daubert* motions or is more inclined to let the jury sort out the issues.