

Daubert

An Ongoing Evolution

I. Prior to Daubert

Prior to *Daubert*, relevancy in combination with the *Frye* test were the dominant standards for determining the admissibility of scientific evidence in federal courts.¹ *Frye* is based on a 1923 Federal Court of appeals ruling involving the admissibility of polygraph evidence. Under *Frye*, the Court based the admissibility of testimony regarding novel scientific evidence on whether it has "***gained general acceptance in the particular field in which it belongs.***" The trial court's gatekeeper role in this respect is typically described as conservative, thus helping to keep pseudoscience out of the courtroom by deferring to those in the field.

Prior to the adoption of the Federal Rules of Evidence, all federal and most state courts followed the "*Frye*"¹ test to determine the admissibility of scientific evidence. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,² the United States Supreme Court held that the Federal Rules of Evidence, and in particular Fed. R. Evid. 702, superseded *Frye's* "general acceptance" test.³

II. History of Daubert

The *Daubert* standard is a legal precedent set in 1993 by the Supreme Court of the United States regarding the admissibility of expert witnesses' testimony during federal legal proceedings. The citation is *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

II.I. How/When is it used?

A *Daubert motion* is a motion, raised before or during trial², to exclude the presentation of unqualified evidence to the jury. A Motion in Limine is usually used to exclude the testimony of an expert witness who has no such expertise or used questionable methods to obtain the information.

III. Daubert Explained

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Frye v. United States, 293 F. 1013 (DC Cir. 1923)

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2008 Regular Session of the Louisiana Legislature has now set time parameters on when such a motion must be filed.

In *Daubert*, the Supreme Court held that federal trial judges are the “gatekeepers” of scientific evidence. Under the *Daubert* standard, therefore, trial judges must evaluate expert witnesses to determine whether their testimony is both “relevant” and “reliable.”

In *Daubert* the Supreme Court provided four nondefinitive factors³ that trial courts should consider in making this determination. **First**, the court should evaluate whether the theory or technique can be and has been tested.⁴ **Second**, the court must determine whether the theory or technique has been subjected to peer review and publication.^{5,6} **Third**, the court should consider the known or potential rate of error.⁷ **Finally**, the court should evaluate the general acceptance of the theory in the scientific community.⁸ The Seventh Circuit has

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Daubert, 509 U.S. at 593-94

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Daubert, 509 U.S. at 593. Because empirical testing is what distinguishes science from other fields of inquiry, some courts have given this factor particular weight. See, e.g., *Smelser v. Norfolk S. Ry. Co.*, 105 F.3d 299, 303-05 (6th Cir. 1997); *Raynor v. Merrell Pharms. Inc.*, 104 F.3d 1371, 1375-76 (D.C. Cir. 1997); *Dukes v. Illinois Cent. R.R.*, 934 F. Supp. 939, 948 (N.D. Ill. 1996) (testability is most important of four *Daubert* factors). See also *Hall v. Baxter Healthcare Corp.*, 947 F. Supp. 1387, 1402 (D. Ore. 1996); *Cabrera v. Cordis Corp.*, 945 F. Supp. 209, 213-14 (D. Nev. 1996).

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Daubert, 509 U.S. at 593. The Court recognized that many well-founded scientific theories are too new or of too limited interest to be published. *Id.* Nevertheless, peer review "increases the likelihood that substantive flaws in the methodology will be detected."*Id.* Accordingly, publication is a relevant consideration in determining whether a scientific theory or technique is valid. See, e.g., *Peitzmeier v. Hennessey Indus.*, 97 F.3d 293, 297 (8th Cir. 1996); *Kelley v. American Heyer-Schulte Corp.*, 957 F. Supp. 873, 879, 881 (W.D. Tex. 1997). Peer review and publication may not be necessary conditions of reliability in every case. For example, where the toxic effects of a chemical on human beings are recognized by the scientific community, peer review would be unnecessary. *Kannankeril v. Terminix, Int'l, Inc.*, 1997 U.S. App. LEXIS 28712, at *19 (3d Cir. 1997).

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Where expert testimony is based on the expert's experience or training, as opposed to the expert's methodology or technique, courts have disagreed about the applicability of the *Daubert* standards. Compare *Peitzmeier*, 97 F.3d at 297 (*Daubert* applies); *Cummins*, 93 F.3d at 368-69 (same); with *Compton*, 82 F.3d at 1518 (*Daubert* does not apply); *Liriano v. Hobart Corp.*, 949 F.Supp. 171, 177 (S.D.N.Y. 1996) (same). See also *Berry v. City of Detroit*, 25 F.3d 1342, 1349-50 (6th Cir. 1994) (requiring proffered expert to give an "empirical" example is proper way to qualify expert testifying on the basis of technical or specialized knowledge). One court has gone so far as to hold that *Daubert* applies only to expert testimony concerning a "novel scientific theory." *Thornton v. Caterpillar Inc.*, 951 F.Supp. 575, 577-78 (D.S.C. 1997).

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Id. at 594

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added an additional consideration: whether the proffered testimony is based upon the expert's special skills.⁹

In addition to these four *Daubert* factors, other safeguards exist to protect against the admission of unreliable or irrelevant scientific evidence. Federal Rules of Evidence 703, 1070611 and 40312 each provide an independent check. Procedures familiar to every trial

Id. Recognizing that support within the scientific community relates to the validity of the technique or theory, *Daubert* embraces the *Frye* "general acceptance" test. *U.S. v. Rouse*, 111 F.3d 561, 570-72 (8th Cir. 1997); *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316 (7th Cir. 1996); *Cabrera*, 945 F. Supp. at 212-14; *Grimes v. Hoffman-LaRoche Inc.*, 907 F. Supp. 33, 37-38 (D.N.H. 1995); *Sanderson v. International Flavors & Fragrances, Inc.*, 950 F. Supp. 981, 1001-02 (C.D. Cal. 1996); *Ballinger v. Atkins*, 947 F. Supp. 925, 927-28 (E.D. Va. 1996). *But see Daubert v. Merrell Dow Pharms.*, 43 F.3d 1311, 1319 n.11 (9th Cir. 1995). An unexplained conflict with a generally accepted scientific methodology or theory can be the basis for exclusion of proffered expert testimony. *See Turpin v. Merrell Dow Pharms., Inc.*, 959 F.2d 1349, 1360 (6th Cir. 1992); *O'Conner v. Commonwealth Edison Co.*, 807 F. Supp. 1378, 1398 (C.D. Ill. 1992), *aff'd*, 13 F.3d 1090 (7th Cir. 1994); *Conde v. Velsicol Chem. Corp.*, 804 F. Supp. 972, 1024 (S.D. Ohio 1992), *aff'd*, 24 F.3d 809 (6th Cir. 1994).

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Tyus v. Urban Search Management, 102 F.3d 256, 262-64; *Brown v. Southeastern Pa. Transp. Auth. (In re Paoli R.R. Yard PCB Litig.)*, 35 F.3d 717, 742 (3d Cir. 1994).

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Fed. R. Evid. 703 provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by the experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Fed. R. Evid. 703 thus prohibits the admission of expert opinions based on otherwise inadmissible hearsay unless the bases of the opinion are of a type "reasonably relied upon" by the scientific community. *Id.* Because Rule 703 creates an obvious potential for the use of expert opinions as a vehicle for creating a "back door" exception to the hearsay exception, "a balancing approach, like that contained in Rule 403 for dealing with admissible evidence, may also serve as a useful vehicle for the exercise of the court's gatekeeping role as it would apply to limiting the injection of inadmissible evidence into a trial under the auspices of Rule 703." *Kay*, 1997 U.S. Dist. LEXIS 14908, at *5. Judge Milton I. Shadur, author of the *Kay* opinion, noted that concerns about the use of Rule 703 to introduce otherwise inadmissible hearsay was one topic on the agenda of the October 1997 meeting of the Advisory Committee on the Rules of Evidence of the Judicial Conference of the United States. *Id.* at n.2.

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Under Fed. R. Evid. 706, the trial court at its discretion may obtain an expert of the court's own choosing to assist the court. Fed. R. Evid. 706(a). "The inherent power of a trial judge to appoint an expert of

attorney, such as vigorous cross examination, the presentation of contrary evidence, and careful instruction of the jury on the burden of proof, also help guard against the acceptance of suspect scientific evidence.

Finally, the Federal Rules of Civil Procedure prevent cases from going to trial where the evidence is unreliable.

Although trial judges have always had the authority to exclude inappropriate testimony, previous to *Daubert*, trial courts often preferred to let juries hear evidence proffered by both sides. Once certain evidence has been excluded by a *Daubert* motion because it fails to meet the relevancy and reliability standard, it will likely be challenged when introduced again in another trial. Even though a *Daubert* motion is not binding to other courts of law, if something was found not trustworthy, other judges may choose to follow that precedent. Of course, a decision by the Court of Appeals that a piece of evidence is inadmissible under *Daubert* would be binding on district courts within that court's geographic jurisdiction.

IV. Federal Code of Evidence

Federal Rule of Evidence 70213 contains two requirements. First, the evidence must be reliable, or in other words, trustworthy.¹⁴ Trustworthiness guarantees that the information is supported by scientific methods and procedures.¹⁵ Second, the evidence must be relevant.¹⁶

his own choosing is virtually unquestioned." Fed. R. Evid. 706, Advisory Committee Note. *See also Joiner v. General Electric*, 78 F.3d 524, 535 (11th Cir. 1996) (Birch, J., specially concurring) (discussing value of independent Rule 706 expert), *cert. granted*, 1997 U.S. LEXIS 1637 (1997).

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Fed. R. Evid. 403 provides in relevant part as follows: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." *See Moore v. Ashland Chem., Inc.*, 1997 U.S.App. LEXIS 28816, at *35-*38, *80-*82 (5th Cir. 1997).

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Fed. R. Evid. 702 provides as follows: "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."

Unlike an ordinary fact witness, an expert witness is given wide latitude to offer opinions. *Cf. Hartzell Mfg., Inc. v. American Chem. Technologies, Inc.*, 899 F. Supp. 405, 408-09 (D. Minn. 1995) (discussing admission of lay witness opinion under Rule 701).

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Daubert, 509 U.S. at 590 n.9

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The criterion of relevance has been appropriately described as one of "fit."¹⁷ To satisfy this requirement, the proffered testimony or evidence must be sufficiently tied to the facts of the case that it will help the jury in resolving a factual dispute.¹⁸ "Rule 702's 'helpfulness' standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility."¹⁹

V. Is A Daubert Hearing REQUIRED?

Two recent cases show the discretion a trial court holds on whether to hold a formal *Daubert* hearing, in *United States v. Lopez-Martinez*,²⁰ and *In re Scrap Metal Antitrust Litigation*.²¹

While the trial court has a well-recognized "gatekeeping" role in admitting expert testimony, what discretion does the court have on whether to hold a formal *Daubert* hearing? See, e.g., *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141 (1999) (noting "the trial judge's general 'gatekeeping' obligation — applies not only to testimony based on

Id. at 590. "[I]n order to qualify as scientific knowledge, an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation -- i.e., good grounds, based on what is known." *Id.* (internal quotations omitted).

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Fed. R. Evid. 702 establishes this relevancy requirement by insisting that the evidence or testimony "assist the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. See *Daubert*, 509 U.S. at 591

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Daubert, 509 U.S. at 591 (quoting *United States v. Downing*, 753 F.2d 1224, 1242 (3d Cir. 1985)).

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Id.

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Id. at 591-92. For example, if the darkness of a certain night is a fact at issue, the scientific study of the phases of the moon would assist the trier of fact. *Id.* On the other hand, if the issue is whether an individual was behaving irrationally on a certain night, evidence that the moon was full on the night in question would not assist the trier of fact and would be inadmissible because no valid scientific correlation has been demonstrated between the full moon and human behavior. *Id.*

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__ F.3d __ (9th Cir. Sept. 10, 2008) (No. 07-10174).

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527 F.3d 517 (6th Cir. May 15, 2008) (No. 06-4511).

‘scientific’ knowledge, but also to testimony based on ‘technical’ and ‘other specialized’ knowledge”).

Two recent cases demonstrate the district the trial court has a substantial amount of discretion on whether to hold a formal hearing.

In the first case, the defendant *Lopez-Martinez* was charged with smuggling aliens into the United States after leaving one member of his party behind who died in the desert. During the trial, the government called a border patrol agent to testify as an expert concerning the “patterns and methods common among smugglers in the Yuma area.” *Lopez-Martinez*, ___ F.3d at __. After his conviction, for the first time on appeal he claimed the trial court erred in admitting the expert testimony without holding a *Daubert* hearing to determine the reliability of the expert testimony under *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

The Ninth Circuit reviewed the issue for plain error, since no trial objection was made, and no error was found. The circuit explained that under FRE 702 the trial court retained a “broad latitude” to decide “how to determine reliability.” *Lopez-Martinez*, ___ F.3d at __ (citing *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141-42 (1999) (“[T]he law grants a district court the same broad latitude when it decides how to determine reliability as it enjoys in respect to its ultimate reliability determination.”)). The circuit observed that the agent’s testimony about “patterns and methods common among smugglers” was “neither rocket science nor complex statistical modeling” and *there was no need for the trial judge to conduct a formal Daubert hearing* or to mandate that the agent provide a detailed description of each step in logical chain the agent used to reach his conclusions. The record showed that the trial court could determine the agent's reliability from the agent's explanation of his methods and his experience, which was sufficient under FRE 702.

In the second case, the issue was squarely presented before the trial court. The case involved a civil antitrust conspiracy concerning scrap metal. An expert economist testified about damages resulting from a restraint on competition during an eight year period alleged against a scrap metal generator and other brokers and dealers in scrap metal. The parties addressed the admissibility of the expert testimony in several “voluminous” filings. Before trial court decided to allow the expert to testify. No formal *Daubert* hearing was held. After the jury returned a judgment exceeding \$20 million against the defense, on appeal the defendant challenged the trial court’s failure to hold a formal *Daubert* hearing. The Sixth Circuit found no error was committed by the failure to hold a formal *Daubert* hearing. The circuit noted that the trial court had an extensive “record on the expert testimony” and the *Daubert* issue had been “fully briefed by the parties” during the pre-trial hearing concerning the admissibility of the expert testimony:

“We conclude that the court accurately considered the key issues, found the testimony to be sufficiently reliable by stating that [the expert] ‘provided reasoned explanations’ and ‘presented viable arguments’ for his calculations, and concluded that Columbia’s attacks were most appropriate for cross-examination.” *Scrap Metal*, 527 F.3d at 532.

The circuit also noted the deference a reviewing court gives to the trial court, which “applies to the way in which the court assesses admissibility as well as the court’s ultimate decision of admissibility.” *Scrap Metal*, 527 F.3d at 528 (citing *Kumho Tire Co.*, 526 U.S. at 152-53).

These recent cases illustrate the discretion that the trial court holds in the manner in which it fulfills its gatekeeping function. In some cases, a formal *Daubert* hearing may be necessary. In many cases it will not as long as the record demonstrates that the trial court properly decided the issues concerning the admission of the expert testimony. Additionally, the proponent of the expert testimony holds the burden to show the expert foundational requirements are met and therefore has an interest in creating an appropriate record for review on appeal.

VI. Status of Louisiana Law

VI.I. History in Louisiana

Although the *Daubert* case itself deals only with trials conducted under the Federal Rules of Evidence, most states have chosen to adopt its test in one form or another. Louisiana, for example, adopted a variant of the *Daubert* test in *State v. Foret*.²² Much like the evidence offered, the judicial mechanisms for dealing with a *Daubert* challenge are still in the frontier stage. Attorneys will develop new means of both offering and challenging expert testimony, and the trial judge must be prepared to deal with them.

Prior to the adoption of the Louisiana Code of Evidence in 1989, state courts relied upon a formula for ruling on admissibility of expert testimony devised by Justice Dennis in *State v. Wheeler*.²³ Justice Dennis' test recognized two elements as prerequisites to admissibility:

- 1) the subject of the inference must be so distinctly related to some science, profession, business or occupation as to be beyond the understanding of the average layman; and
- 2) the witness must have sufficient skill, knowledge or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier of fact in his search for truth.²⁴

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

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416 So. 2d 78 (La. 1982)

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Justice Dennis also included other variables to be considered in making admissibility determinations including: a preference for direct, concrete evidence over inferential evidence along with the purpose of the evidence and how close it was to the "hub" of the trial.

As Louisiana had rejected the *Frye* test in *State v. Cantanese*²⁵ three years earlier, the *Wheeler* analysis remained the primary means of evaluating admissibility of expert testimony until the adoption of the Code of Evidence.²⁶

Soon after Louisiana adopted the Code of Evidence, state courts began to rely upon its provisions to develop standards for admissibility. To this end, the Louisiana Courts of Appeal for the second, third, and fourth circuits adopted the standards articulated by the United States Court of Appeals for the Fifth Circuit in *Christophersen v. Allied-Signal Corp.*²⁷ The *Christophersen* analysis consisted of four inquiries, with the first three serving as threshold requirements:

(1) [w]hether the witness is qualified to express an expert opinion, Fed. R. Evid. 702; (2) whether the facts upon which the expert relies are the same type as are relied upon by other experts in the field, Fed. R. Evid. 703; (3) whether in reaching his conclusion the expert used a well-founded methodology, *Frye*; and (4) assuming the expert's testimony has passed Rules 702 and 703 and the *Frye* test, whether under Fed. R. Evid. 403 the testimony's potential for unfair prejudice substantially outweighs its probative value.²⁸

See Bonnie J. Davis, Note, *Admissibility of Expert Testimony After Daubert and Foret: A Wider Gate, a More Vigilant Gatekeeper*, 54 La. L. Rev. 1307, 1331 (1994) (quoting *Wheeler*, 416 So. 2d at 80).

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368 So. 2d 975 (La. 1979) (rejecting the *Frye* general acceptance test and instead articulating a probative value versus prejudicial effect balancing test).

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Davis, *supra* note 11, at 1331. See *Schwamb v. Delta Airlines, Inc.*, 516 So. 2d 452 (La. App. 1st Cir. 1987), *writ denied*, 520 So. 2d 750 (1988) (applying *Wheeler* analysis in civil trial context).

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939 F. 2d 1106 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1280 (1992). The Louisiana Court of Appeals for the fourth circuit adopted the *Christophersen* standards in *Adams v. Chevron*, 589 So. 2d 1219 (La. App. 4th Cir. 1991), *writ denied*, 592 So. 2d 415 (1992). The second circuit adopted the *Adams and Christophersen* analysis in *State v. Hill*, 601 So. 2d 684 (La. App. 2d Cir.), *writ denied*, 608 So. 2d 192 (1992). The third circuit followed suit in *Glankler v. Rapides Parish School Board*, 610 So. 2d 1020 (La. App. 3d Cir. 1992), *writ denied*, 614 So. 2d 78 (1993). See Davis, *supra* note 11, at 1332.

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Christophersen, 939 F. 2d at 1110.

Although the adoption of the Code of Evidence (1989) and the growing acceptance of the *Christophersen* analysis helped bring relative uniformity to judicial practice in regards to admissibility of experts in Louisiana, there remained uncertainty as to what the proper standards for admissibility should be. In *State v. Foret* the Supreme Court of Louisiana helped clear up this confusion.

VI.II. Adoption of Daubert/Foret

In *Foret*²⁹ (involving admissibility of expert testimony on Child Sexual Abuse Accommodation Syndrome in a prosecution for alleged sexual molestation of a juvenile under the offender's control or supervision), the Supreme Court of Louisiana unequivocally embraced the reliability and relevance standards enunciated in *Daubert*. The Court held that since article 702 of the Louisiana Code of Evidence³⁰ mirrors Rule 702 of the Federal Rules of Evidence, upon which the *Daubert* decision is based, the adoption of *Daubert*-like procedures for the admission of expert testimony would be both instructive in interpreting the Louisiana Code and helpful in moving towards a national law of evidence.³¹ All told, the similarity between the federal and state evidence rules coupled with Louisiana's earlier rejection of the *Frye* test in favor of a more *Daubert*-like balancing test for admissibility led the state Supreme Court to, "adopt *Daubert's* requirement that expert scientific testimony must rise to a threshold level of reliability in order to be admissible under La.C.E. art. 702."³² In order to flesh out exactly what such a threshold determination of reliability entails the state Supreme Court went on to accept the *Daubert* court's "observations" on what would be helpful in making this determination.

The reliability inquiry is coupled with the article/Rule 702 relevance requirement that the expert's testimony must assist the trier of fact in understanding or determining a fact in issue. Ultimately, and by extension *Foret*, the court created a two-pronged test requiring the trial judge to make a preliminary assessment, preferably outside of the jury's presence, that the expert is proposing to testify to actual scientific knowledge (the reliability prong) and that

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State v. Foret, 628 So. 2d 1116 (La. 1993).

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Louisiana Code of Evidence article 702 reads, "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." *Foret*, 628 So. 2d at 1121.

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628 So. 2d at 1122.

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628 So. 2d at 1123.

such knowledge will assist the trier of fact (the relevance prong).³³ Testimony must meet both of these standards in order to be admissible under *Foret*.

Finally, the *Foret* court recognized that Daubert-type analysis requires the court to employ the balancing test of Federal Rule of Evidence 403³⁴ to determine if the probative value of given evidence is outweighed by its potential for unfair prejudice.³⁵

Since *Foret* Louisiana courts have employed the *Daubert* standards in a variety of civil and criminal cases.³⁶ The standard of review used for trial courts' decisions on admissibility in Louisiana has been abuse of discretion. This strict standard has been interpreted to require a showing that the trial judge's decision to admit or disallow evidence was manifestly erroneous and more than harmless error to warrant overruling of a lower court's decision.³⁷ In addition, the state courts of appeals have demonstrated an unwillingness to engage in *sua sponte* examination of proffered expert testimony requiring counsel to put forward admissibility challenges themselves at the trial level.³⁸

VI.III. Senate Bill 308 (Act No. 787 - 2008 Regular Legislative Session)

In the 2008 Regular legislative session Senate Bill 308 was filed by Sen. Jack Donahue. Sen. Donahue is the president of DonahueFavret Contractors, Inc., and is the past chairman of SouthPac (LABI).

Senate Bill 308 read as follows:

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Clement v. Griffin, 634 So. 2d 412, 426 (La.App. 4th Cir. 1994).

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Louisiana Code of Evidence article 403 generally follows Federal Rule of Evidence 403. See *Foret*, 628 So. 2d at 1127.

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Id., at 1122.

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One notable exception is the field of hedonic damages where the first circuit has declared that the *Foret/ Daubert* inquiry is inappropriate for determining admissibility of such testimony. See *Chustz v. J.B. Hunt Transport, Inc.* 659 So. 2d 784 (La. App. 1st Cir., 1995).

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See *Williamson v. Haynes Best Western of Alexandria*, 688 So. 2d 1201, 1241 (La. App. 4th Cir., 1997).

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See *Bryant v. Tidy Building Services*, 678 So. 2d 48, 49 (La. App. 4th Cir. 1996).

Code of Civil Procedure Art. 1425(C) is hereby amended and reenacted and Code of Civil Procedure Art. 1425(F) is hereby enacted to read as follows:

Art. 1425. Experts; pre-trial disclosures; scope of discovery

C. The disclosures of Paragraph B of this Article shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures required pursuant to Paragraph B of this Article shall be made at least ninety days before the trial date ~~or the date the case is to be ready for trial~~ or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Paragraph B of this Article, within thirty days after the disclosure made by the other party. The parties shall supplement these disclosures when required by Article 1428.

* * *

F. (1) Any party may file a motion for a pretrial hearing to determine whether a witness qualifies as an expert or whether the methodologies employed by such witness are reliable under Articles 702 through 705 of the Louisiana Code of Evidence. The motion shall be filed not later than sixty days prior to trial and shall set forth sufficient allegations showing the necessity for these determinations by the court.

(2) The court shall hold a contradictory hearing and shall rule on the motion not later than thirty days prior to the trial. At the hearing, the court shall consider the qualifications and methodologies of the proposed witness based upon the provisions of Articles 104(A) and 702 through 705 of the Louisiana Code of Evidence. For good cause shown, the court may allow live testimony at the contradictory hearing.

(3) If the ruling of the court is made at the conclusion of the hearing, the court shall recite orally its findings of fact, conclusions of law, and reasons for judgment. If the matter is taken under advisement, the court shall render its ruling and provide written findings of fact, conclusions of law, and reasons for judgment not later than five days after the hearing.

(4) The findings of facts, conclusions of law, and reasons for judgment shall be made part of the record of the proceedings. The findings of facts, conclusions of law, and reasons for judgment shall specifically include and address:

(a) The elements required to be satisfied for a person to testify under Articles 702 through 705 of the Louisiana Code of Evidence.

(b) The evidence presented at the hearing to satisfy the requirements of Articles 702 through 705 of the Louisiana Code of Evidence at trial.

(c) A decision by the judge as to whether or not a person shall be allowed to testify under Articles 702 through 705 of the Louisiana Code of Evidence at trial.

(d) The reasons of the judge detailing in law and fact why a person shall be allowed or disallowed to testify under Articles 702 through 705 of the Louisiana Code of Evidence.

(5) A ruling of the court pursuant to a hearing held in accordance with the provisions of this Subsection shall be subject to appellate review was provided by law.

(6) Notwithstanding the time limitations in Subparagraphs (1), (2), and (3) of this Paragraph, by unanimous consent of the parties, and with approval by the court, a motion under this Subsection may be filed, heard, and ruled upon by the court at any time prior to trial. The ruling by the court on such motion shall include findings of fact, conclusions of law, and reasons for judgment complying with the provisions of Subparagraph (4) of this Paragraph.

(7) The provisions of this Paragraph shall not apply to testimony in an action for divorce or annulment of marriage, or to a separation in a covenant marriage, to a property partition, or to an administration of a succession, or to testimony in any incidental or ancillary proceedings or matters arising from such actions.

(8) All or a portion of the court costs, including reasonable expert witness fees and costs, incurred when a motion is filed in accordance with this Paragraph may, in the discretion of the court, be assessed to the non-prevailing party as taxable costs at the conclusion of the hearing on the motion.

Section 2. The provisions of this Act shall not apply to any action filed for the recovery of any covered losses, in accordance with a homeowners insurance policy or business owners insurance policy, which occurred as a result of hurricanes Katrina or Rita.

Section 3. This Act shall become effective January 1, 2009; however if an action has been set for trial between January 1, 2009, and April 1, 2009, the provisions of this Act shall become effective as to those actions on April 1, 2009.

Coding: Words which are struck through are deletions from existing law;

words in **boldface type and underscored** are additions.

VII. **Conclusion**

In the aftermath of *Daubert*, courts have taken their role as gatekeepers seriously. Expert testimony that would have easily passed the *Frye* test for admissibility is being excluded under the more stringent requirements of Fed. R. Evid. 702 as well as La. Code of Evidence, as construed by *Daubert*. Because of the often critical "make-or-break" role that expert testimony plays in many cases, prudence mandates vigilance at all stages of litigation to ensure that proposed expert testimony is subjected to careful scrutiny under the *Daubert* standards during discovery, and at trial.

Given Louisiana's newly amended Code of Civil Procedure Article 1425, Case Management Orders must be reviewed to ensure compliance so as to not have your expert excluded for failure to comply.

Respectfully Submitted:
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