

POLICY BRIEF



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The Case for Daubert: Ensuring sound science in Arizona courts.

The Arizona Chamber Foundation (501(c)3) is a non-partisan, objective educational and research foundation. The Foundation produces research studies on Arizona public policy issues such as health care, budget, education, regulation, energy, and others in an effort to inform policy makers, business leaders, and the general public.

Introduction

Ensuring the credibility of evidence introduced in courtrooms is an essential element of a fair and just legal system. By following the Daubert standard, U.S. Federal court judges are given significant authority to scrutinize the admissibility of expert testimony. The expanded judicial authority decreases the probability of “junk science” being presented to the jury and affecting the outcome of a trial. It also serves as a filter that screens out ungrounded lawsuits from even reaching trial, which is especially important for manufacturers facing questionable product liability claims and health care providers facing questionable medical malpractice claims.

While most states have adopted some version of the Daubert standard, Arizona is among the few states that still follow the weaker Frye standard which provides judges much less authority to evaluate the credibility of expert testimony. This increases the likelihood that a legitimate injury goes uncompensated because of a defense based on “junk science,” and also increases the potential for businesses to face the costs associated with defending meritless lawsuits. The manufacturing sector, having shed 52,000 Arizona jobs since 2000, cannot afford to continue defending claims that depend on expert testimony that would be dismissed under the Daubert standard¹. Likewise, businesses and individuals cannot afford the rising health insurance premiums that are partially driven by the threat of frivolous medical malpractice claims.

Daubert History

Throughout the majority of the 20th century, U.S. federal courts relied exclusively on the 1923 case *Frye v. U.S.* for decisions regarding the admissibility of expert testimony. In what became known as the Frye standard, the ruling required that expert testimony be based on science that has gained “general acceptance” in the relevant field². In effect, “judges...defer[red] to the views of scientists in a relevant field” in determining what constituted sound science³.

However, the 1993 U.S. Supreme Court decision in *Daubert v. Merrell Dow Pharmaceutical* established a new “Daubert standard” to replace

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Frye. This new standard encouraged judges to assume a more active “gatekeeper” role by not only examining the validity of the underlying science more rigorously, but also examining the methodology used by the expert in applying the science to the specific case. In particular, the court opinion recommended four straightforward guidelines for judges to consider when examining the merits of the testimony⁴.

1. Whether the expert’s technique or theory can be or has been tested.
2. Whether the theory has been subject to peer review and publication.
3. The known or potential rate of error of the technique or theory.
4. Whether the theory or technique has been generally accepted in the relevant field.

A number of subsequent cases expanded on Daubert, including an expansion of its scope to include non-scientific expert testimony, and in December of 2000 Federal Rule of Evidence 702 was formally amended to reflect the implications of the Daubert standard⁵. To be admitted, the testimony must be (1) based upon sufficient facts or data, (2) the product of reliable principles and methods, and (3) the witness must apply the principles and methods reliably to the facts of the case⁶.

How does Arizona’s standard differ from Daubert?

While the Daubert standard is firmly established in federal courts, it has not been fully adopted at the state level. Thirty seven states use a standard that reflects some or all of Daubert’s elements, but Arizona continues to use a weakened version of the Frye standard. Frye generally requires that expert testimony be admitted if it is based upon science that has gained “general acceptance” in the relevant scientific field. Arizona follows this rule, but the Arizona Supreme Court added that testimony based on the expert’s “own experience, observation, or research” (ie, something that could not possibly gain general acceptance) was not subject to the Frye

standard⁷. This means that the type of testimony that a Daubert hearing would closely examine is not subject to any type of review in Arizona, which increases the probability of “junk science” making its way into the court room.

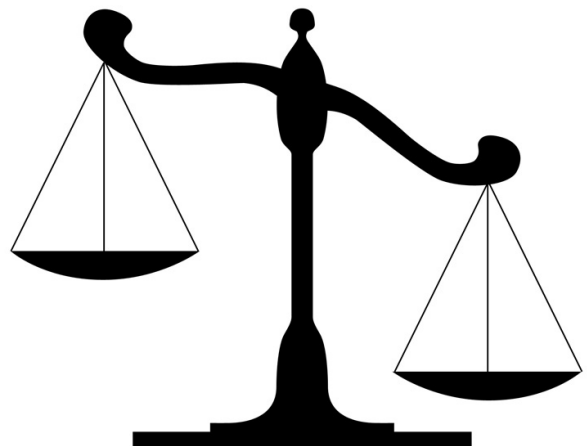
Does Daubert have an effect?

A 2001 study by the RAND Institute for Civil Justice analyzed trends in challenges to the admission of expert witnesses in federal courts between 1980 and 1999. They found significant evidence suggesting that judges applied stricter standards after the Daubert ruling of 1993, which initially led to higher success rates for those challenging the admission of expert testimony. Over time, these success rates declined, likely resulting from an increase in the quality of the witness testimony being presented to the court and/or an increase in the overall number of challenges⁸. In either case, this indicates that Daubert impacted the behavior of federal judges, and litigants responded by adjusting their own behavior.

How can Daubert benefit Arizona?

Fair Trial

Adopting the Daubert standard has become a priority for liability reform advocates because of its ability to screen out lawsuits based on “junk science.” However, implementing strong evidence standards benefits the judicial system as a whole, not just de-



fendants. A plaintiff with a legitimate claim is also vulnerable to a defense based on “junk science.” Effectively screening the evidence presented to a jury improves the likelihood of a fair trial for all parties involved.

Improve Arizona Business Environment

State legal systems create incentives that encourage or discourage certain behaviors. The Daubert standard discourages lawyers from filing cases whose merit depend on less-than-sound scientific testimony. Conversely, Arizona leaves the door open to these types of lawsuits by continuing to implement the Frye standard. Companies operating in Arizona incur the additional costs of defending lawsuits that would have no merit in neighboring states that have adopted some form of the Daubert standard

The legal costs are not limited to those companies who actually face litigation. The price of liability insurance paid by any company partially reflects the tort environment in which the business operates. Arizona’s Frye standard fails to effectively discourage ungrounded lawsuits, therefore increasing the probability of a firm facing litigation. This higher probability is reflected in the liability insurance rate paid by each firm. Money that could be used for investment and job creation is instead diverted to a relatively less productive use as an insurance premium. Switching to the Daubert standard could immediately improve Arizona’s business environment by allowing firms to spend less money on legal defense and insurance and more money on jobs and investment.

How can Arizona adopt Daubert?

While the Arizona Constitution grants courts the power to create their own rules of procedure, the Legislature still has the authority to pass supplementary laws that do not conflict with the existing rules. Frye is the standard used by the Arizona Supreme Court to interpret the vague Arizona Rule of Evidence 702. By adopting language that reflects the Daubert standard, the Legislature will be guid-

ing the interpretation of Rule 702 as opposed to creating a law that supersedes or conflicts with the current rule. Previous laws that clarified or supplemented the Rules of Evidence have been upheld by Arizona courts.

Conclusion

The Legislature has the ability and legal authority to improve both the quality of the legal system and the overall attractiveness of the business environment in Arizona by switching from Frye to Daubert. During a time of 9.1% unemployment in the state, adoption of the Daubert standard would be a positive step toward an improved business climate that could allow companies to succeed, grow, and generate the jobs that are desperately needed.

¹ Bureau of Labor Statistics, State and Metro Area Employment, Hours, & Earnings. Data available at <http://www.bls.gov/sae/data.htm>

² Frye v United States 293 F. 1013 (D.C.. Cir 1923)

³ Bernstein, David E. and Jackson, Jeffrey D., “The Daubert Trilogy in the States.” *Jurimetrics*, Vol. 44, 2004. Available at SSRN: <http://ssrn.com/abstract=498786>

⁴ Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993)

⁵ The “Daubert Trilogy” includes Daubert, General Electric Co. v. Joiner, 522 U.S. 136 (1997) and Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999)

⁶ Federal Rule of Evidence 702

⁷ Logerquist v. McVey, 1 P.3d 113 (Ariz. 2000)

⁸ Dixon, Lloyd and Gill, Brian, “Changes in the Standards for Admitting Expert Evidence in Federal Civil Cases Since the Daubert Decision,” (2001) Available at http://www.rand.org/pubs/monograph_reports/MR1439/MR1439.pdf