George Mason University
SCHOOL of LAW

THE DAUBERT TRILOGY IN THE STATES

David E. Bernstein
Jeffrey D. Jackson

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THE DAUBERT TRILOGY IN THE STATES

David E. Bernstein*
Jeffrey D. Jackson**

ABSTRACT: The Daubert trilogy of Supreme Court cases--Daubert, Joiner, and Kumho Tire, codified in Federal Rule of Evidence 702--has established new rules the admissibility such evidence in federal court.

The situation in state courts is far more unsettled. First, a significant number of courts have continued to adhere to the tests they used before Daubert, either Frye general acceptance test or some other test.

Even among those states which have adopted Daubert, its application has been decidedly nonuniform. Only few states have adopted the Daubert trilogy in its entirety. Some states have adopted Daubert, but not yet adopted Kumho Tire or Joiner. Others have adopted Daubert and Kumho Tire, but not Joiner, or have adopted only part of Joiner. Still other states view the Daubert trilogy as only instructive or consistent with their own traditional state tests.

This article analyzes the degree to which the holdings of the Daubert trilogy have been adopted by state courts. This analysis shows that there is a rich diversity of tests within the states, so much so that, contrary to the prevailing impression, the Daubert trilogy is not yet the majority standard even among the states that have rejected Frye.


*Professor, George Mason University School of Law.
**LLM., Georgetown University Law Center, 2003.
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In 1993, the Supreme Court decided what became the first in the “Daubert trilogy” of cases concerning the admissibility of expert testimony, *Daubert v. Merrell Dow Pharmaceuticals, Inc.* In *Daubert*, the Court determined that Federal Rule of Evidence 702 mandated that scientific evidence be subject to a reliability test, rather than the common law “general acceptance test” set forth in *Frye v. United States.* In place of *Frye*, the Court imposed upon judges the “gatekeeping” responsibility of assessing whether “the reasoning or methodology underlying the testimony is scientifically valid and . . . whether that reasoning or methodology properly can be applied to the facts at issue.” The Court set forth several general factors that might be considered in reaching a decision on whether to admit scientific expert evidence, including: (1) whether the theory or technique can be or has been tested; (2) whether the theory or technique has been subjected to peer review and publication, as such review “increases the likelihood that substantive flaws in the methodology will be detected”; (3) in the case of the particular technique, the known or potential rate of error; and (4) whether the theory or technique enjoys general acceptance within the relevant scientific community.

*Daubert* changed the nature of the admissibility determination by judges from *Frye*’s deference to the views of scientists in a relevant field to an independent evaluation of the proffered evidence. Courts and commentators disagreed, however, regarding whether this “revolution” in how judges were to go about deciding whether to admit scientific evidence would lead to more permissive or more restrictive admissibility rulings.

Both sides of the debate could point to evidence favoring their position. Those who believed that *Daubert* was relatively permissive noted that the *Frye* general acceptance test had been considered by many an inflexible and unduly conservative test that excluded innovative scientific techniques. *Daubert*, by promising flexibility and case-by-case analysis of admissibility, seemed to liberalize admissibility rules by allowing courts to reconsider the validity of polygraph tests and other forensic techniques that had been excluded on general acceptance grounds but which some scientists believed were reliable. On the other hand, *Daubert* also gave courts the opportunity to reconsider the admissibility of

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2. 293 F. 1013 (D.C. Cir. 1923). Under the *Frye* test, courts focused on whether the scientific principle at issue had “gained general acceptance in the particular field in which it belongs.” *Id.* at 1014.
4. *Id.* at 593–94.
6. *Id.*
common forensic techniques, such as handwriting analysis, that were generally accepted among forensic scientists, but had never been proven reliable.

Similarly, before Daubert a string of recent federal circuit court opinions had applied Frye to toxic tort evidence and had interpreted Frye rather stringently. Because plaintiffs’ proffered evidence in toxic tort cases is often sufficiently novel that it will not yet have achieved general acceptance, the Frye test, especially if applied to an expert’s conclusions, threatened to severely impede the ability of toxic tort plaintiffs to present admissible evidence. Daubert, by emphasizing the flexibility of the admissibility determination and by admonishing courts that they must focus on an expert’s methodology, not his conclusions, appeared to some to be a more permissive alternative to Frye. The death of Frye seemed an especially serious blow to advocates of strict scrutiny of scientific evidence in toxic tort cases because their most well-known champion, Peter Huber, was a strong advocate of Frye.

However, Huber and other advocates of strict scrutiny expressed satisfaction with Daubert. Despite the recent precedents noted above, Frye had rarely been applied to toxic tort evidence. Moreover, courts had often applied Frye in a cursory manner, examining only the general acceptance of an expert’s overarching methodology and not also whether that methodology was used in the

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8. As Michael Saks notes, “the Frye test suffers from a special paradox: because less rigorous fields will reach a state of ‘general acceptance’ more readily than more rigorous fields, courts employing Frye will more readily admit the offerings of less dependable fields and less readily admit the offerings of more dependable fields.” Michael J. Saks, The Aftermath of Daubert: An Evolving Jurisprudence of Expert Evidence, 40 Jurimetrics J. 229, 230 (2000); see also Faigman et al., supra note 5, § 1–24, at 10.


Often overlooked is that Huber did not advocate application of the traditional Frye test but instead advocated “a sophisticated, modern application of Frye [that] looks to the methods behind a scientific report.” Huber, supra note 11, at 200. Huber’s primary concern was that courts assess the underlying reliability of scientific evidence, using scientific standards; he used Frye as a shorthand for strict scrutiny that would incorporate appropriate scientific standards and was not especially attached to the general acceptance test, as such. An author of this Article had worked for several years with Huber on scientific evidence issues before Daubert and recalls Huber’s delight when Daubert was decided. His endorsement of Daubert was not “spin”—he really believed that the Daubert Court established a sound framework for the admissibility of scientific evidence.
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particular case in a generally accepted way. *Daubert*, by contrast, required an inquiry into the reliability of proffered scientific evidence, an inquiry that, it was argued, would inevitably require courts to review experts’ reasoning process, something they rarely did under *Frye*.

Debate along these lines raged for several years, until the Court decided the second case in the *Daubert* trilogy, *General Electric Co. v. Joiner*, in 1997. *Joiner* clarified the *Daubert* test in two important respects. First, *Joiner* made it clear that courts could scrutinize the reliability of an expert’s reasoning process as well as the expert’s general methodology and that “nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert.” Instead, courts were free to conclude that “there is simply too great an analytical gap between the data and the opinion proffered.” The *Joiner* Court, moreover, did not simply remand the case but sent a clear “strict scrutiny message” by reversing the Eleventh Circuit and upholding the district court’s exclusion of the marginal causation evidence that plaintiffs often rely on in toxic tort cases. Those who had hoped that *Daubert* had liberalized the admissibility standards for evidence in toxic tort cases conceded defeat.

Further, *Joiner* made it clear that the decision of the trial court judge as to whether to admit particular scientific evidence was to be reviewed only for an abuse of discretion. The Court rejected the notion propounded by several circuits that they should engage in especially stringent review of decisions excluding scientific evidence proffered by plaintiffs in toxic tort and products liability cases.

The third case in the *Daubert* trilogy, *Kumho Tire Co. v. Carmichael*, further clarified that *Daubert’s* overall effect in the federal courts would be to contract the scope of admissibility of expert testimony. *Kumho Tire* extended *Daubert’s* gatekeeping function beyond scientific evidence to encompass all

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13. These commentators found support in the Court’s statement that Rule 702 “requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility.” *Daubert*, 509 U.S. 579, 592 (1993).
15. *Id.* at 146.
17. See Michael H. Gottesman, *From Barefoot to Daubert to Joiner: Triple Play or Double Error?*, 40 ARIZ. L. REV. 753, 755 (1998). Professor Gottesman represented the plaintiffs in *Joiner* and *Daubert*.

By contrast, the admission of forensic evidence in criminal cases remains relatively routine. Legal commentators agree that the *Daubert* trilogy has had far less of a constricting effect on forensic science evidence compared with its effect on evidence in torts cases, most likely because defense attorneys in routine criminal cases lack the resources and expertise to challenge the admission of scientific evidence. Moreover, because all three cases in the *Daubert* trilogy arose in the civil context, lower courts seem more inclined in to overcome their traditional inertia about admitting scientific evidence in that context. In any event, the relative ease of admission of forensic science evidence does not suggest that *Daubert* is more liberal regarding such matters than is *Frye*, because forensic science evidence is also routinely admitted in *Frye* jurisdictions.
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expert testimony. It is difficult to overestimate the significance of this ruling. Before Daubert, the Frye general acceptance test had traditionally applied only to limited categories of scientific expert testimony, with all other expert testimony subject to a liberal admissibility standard that focused primarily on the qualifications of the expert. By contrast, Kumho Tire expanded Daubert’s reliability test to the broader universe of expert testimony.

Kumho Tire also stated that the factors suggested in Daubert for evaluating reliability were not meant to constitute a “definitive checklist or test,” but instead were meant only to be illustrative. The applicability of these and other factors depends “upon the particular circumstances of the particular case at issue.” The Daubert trilogy was later codified in Federal Rule of Evidence 702, as amended in December 2000:

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.

Meanwhile, many states changed their evidentiary rules in reaction to Daubert. Although binding only on federal courts, a number of state courts quickly adopted the Daubert test for the admissibility of scientific evidence.

By 1998 one commentator claimed that “thirty-three states have adopted Daubert in essence.” This statement greatly overstated Daubert’s influence. It appears that the author’s count included all jurisdictions that adopted a test other than Frye, which remains the rule in a significant minority of states. As

20. Id. at 49.
21. Id. at 150–51 (discussing Daubert, 509 U.S. at 593).
22. Id. at 150.
discussed below, however, by mid-2003 only twenty-seven states had adopted a test consistent with Daubert. Also, “consistent with” is a relatively broad category, encompassing states that have not directly adopted Daubert but have stated that Daubert is consistent with their state tests or is otherwise instructive. Also, courts that have adopted or stated their approval of Daubert have not necessarily adopted Joiner or Kumho Tire’s expansion of Daubert.

Some of the states that adopted Daubert had been Frye jurisdictions, and their courts endorsed Daubert because they believed that it was a more permissive test than Frye.26 Other state courts thought Daubert was consistent with liberal admissibility rules they had previously adopted. However, as some commentators predicted,25 Daubert, particularly as extended by Joiner and Kumho Tire, became far broader than Frye ever was. Unlike Daubert, Frye was limited to “novel” scientific evidence; unlike Joiner, Frye typically was applied only to general methodology, not to reasoning; unlike Kumho Tire, Frye did not apply to nonscientific evidence.

Not surprisingly, then, some of the states that had jumped quickly on the Daubert bandwagon have been more reluctant to adopt Joiner and Kumho Tire. Only nine of the Daubert states have either explicitly or implicitly adopted all of the holdings of the trilogy.27 Several states, meanwhile, have rejected all or part of Joiner or Kumho Tire.

This article analyzes the degree to which the holdings of the Daubert trilogy have been adopted by various state courts. Part I discusses states that have adopted the Daubert trilogy in its entirety, either explicitly or implicitly. Part II discusses states that have adopted the holdings of Daubert and Kumho Tire but have not fully adopted Joiner. Part III discusses states that have adopted Daubert but not Kumho Tire. Part IV discusses states that have refused to explicitly adopt Daubert but view some or all of the trilogy as instructive or consistent with their
own state tests. Finally, Part V discusses states that have rejected *Frye* but apply tests for the admissibility of expert testimony that bear little resemblance to *Daubert*. This analysis shows that there is a rich diversity of tests within the states, so much so that the *Daubert* trilogy is not the majority test even among the states that have rejected *Frye*. 
I. STATES ADOPTING THE DAUBERT TRILOGY IN ITS ENTIRETY

Only nine states—Arkansas, Delaware, Louisiana, Massachusetts, Mississippi, Nebraska, Oklahoma, Texas, and Wyoming—have either explicitly or implicitly adopted the full holdings of the Daubert trilogy. Even this may be an overstatement, however. The two judicial opinions in Louisiana adopting Joiner’s scrutiny of the expert’s reasoning process and abuse of discretion standards are Court of Appeals cases. The Louisiana Supreme Court has not yet ruled on the viability of Joiner in Louisiana.

II. STATES ADOPTING DAUBERT AND KUMHO TIRE BUT NOT JOINER

Six states have adopted the reasoning and holdings of both Daubert and Kumho Tire but have not adopted Joiner. In Kentucky, Ohio, North Carolina, and others, see supra note 31.

33. Miss. R. Evid. 702.
38. See supra note 31.
39. Kentucky has adopted Daubert, Kumho Tire, and Joiner’s abuse of discretion standard. See Mitchell v. Commonwealth, 908 S.W.2d 100 (Ky. 1995) (adopting Daubert), overruled on other grounds by Fugate v. Commonwealth, 993 S.W.2d 931 (Ky. 1999); Goodyear Tire & Rubber Co. v. Thompson, 11 S.W.3d 575 (Ky. 2000) (adopting Kumho Tire and Joiner’s abuse of discretion standard). It has not considered whether to adopt Joiner’s scrutiny of the reasoning process.
41. North Carolina has adopted both Daubert and, in a court of appeals opinion, Kumho Tire.
Rhode Island, and South Dakota, the issues involved in *Joiner* have not yet arisen. New Hampshire, by contrast, has adopted both *Daubert* and *Kumho Tire*, but has repudiated *Joiner*’s abuse of discretion standard, at least insofar as it applies to situations where “the reliability or general acceptance of novel scientific evidence is not likely to vary according to the circumstances of a particular case.” The New Hampshire Supreme Court held that the level of scrutiny that it applies to lower courts’ admissibility decisions will vary depending on “the complexity of the evidence involved and the impact the evidence likely will have on the trial itself,” and where the reliability of the theory underlying the technique would not vary with each case, it would review the lower court’s decision with regard to reliability *de novo*.

### III. STATES ADOPTING *DAUBERT* BUT NOT *KUMHO TIRE* OR *JOINER*

Seven states have adopted *Daubert*’s reasoning, but have not adopted *Kumho Tire*’s holding that the reliability test applies to all expert evidence or *Joiner*’s holding that the reliability test may be applied to an expert’s reasoning process. As discussed below, in most of these states these issues have not yet explicitly arisen, but a few states have implicitly or explicitly repudiated *Kumho Tire*.

Of the states that have not yet explicitly ruled on *Kumho Tire*, Vermont is the most likely to adopt *Kumho Tire*’s holding. The Vermont Supreme Court adopted *Daubert* in 1995, and more recently referred approvingly to *Kumho Tire* in discussing its *Daubert* test. It appears, therefore, that Vermont is likely to adopt *Kumho Tire*’s holding if squarely faced with the question.

Alaska has adopted *Daubert* and has also adopted *Joiner*’s abuse of...
discretion standard. However, the Alaska Supreme Court has not expressed a view on Kumho Tire or Joiner’s expansion of the Daubert test. The Alaska Court of Appeals favorably addressed Kumho Tire in a pair of unpublished opinions, Bourdon v. State and Vent v. State. In Bourdon, the court, citing Kumho Tire, applied Daubert to child abuse expert testimony. In Vent, the court noted scholarly criticism of extending Daubert beyond scientific testimony but ultimately followed Kumho Tire in applying Daubert to expert testimony regarding the psychology of confessions.

New Mexico, one of the first state courts to adopt Daubert, has not yet explicitly adopted Kumho Tire, although the Court of Appeals suggested in dicta that it would adopt Kumho Tire. It is not clear whether the New Mexico Supreme Court would adopt Kumho Tire if given the opportunity, nor has the court expressed an opinion on the substantive aspect of Joiner.

Similarly, although Connecticut has adopted Daubert, the Connecticut Court of Appeals has noted that “[o]ur courts . . . have neither adopted nor rejected the Kumho Tire Co., Ltd., rule.” The commentary to Connecticut Code of Evidence § 7-2, which incorporates the Daubert standard, states that it “should not be read either as including or precluding the Kumho Tire rule.” Connecticut has adopted Joiner’s abuse of discretion standard but has not addressed whether to adopt Joiner’s scrutiny-of-the-reasoning-process holding.

In State v. O’Key, the Oregon Supreme Court, although expressly

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53. Vent, 2003 WL 294364, at *7–8. In noting criticism of extending Daubert to nonscientific evidence, the court quoted Edward J. Imwinkelreid’s comment that “although the Daubert Court may have selected the optimal test for the admissibility of scientific evidence, that test is useless as a criterion for the admissibility of other types of expert testimony.” Id. at *7 (quoting Edward J. Imwinkelreid, The Next Step After Daubert: Developing a Similarly Epistemological Approach to Ensuring the Reliability of Nonscientific Expert Testimony, 15 CARDOZO L. REV. 2271, 2285 (1984)).
55. See Banks v. IMC Kalium Carlsbad Potash Co., 62 P.3d 290 (N.M. Ct. App. 2001). In determining whether New Mexico’s case adopting Daubert should apply to scientific evidence in a proceeding before the Workers Compensation Administration, the Court of Appeals noted that “[t]he Alberico/Daubert analysis is not limited to novel scientific theories” and cited Kumho Tire for this proposition. Id. at 293.
56. See State v. Torres, 976 P.2d 20 (N.M. 1999) (explicitly rejecting Joiner’s abuse of discretion standard in favor of a de novo review of the decision whether to apply Daubert and a discretionary review of the findings).
59. CONN. CT. R. § 7-2 (West 2003).
60. See State v. Pappas, 776 A.2d 1091 (Conn. 2001).
62. 899 P.2d 663 (Or. 1995).
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stating that Daubert was not binding, adopted a similar “gatekeeping” rule for scientific evidence. However, Oregon has not made a decision whether to adopt Kumho Tire. The Oregon Court of Appeals has noted that “[i]t is by no means clear” whether courts are to assume a gatekeeping role for evidence other than scientific evidence. The Oregon Supreme Court has, however, expressly repudiated Joiner’s abuse of discretion standard of review, stating that “[n]otwithstanding the usual deference to trial court discretion, we as an appellate court retain our role to determine the admissibility of scientific evidence under the Oregon Evidence Code.” The Oregon Supreme Court has also implicitly rejected Joiner. The court held that courts may only scrutinize an expert’s general methodology and not his reasoning.

West Virginia, another early adopter of Daubert, has also failed to adopt Kumho Tire. In West Virginia Div. of Highways v. Butler, the West Virginia Supreme Court explicitly declined to adopt Kumho Tire, applying instead a more permissive standard for nonscientific expert evidence. Two years later in Watson v. Inco Alloys Int’l, Inc., the court again rejected Kumho Tire. However, Justice Davis, the author of the majority opinion, urged the court to adopt Kumho Tire in the future. In State v. Leep, the West Virginia Supreme Court noted the controversy but decided not to settle it, stating that it would “reserve further consideration thereof for a more factually appropriate case.”

Montana, also an early adopter of Daubert, has implicitly rejected

63. Id. at 680 n.7.
66. Id. at 606.
68. 516 S.E.2d 769 (W. Va. 1999).
69. Id. at 774 n.4 (stating “[w]e decline to adopt the Kumho analysis in this case”).
70. 545 S.E.2d 294 (W. Va. 2001).
71. Id. at 301.
72. Davis stated that:
At this time, the majority declines to expressly address whether we will adopt the new federal procedure regarding expert testimony. However, the author of this opinion, separate from the majority, does not believe that Kumho would be a death knell to the admission of non-scientific expert testimony. Indeed, Kumho has been approved by a majority of state courts who have taken it under consideration. The author of this opinion believes that it is the restrictive interpretation of Kumho anticipated by some commentators that is causing confusion. However, there are two specific reasons that Kumho does not realistically present any new barrier to the admissibility of expert testimony that is based on technical or other specialized knowledge. First, the Kumho test is a flexible one that does not require application of the specific factors suggested in Daubert, which were also intended to be applied flexibly. . . . Second, Kumho, as an extension of Daubert, applies only to expert testimony that is not subject to judicial notice.
73. Id. at 301 n.11 (citations omitted).
74. Id. at 143 n.21.
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Kumho. In State v. Cline, the Montana Supreme Court confined consideration of the Daubert factors to “novel scientific evidence.” The Montana Supreme Court has not explicitly taken a position on Joiner, but it appears to follow Joiner’s abuse of discretion standard.

Alabama applies Daubert only in very limited circumstances. Alabama Code § 36-18-30 mandates that the Daubert test be applied to “[e]xpert testimony or evidence relating to the use of genetic markers contained in or derived from DNA for identification purposes. . . .” The Alabama Supreme Court has refused to apply Daubert outside of this specific circumstance. The Alabama Supreme Court has not addressed the applicability of either factor of Joiner.

IV. STATES HOLDING THAT DAUBERT IS INSTRUCTIVE

There are five states that have not adopted Daubert but utilize the Daubert factors in interpreting their own tests. As might be expected, these courts vary widely on the application of the rest of the Daubert trilogy. Tennessee, for example, has adopted Daubert’s test in all but name. Tennessee has also adopted Kumho Tire’s holding extending the Daubert factors to all expert evidence, as well as Joiner’s scrutiny of the reasoning process and standard of review.

Hawaii has expressly refrained from adopting Daubert. However, the Hawaii Supreme Court has held that, because the Hawaii Rules of Evidence are patterned after the Federal Rules, Daubert is “instructive” in interpreting the state rule. The Hawaii Supreme Court has stated that, to be admissible, evidence must be both “relevant” and “reliable” and that the Daubert factors are helpful in assessing reliability. The court applies this analysis to all expert evidence, based on Kumho Tire. Further, the court has partially adopted Joiner’s abuse of discretion review consistent with Joiner.

76. See State v. Cline, 909 P.2d 1171 (Mont. 1996).
77. Id. at 1177.
78. See id. at 1178 (examining the district court’s admission of novel scientific testimony for abuse of discretion).
80. See AAA Cooper Transp. v. Philyaw, 842 So. 2d 689, 690 n.1 ( Ala. 2002).
81. See McDaniel v. CSX Transp., Inc., 955 S.W.2d 257, 265 (Tenn. 1997) (stating that “[a]lthough we do not expressly adopt Daubert, the non-exclusive list of factors to determine reliability are useful in applying our Rules 702 and 703”).
82. See State v. Stevens, 78 S.W.3d 817 (Tenn. 2002) (adopting Kumho Tire’s analysis and Joiner’s scrutiny of the reasoning process, as well as providing for abuse of discretion review consistent with Joiner).
83. See Acoba v. General Tire, Inc., 986 P.2d 288, 300 n.6 (Haw. 1999) (“To date this court has neither expressly approved nor rejected the Daubert criteria. We decline to do so at this time.”), State v. Vliet, 19 P.3d 42, 53 (2001) (stating “[t]he prosecution is correct in contending that this court has not adopted the Daubert test . . . and we expressly refrain from doing so”).
84. Vliet, 19 P.3d at 53.
85. Id. at 54–55.
86. See id. at 56–57 (stating that “[w]ithin this framework, we do not consider it essential or necessary that a trial court embark upon a preliminary determination of whether the proffered expert testimony should be characterized as scientific, technical, or otherwise specialized knowledge”).
discretion test but reviews ultimate conclusions de novo. 87 Hawaii courts have not addressed whether courts may scrutinize an expert’s reasoning under the Hawaii Rules of Evidence.

Indiana has held that Daubert is “helpful, but not controlling” in interpreting its rule of evidence. 88 Indiana has also implicitly rejected Kumho Tire’s extension of courts’ Daubert gatekeeping role to nonscientific expert testimony. The Indiana Supreme Court recently held that Indiana’s version of Rule 702 applies only to scientific evidence and not to expert testimony based on specialized knowledge. 89 Although the Indiana Supreme Court has not passed on Joiner’s holding regarding scrutiny of the reasoning process, the Indiana Court of Appeals has followed Joiner on this issue. 90 While not explicitly addressing Joiner’s abuse of discretion standard, the Indiana Supreme Court has held that decisions on reliability should be reviewed for abuse of discretion. 91

Iowa has held that district courts are not required to consider the Daubert factors, but they may do so if they find that the factors are “helpful,” especially in complex cases. 92 Similarly, judges have the discretion to apply the Daubert factors to all expert evidence in such cases, not just to scientific evidence. 93 The focus, according to the state supreme court, should be entirely on the principles and methodology utilized by the expert, not on the conclusions generated. 94 This language was taken from Daubert, but without the clarifying language from Joiner that conclusions and methodology are not completely distinct and that reasoning may therefore be scrutinized. Implicitly, then, Iowa has rejected that aspect of Joiner. The virtually unlimited discretion allowed Iowa courts in the application of the factors is consistent with Joiner’s standard of review.

Colorado has adopted a “totality of the circumstances” test for scientific expert evidence that focuses on whether the evidence involved is both relevant and reliable. 95 In assessing the reliability, courts are directed to conduct a broad inquiry and may consider the factors set forth in Daubert. 96 The use of the Daubert factors apparently applies only to scientific evidence, rather than to all expert evidence, so Colorado seems to have rejected Kumho Tire. 97 Colorado has

87. See id. at 55–56 n.24 (explaining its partial adoption of a standard consistent with Joiner, but noting that it differs from Joiner as to the standard to be applied to ultimate conclusion of admissibility).
88. McGrew v. State, 682 N.E.2d 1289, 1290 (Ind. 1997). Indiana Rule of Evidence 702(b), unlike the pre-2000 Federal Rules of Evidence, requires that expert scientific evidence may not be admitted unless “the court is satisfied that the scientific principles upon which the expert testimony rests are reliable.” Ind. R. Evid. 702(b) (West 2003).
91. See McGrew, 682 N.E.2d at 1292.
93. Id. at 532–33.
94. See id. at 533.
95. See People v. Shreck, 22 P.3d 68, 77 (Colo. 2001).
96. Id. at 77–78.
97. See id. at 73–79. The rule stated by the Court in Shreck is stated as the rule for scientific
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not discussed Joiner’s “reasoning process” holding, but it appears that the expansive discretion granted to trial courts in determining relevance and reliability would not foreclose it.98 This expansive discretion is also consistent with Joiner’s abuse of discretion standard of review.

Maine has not adopted Daubert. However, its analysis of its own version of pre-2000 Fed. R. Evid. 702 parallels Daubert, and the Maine Supreme Court cites Daubert along with its own cases.99 It appears that Maine applies this analysis to all expert evidence.100 The review is for “abuse of discretion or clear error.”101 No cases have addressed the question of whether Joiner’s reasoning process analysis applies.

IV. NON-FRYE STATES THAT REJECT DAUBERT

Idaho’s test for admissibility of expert evidence is simply to follow the language of Idaho Rule of Evidence 702, which is identical to pre-2000 Fed. R. Evid. 702.102 Because this standard is vague, the Idaho Court of Appeals has looked to Daubert for guidance on several occasions.103 However, the Idaho Supreme Court recently reaffirmed its rejection of the application of Daubert to expert testimony and cited with approval a “bare analysis” of expert testimony conducted by a trial court.104

New Jersey has refused to adopt Daubert but follows an analysis that is somewhat similar for scientific evidence in civil cases.105 Under this analysis, “an expert must be able to identify the factual basis for his conclusion, explain his methodology, and demonstrate that both the factual basis and underlying methodology are scientifically reliable.”106 New Jersey has not applied this analysis beyond scientific evidence, and, despite the test’s superficial similarity to Daubert and Joiner, the New Jersey courts are known to be quite liberal about admitting expert scientific testimony in civil cases. Further, the standard of review in New Jersey of trial court admissibility rulings is unclear.107

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evidence in Colorado. Id. at 73. The court in Shreck did refuse to limit the rule to “novel” scientific evidence. Id. at 78 n.12.

98. See id. at 78–79 (discussing the liberal standards and discretion of the court in determining reliability and relevance).


100. See Green v. Cessna Aircraft Co., 673 A.2d 216, 218-19 (Me. 1996) (citing Daubert regarding the admissibility of expert testimony about failure of parts on an aircraft); see also State v. Tomah, 736 A.2d 1047, 1055 (Me. 1999) (stating that expert evidence must meet Rule 702).

101. MacDonald, 718 A.2d at 198.


106. Kemp, 809 A.2d at 86.

107. See Harvey, 699 A.2d at 620 (noting the Eleventh Circuit’s decision in Joiner but coming to no conclusion).

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Like *Daubert*, North Dakota’s test for the admissibility of scientific evidence requires trial courts to inquire into the relevance and reliability of the expert testimony.\(^{108}\) However, the North Dakota rule “envisions generous allowance of the use of expert testimony if the witnesses are shown to have some degree of expertise in the field in which they are to testify.”\(^{109}\) This standard is far more liberal than *Daubert and Joiner*.\(^{110}\)

South Carolina’s test, like *Daubert*, imposes a “gate-keeping” requirement for scientific evidence.\(^{111}\) However, South Carolina’s test uses different factors to assess reliability: “(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedure.”\(^{112}\) The standard of review is abuse of discretion, but, unlike the *Daubert* factors, which are merely illustrative, South Carolina courts must apply their states’ four factors.\(^{113}\) In practice, South Carolina’s test appears to be far more forgiving than *Daubert-joiner*.\(^{114}\)

Utah applies an apparently more rigorous standard than *Daubert* to the admission of scientific evidence.\(^{115}\) In *State v. Crosby*, the Utah Supreme Court determined that its long-held standard was similar to, although less flexible than, *Daubert*.\(^{116}\) Under Utah’s standard, the court must determine whether scientific evidence is “inherently reliable” before it can be admitted. Such a determination involves exploration of “the correctness of the scientific principles underlying the testimony, the accuracy and reliability of the techniques utilized in applying the principles to the subject matter before the court and in reaching the conclusion expressed in the opinion, and the qualifications of those actually gathering the data and analyzing it.”\(^{117}\) The trial court should “carefully explore each logical link in the chain that leads to the expert testimony given in court and determine its reliability.”\(^{118}\) However, the Utah test applies only to expert testimony “based on newly discovered principles”\(^{119}\) or testimony based on “novel scientific methods and techniques.”\(^{120}\) Other types of expert testimony, such as medical diagnoses, are subject to a much more liberal test.

Virginia imposes a duty on the trial court, as in *Daubert*, to make a
threshold finding of reliability whenever “unfamiliar” scientific evidence is offered.\textsuperscript{121} However, Virginia has expressly left open the question of whether the \textit{Daubert} factors could be applied to this determination.\textsuperscript{122}

Wisconsin, while not ruling out the possibility that it will some day adopt \textit{Daubert},\textsuperscript{123} for now eschews any substantive test for the admissibility of expert testimony—mere qualifications are sufficient:

The fundamental determination of admissibility comes at the time the witness is “qualified” as an expert. In a state such as Wisconsin, where substantially unlimited cross-examination is permitted, the underlying theory or principle on which admissibility is based can be attacked by cross-examination or by other types of impeachment.\textsuperscript{124}

Nevada has a similarly liberal test for the admission of expert testimony.\textsuperscript{125} The Georgia Supreme Court has not addressed \textit{Daubert}, but the state Court of Appeals has consistently held that \textit{Daubert} is not the rule in Georgia, leaving Georgia with a very liberal test for the admissibility of scientific evidence.\textsuperscript{126}

As the analysis in this article shows, only a minority of state courts have wholeheartedly adopted the \textit{Daubert} trilogy. Many states adopted \textit{Daubert} when they thought that it clearly liberalized admissibility standards for scientific evidence relative to the old \textit{Frye} general acceptance test. Such states are not inclined to adopt \textit{Joiner} or \textit{Kumho Tire}, which made it clear that \textit{Daubert} will often lead to the exclusion of evidence that would either be admitted under \textit{Frye}, or, even more significant, evidence that \textit{Frye} would not have applied to in the first instance. Even states that are generally sympathetic to \textit{Daubert} and its relatively stringent reliability test have not rushed to endorse \textit{Joiner} and \textit{Kumho Tire}. Rather, they have adopted those parts of the \textit{Daubert} trilogy that were consistent with their prior case law and have taken a wait-and-see approach to novel issues. Many states, meanwhile, either see \textit{Daubert} as merely instructive or have rejected it entirely. While more state courts likely will adopt the \textit{Daubert} trilogy as the relevant issues arise, if the trilogy is to become the standard for the admissibility of expert evidence around the country, it likely will be a result of state adoption of rules equivalent to Federal of Evidence 702, as amended in 2000.


\textsuperscript{122} See John v. Im, 559 S.E.2d 694, 698 (Va. 2002) (“We note, however, that we have not previously considered the question whether the \textit{Daubert} analysis employed by the federal courts should be employed in our trial courts to determine the scientific reliability of expert testimony. [Footnote omitted.] Therefore, we leave this question open for future consideration.”).

\textsuperscript{123} Conley Publ’g Group Ltd. v. Journal Communications Inc., 665 N.W.2d 879, 892 (Wis. 2003).

\textsuperscript{124} See State v. Walstead, 351 N.W.2d 469, 487 (Wis. 1984).

\textsuperscript{125} Dow Chem. Co. v. Mahlum, 970 P.2d 98, 108 n.3 (Nev. 1998).

The Daubert Trilogy in the States