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## THE *DAUBERT* TRILOGY IN THE STATES

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**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*.

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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.*<sup>1</sup> 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*.<sup>2</sup> 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.”<sup>3</sup> 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.<sup>4</sup>

*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.<sup>5</sup> Courts and commentators disagreed, however, regarding whether this “revolution”<sup>6</sup> 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.<sup>7</sup> *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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1. 509 U.S. 579 (1993).

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.

3. *Daubert*, 509 U.S. at 593.

4. *Id.* at 593–94.

5. See FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY § 1–30, at 13 (2d ed. 2002).

6. *Id.*

7. For the relevant arguments, see Paul Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half Century Later*, 80 COLUM. L. REV. 1197 (1980).

common forensic techniques, such as handwriting analysis, that were generally accepted among forensic scientists, but had never been proven reliable.<sup>8</sup>

Similarly, before *Daubert* a string of recent federal circuit court opinions had applied *Frye* to toxic tort evidence and had interpreted *Frye* rather stringently.<sup>9</sup> 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*.<sup>10</sup> 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*.<sup>11</sup>

However, Huber and other advocates of strict scrutiny expressed satisfaction with *Daubert*.<sup>12</sup> 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.

9. *Daubert v. Merrell Dow Pharms., Inc.*, 951 F.2d 1128 (9th Cir. 1991); *Christophersen v. Allied-Signal Corp.*, 939 F.2d 1106 (5th Cir. 1991) (per curiam) (en banc); *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188 (6th Cir. 1988).

10. See, e.g., Kenneth J. Chesebro, *Taking Daubert's "Focus" Seriously: The Methodology/Conclusion Distinction*, 15 CARDOZO L. REV. 1745 (1994); Michael H. Gottesman, *Admissibility of Expert Testimony After Daubert: The "Prestige" Factor*, 43 EMORY L.J. 867, 869–72 (1994).

11. See PETER W. HUBER, *GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM* (1991).

12. David E. Bernstein & Peter W. Huber, *Defense Perspective*, 1 SHEPARD'S EXPERT & SCI. EVID. Q. 59, 60 (1993) ("The trend towards stricter scrutiny of scientific evidence began in the late-1980s; in the aftermath of *Daubert* it will accelerate."); David Bernstein, *Hauling Junk Science Out of the Courtroom*, WALL ST. J., July 13, 1993, at A16 ("[A]s standards are established, [*Daubert*] . . . means that junk science will have a far harder time making it to court."); Marc S. Klein, *The Revolution in Practice and Procedure: "Daubert Hearings,"* 1 SHEPARD'S EXPERT & SCI. EVID. Q. 655, 656 (1994).

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.

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,<sup>13</sup> 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*,<sup>14</sup> 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."<sup>15</sup> Instead, courts were free to conclude that "there is simply too great an analytical gap between the data and the opinion proffered."<sup>16</sup> 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.<sup>17</sup>

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.<sup>18</sup> 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*,<sup>19</sup> 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).

14. 522 U.S. 136 (1997).

15. *Id.* at 146.

16. *Id.* (citing *Turpin v. Merrell Dow Pharms., Inc.*, 959 F.2d 1349, 1360 (6th Cir. 1992), *cert denied*, 506 U.S. 826 (1992)).

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.

18. *Joiner*, 522 U.S. at 142–43.

19. 526 U.S. 137 (1999).

expert testimony.<sup>20</sup> 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.<sup>21</sup> The applicability of these and other factors depends “upon the particular circumstances of the particular case at issue.”<sup>22</sup> 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.<sup>23</sup>

By 1998 one commentator claimed that “thirty-three states have adopted *Daubert* in essence.”<sup>24</sup> 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.<sup>25</sup> As

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20. *Id.* at 49.

21. *Id.* at 150–51 (discussing *Daubert*, 509 U.S. at 593).

22. *Id.* at 150.

23. Early adopters of *Daubert* included *State v. Foret*, 628 So. 2d 1116 (La. 1993); *Com. v. Lanigan*, 641 N.E.2d 1342 (Mass. 1994); *State v. Alberico*, 861 P.2d 192 (N.M. 1993); *State v. Hofer*, 512 N.W.2d 482 (S.D. 1994); *State v. Brooks*, 643 A.2d 226 (Vt. 1993); *Wilt v. Buracker*, 443 S.E.2d 196 (W. Va. 1993); see also Joseph R. Meaney, *From Frye to Daubert: Is a Pattern Unfolding?*, 35 JURIMETRICS J. 191, 192–93 (1995).

These courts typically reasoned that because their own expert evidence statutes were modeled after Fed. R. Evid. 702, they should be interpreted in the same manner as the Supreme Court interpreted that rule. See, e.g., *Foret*, 628 So. 2d at 1123; *Lanigan*, 641 N.E.2d at 1348–49; *Alberico*, 861 P.2d at 203 (all noting that state rules are identical to Fed. R. Evid. 702 and applying *Daubert*).

24. Heather G. Hamilton, *The Movement from Frye to Daubert: Where Do the States Stand?*, 38 JURIMETRICS J. 201, 209 (1998).

25. See David E. Bernstein, *Frye, Frye, Again: The Past, Present and Future of the General Acceptance Test*, 41 JURIMETRICS J. 385, 401 (2001). The *Frye* states are Alabama, Arizona, California, Florida, Illinois, Kansas, Maryland, Michigan, Minnesota, Mississippi, Missouri, New Jersey, New York, North Dakota, Pennsylvania, and Washington. See *Courtaulds Fibers, Inc. v. Long*, 779 So. 2d 198 (Ala. 2000); *Turner v. State*, 746 So. 2d 355 (Ala. 1998); *Logerquist v. McVey*, 1 P.3d 113 (Ariz. 2000); *People v. Leahy*, 34 Cal. Rptr. 2d 663 (Cal. Ct. App. 1994); *Murray v. State*, 692

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*.<sup>26</sup> Other state courts thought *Daubert* was consistent with liberal admissibility rules they had previously adopted. However, as some commentators predicted,<sup>27</sup> *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.<sup>28</sup> 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

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So. 2d 157 (Fla. 1997); *Donaldson v. Cent. Ill. Pub. Serv. Co.*, 767 N.E.2d 314 (Ill. 2002); *Kuhn v. Sandoz Pharms. Corp.*, 14 P.3d 1170 (Kan. 2000); *Burrall v. State*, 724 A.2d 65 (Md. 1999); *Anton v. State Farm Mut. Auto. Ins. Co.*, 607 N.W.2d 123 (Mich. Ct. App. 1999); *Goeb v. Tharaldson*, 615 N.W.2d 800 (Minn. 2000); *Kansas City S. Ry. Co. v. Johnson*, 798 So. 2d 374 (Miss. 2001); *Long v. Mo. Delta Med. Ctr.*, 33 S.W.3d 629 (Mo. Ct. App. 2000); *State v. Harvey*, 699 A.2d 596 (N.J. 1997); *People v. Wesley*, 83 N.Y.2d 417 (N.Y. 1994); *City of Fargo v. McLaughlin*, 512 N.W.2d 700 (N.D. 1994); *Blum ex rel. Blum v. Merrell Dow Pharms., Inc.*, 764 A.2d 1 (Pa. 2000); *State v. Copeland*, 922 P.2d 1304 (Wash. 1996).

26. *E.g.*, *Mayhorn v. Logan Med. Found.*, 454 S.E.2d 87 (W. Va. 1994). Post-*Daubert* but pre-*Joiner*, many federal court decisions stated that *Daubert* was a more liberal test than *Frye*. *See, e.g.*, *United States v. Bonds*, 12 F.3d 540, 568 (6th Cir. 1993) (“We find that the DNA testimony easily meets the more liberal test set out by the Supreme Court in *Daubert*.”). On the other hand, some *Frye* states rejected *Daubert* because they wanted to retain a purportedly stricter rule. *See, e.g.*, *People v. Leahy*, 882 P.2d 321 (Cal. 1994) (emphasizing the purported relative liberality of the *Daubert* test); *Brim v. State*, 695 So. 2d 268, 271 (Fla. 1995) (“Despite the federal adoption of a more lenient standard in [*Daubert*], we have maintained the higher standard of reliability as dictated by *Frye*.”); *State v. Carter*, 524 N.W.2d 763, 778 (Neb. 1994) (referring to “the more lenient relevancy standard of *Daubert*”); *Blum ex rel. Blum v. Merrell Dow Pharms., Inc.*, 764 A.2d 1, 2 (Pa. 2000) (observing that *Daubert* relaxes to some extent the impediments to the admission of novel scientific evidence).

27. *See supra* note 7.

28. *See infra* Part I.

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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,<sup>29</sup> Delaware,<sup>30</sup> Louisiana,<sup>31</sup> Massachusetts,<sup>32</sup> Mississippi,<sup>33</sup> Nebraska,<sup>34</sup> Oklahoma,<sup>35</sup> Texas,<sup>36</sup> and Wyoming<sup>37</sup>—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.<sup>38</sup> 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,<sup>39</sup> Ohio,<sup>40</sup> North Carolina,<sup>41</sup>

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29. *Farm Bureau Mut. Ins. Co. of Ark. v. Foote*, 14 S.W.3d 512 (Ark. 2000) (adopting *Daubert*); *Coca-Cola Bottling Co. of Memphis, Tenn. v. Gill*, 100 S.W.3d 715 (Ark. 2003) (adopting *Kumho Tire* and *Joiner*).

30. *M.G. Bancorporation, Inc. v. LeBeau*, 737 A.2d 513 (Del. 1999) (adopting *Daubert*, *Kumho Tire* and *Joiner*'s abuse of discretion standard); *Minner v. Am. Mortgage & Guar. Co.*, 791 A.2d 826 (Del. Ch. 2000) (adopting *Joiner*'s scrutiny of the reasoning process).

31. *Foret*, 628 So. 2d at 1116 (adopting *Daubert*); *Darbonne v. Wal-Mart Stores, Inc.*, 774 So. 2d 1022 (La. Ct. App. 2000) (adopting *Kumho Tire*); *Lanasa v. Harrison*, 828 So. 2d 602 (La. Ct. App. 2002) (adopting *Joiner*'s abuse of discretion); *Lemaire v. CIBA-GEIGY Corp.*, 793 So. 2d 336 (La. Ct. App. 2001) (adopting *Joiner*'s scrutiny of the reasoning process).

32. *Commonwealth v. Lanigan*, 641 N.E.2d 1342 (Mass. 1994) (adopting *Daubert*); *Canavan's Case*, 733 N.E.2d 1042 (Mass. 2000) (adopting *Joiner* and *Kumho Tire*).

33. MISS. R. EVID. 702.

34. *Schafersman v. Agland Coop.*, 631 N.W.2d 862 (Neb. 2001) (expressly adopting *Daubert*, *Joiner*, and *Kumho*).

35. *Christian v. Gray*, 65 P.3d 591 (Okla. 2003) (adopting *Daubert* for civil cases); *Harris v. State*, 13 P.3d 489 (Okla. Crim. App. 2000) (applying *Daubert*).

36. *E.I. du Pont de Nemours & Co., Inc. v. Robinson*, 923 S.W.2d 549 (Tex. 1995) (*Daubert*); *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713 (Tex. 1998) (announcing test consistent with *Kumho Tire* and *Joiner*'s scrutiny of the reasoning process); *Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623 (Tex. 2002) (applying standard of review consistent with *Joiner*'s abuse of discretion standard).

37. *Bunting v. Jamieson*, 984 P.2d 467 (Wyo. 1999) (*Daubert* and *Kumho Tire*); *Williams v. State*, 60 P.3d 151 (Wyo. 2002) (*Joiner*).

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.

40. Ohio has adopted *Daubert*, *Kumho Tire*, and, in a court of appeals decision, *Joiner*'s abuse of discretion standard. See *State v. Nemeth*, 694 N.E.2d 1332 (Ohio 1998); *Lewis v. Alfa Laval Separation, Inc.*, 714 N.E.2d 426 (Ohio Ct. App. 1998). 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,<sup>42</sup> and South Dakota,<sup>43</sup> the issues involved in *Joiner* have not yet arisen. New Hampshire, by contrast, has adopted both *Daubert* and *Kumho Tire*<sup>44</sup> 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.”<sup>45</sup> 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*.<sup>46</sup>

### **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,<sup>47</sup> and more recently referred approvingly to *Kumho Tire* in discussing its *Daubert* test.<sup>48</sup> 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

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*See* State v. Goode, 461 S.E.2d 631 (N.C. 1995); Taylor v. Abernathy, 560 S.E.2d 233 (N.C. Ct. App. 2002). Its court of appeals has also adopted an abuse of discretion standard compatible with *Joiner*. *See* State v. Spencer, 459 S.E.2d 812 (N.C. Ct. App. 1995). It has not considered whether to adopt *Joiner's* scrutiny of the reasoning process.

42. Rhode Island has adopted *Daubert* and *Kumho Tire*. *See* Raimbeault v. Takeuchi Mfg. (U.S.), Ltd., 772 A.2d 1056 (R.I. 2001). It has also adopted *Joiner's* abuse of discretion standard. *See* DiPetrillo v. Dow Chem. Co., 729 A.2d 677 (R.I. 1999). It has not considered whether to adopt *Joiner's* scrutiny of the reasoning process.

43. South Dakota has adopted *Daubert* and *Kumho Tire*, as well as *Joiner's* abuse of discretion standard. *See* State v. Hofer, 512 N.W.2d 482 (S.D. 1994) (*Daubert*); Rogen v. Monson, 609 N.W.2d 456 (S.D. 2000) (*Kumho Tire* and *Joiner's* abuse of discretion standard).

44. *See* Baker Valley Lumber, Inc. v. Ingersoll-Rand Co., 813 A.2d 409 (N.H. 2002).

45. *See* State v. Dahood, 814 A.2d 159, 161–62 (N.H. 2002) (concerning the admissibility of the horizontal gaze nystagmus test).

46. *Id.*

47. *See* State v. Streich, 658 A.2d 38 (Vt. 1995).

48. *See* State v. Kinney, 762 A.2d 833, 841 (Vt. 2000) (“We recognize that *Daubert*, and the more recent decision in *Kumho Tire Co. v. Carmichael* . . . emphasized the gatekeeper function of the trial court to determine that novel scientific or technical evidence is sufficiently reliable and relevant before it is admissible.”) (citation omitted).

discretion standard.<sup>49</sup> 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*<sup>50</sup> and *Vent v. State*.<sup>51</sup> In *Bourdon*, the court, citing *Kumho Tire*, applied *Daubert* to child abuse expert testimony.<sup>52</sup> 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.<sup>53</sup>

New Mexico, one of the first state courts to adopt *Daubert*,<sup>54</sup> has not yet explicitly adopted *Kumho Tire*, although the Court of Appeals suggested in dicta that it would adopt *Kumho Tire*.<sup>55</sup> It is not clear whether the New Mexico Supreme Court would adopt *Kumho Tire* if given the opportunity,<sup>56</sup> nor has the court expressed an opinion on the substantive aspect of *Joiner*.

Similarly, although Connecticut has adopted *Daubert*,<sup>57</sup> the Connecticut Court of Appeals has noted that “[o]ur courts . . . have neither adopted nor rejected the *Kumho Tire Co., Ltd.*, rule.”<sup>58</sup> 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.”<sup>59</sup> Connecticut has adopted *Joiner's* abuse of discretion standard<sup>60</sup> but has not addressed whether to adopt *Joiner's* scrutiny-of-the-reasoning-process holding.<sup>61</sup>

In *State v. O'Key*,<sup>62</sup> the Oregon Supreme Court, although expressly

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49. See *State v. Coon*, 974 P.2d 386 (Alaska 1999).

50. 2002 WL 31761482 (Alaska Ct. App. Dec. 11, 2002).

51. 2003 WL 294364 (Alaska Ct. App. Feb. 12, 2003).

52. *Bourdon*, 2002 WL 31761482, at \*7–8.

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 CARDOZOL. REV. 2271, 2285 (1984)).

54. See *State v. Alberico*, 861 P.2d 192 (N.M. Ct. App. 1993).

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).

57. See *State v. Porter*, 698 A.2d 739, 746 (Conn. 1997).

58. *Doe v. Thames Valley Council for Com. Action, Inc.*, 797 A.2d 1146, 1161–62 n.21 (Conn. App. Ct. 2002).

59. CONN. CT. R. § 7-2 (West 2003).

60. See *State v. Pappas*, 776 A.2d 1091 (Conn. 2001).

61. The only mention of *Joiner's* scrutiny of the reasoning process is in dicta in an unpublished Connecticut Superior Court opinion, *K&V Scientific Co. v. Ensign-Bickford Co.*, 2002 WL 31662326, at \*2 (Conn. Super. Ct. Nov. 6, 2002).

62. 899 P.2d 663 (Or. 1995).

stating that *Daubert* was not binding, adopted a similar “gatekeeping” rule for scientific evidence.<sup>63</sup> 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.<sup>64</sup> 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.”<sup>65</sup> 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.<sup>66</sup>

West Virginia, another early adopter of *Daubert*,<sup>67</sup> has also failed to adopt *Kumho Tire*. In *West Virginia Div. of Highways v. Butler*,<sup>68</sup> the West Virginia Supreme Court explicitly declined to adopt *Kumho Tire*, applying instead a more permissive standard for nonscientific expert evidence.<sup>69</sup> Two years later in *Watson v. Inco Alloys Int’l, Inc.*,<sup>70</sup> the court again rejected *Kumho Tire*.<sup>71</sup> However, Justice Davis, the author of the majority opinion, urged the court to adopt *Kumho Tire* in the future.<sup>72</sup> In *State v. Leep*,<sup>73</sup> 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.”<sup>74</sup>

Montana, also an early adopter of *Daubert*,<sup>75</sup> has implicitly rejected

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63. *Id.* at 680 n.7.

64. *State v. Sanchez-Cruz*, 33 P.3d 1037 (Or. Ct. App. 2001).

65. *Jennings v. Baxter Healthcare Corp.*, 14 P.3d 596, 604 (Or. 2000) (quoting *State v. Brown*, 687 P.2d 751, 775 (Or. 1984)).

66. *Id.* at 606.

67. *See Wilt v. Buracker*, 443 S.E.2d 196 (W. Va. 1993).

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.

*Id.* at 301 n.11 (citations omitted).

73. 569 S.E.2d 133 (W. Va. 2002).

74. *Id.* at 143 n.21.

75. *See State v. Moore*, 885 P.2d 457 (Mont. 1994).

*Kumho*.<sup>76</sup> In *State v. Cline*, the Montana Supreme Court confined consideration of the *Daubert* factors to “novel scientific evidence.”<sup>77</sup> The Montana Supreme Court has not explicitly taken a position on *Joiner*, but it appears to follow *Joiner*’s abuse of discretion standard.<sup>78</sup>

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. . . .”<sup>79</sup> The Alabama Supreme Court has refused to apply *Daubert* outside of this specific circumstance.<sup>80</sup> 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.<sup>81</sup> 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.<sup>82</sup>

Hawaii has expressly refrained from adopting *Daubert*.<sup>83</sup> 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.<sup>84</sup> 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.<sup>85</sup> The court applies this analysis to all expert evidence, based on *Kumho Tire*.<sup>86</sup> Further, the court has partially adopted *Joiner*’s abuse of

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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).

79. ALA. CODE § 36-18-30 (West 2002).

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*.<sup>87</sup> 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.<sup>88</sup> 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.<sup>89</sup> 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.<sup>90</sup> 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.<sup>91</sup>

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.<sup>92</sup> Similarly, judges have the discretion to apply the *Daubert* factors to all expert evidence in such cases, not just to scientific evidence.<sup>93</sup> 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.<sup>94</sup> 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.<sup>95</sup> In assessing the reliability, courts are directed to conduct a broad inquiry and may consider the factors set forth in *Daubert*.<sup>96</sup> 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*.<sup>97</sup> Colorado has

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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).

89. *See Malinski v. State*, 794 N.E.2d 1071, 1085 (Ind. 2003).

90. *See Lytle v. Ford Motor Co.*, 696 N.E.2d 465, 472 (Ind. Ct. App. 1998) (applying, without further comment, *Joiner's* scrutiny of the reasoning process).

91. *See McGrew*, 682 N.E.2d at 1292.

92. *Leaf v. Goodyear Tire & Rubber Co.*, 590 N.W.2d 525, 533 (Iowa 1999).

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

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.<sup>98</sup> 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.<sup>99</sup> It appears that Maine applies this analysis to all expert evidence.<sup>100</sup> The review is for “abuse of discretion or clear error.”<sup>101</sup> 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.<sup>102</sup> Because this standard is vague, the Idaho Court of Appeals has looked to *Daubert* for guidance on several occasions.<sup>103</sup> 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.<sup>104</sup>

New Jersey has refused to adopt *Daubert* but follows an analysis that is somewhat similar for scientific evidence in civil cases.<sup>105</sup> 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.”<sup>106</sup> 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.<sup>107</sup>

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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).

99. *See State v. MacDonald*, 718 A.2d 195, 198 (Me. 1998).

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.

102. *See State v. Merwin*, 962 P.2d 1026, 1029–30 (Idaho 1995).

103. *See, e.g., State v. Siegal*, 50 P.3d 1033, 1042–43 (Idaho Ct. App. 2002); *State v. Parkinson*, 909 P.2d 647, 652 (Idaho Ct. App. 1996).

104. *Carnell v. Barker Mgmt., Inc.*, 48 P.3d 651, 656–57 (Idaho 2002).

105. *See Kemp ex rel. Wright v. State*, 809 A.2d 77 (N.J. 2002). New Jersey continues to follow the *Frye* test in criminal cases. *E.g., State v. Harvey*, 699 A.2d 596, 621 (N.J. 1997).

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).

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.<sup>108</sup> 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."<sup>109</sup> This standard is far more liberal than *Daubert* and *Joiner*.<sup>110</sup>

South Carolina's test, like *Daubert*, imposes a "gate-keeping" requirement for scientific evidence.<sup>111</sup> 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."<sup>112</sup> 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.<sup>113</sup> In practice, South Carolina's test appears to be far more forgiving than *Daubert-Joiner*.<sup>114</sup>

Utah applies an apparently more rigorous standard than *Daubert* to the admission of scientific evidence.<sup>115</sup> In *State v. Crosby*, the Utah Supreme Court determined that its long-held standard was similar to, although less flexible than, *Daubert*.<sup>116</sup> 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."<sup>117</sup> 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."<sup>118</sup> However, the Utah test applies only to expert testimony "based on newly discovered principles"<sup>119</sup> or testimony based on "novel scientific methods and techniques."<sup>120</sup> 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

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108. *See* Hamilton v. Oppen, 653 N.W.2d 678, 683 (N.D. 2002).

109. *Id.* (quoting Anderson v. A.P.I. Co. of Minn., 559 N.W.2d 204, 206 (N.D. 1997)).

110. *See id.* (stating that qualification of testimony is discretionary).

111. *See* State v. Council, 515 S.E.2d 508 (S.C. 1999).

112. *Id.* at 517.

113. *Id.* at 517-18.

114. *Id.*

115. *See* State v. Crosby, 927 P.2d 638 (Utah 1996).

116. *Id.* at 642.

117. State v. Rimmasch, 775 P.2d 388, 403 (Utah 1989).

118. *Id.*

119. Alder v. Bayer Corp., AGFA Div., 61 P.3d 1068, 1083 (Utah 2002) (quoting State V. Rimmasch, 775 P.2d 388 (Utah 1989)).

120. *Id.* at 1084.



threshold finding of reliability whenever “unfamiliar” scientific evidence is offered.<sup>121</sup> However, Virginia has expressly left open the question of whether the *Daubert* factors could be applied to this determination.<sup>122</sup>

Wisconsin, while not ruling out the possibility that it will some day adopt *Daubert*,<sup>123</sup> 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.<sup>124</sup>

Nevada has a similarly liberal test for the admission of expert testimony.<sup>125</sup> The Georgia Supreme Court has not addressed *Daubert*, but the state Court of Appeals has consistently held that *Daubert* is not the rule in Georgia, leaving Georgia with a very liberal test for the admissibility of scientific evidence.<sup>126</sup>



As the analysis in this article shows, only a minority of state courts have wholeheartedly adopted the *Daubert* trilogy. Many states adopted *Daubert* when they thought that it clearly liberalized admissibility standards for scientific evidence relative to the old *Frye* general acceptance test. Such states are not inclined to adopt *Joiner* or *Kumho Tire*, which made it clear that *Daubert* will often lead to the exclusion of evidence that would either be admitted under *Frye*, or, even more significant, evidence that *Frye* would not have applied to in the first instance. Even states that are generally sympathetic to *Daubert* and its relatively stringent reliability test have not rushed to endorse *Joiner* and *Kumho Tire*. Rather, they have adopted those parts of the *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 *Daubert* as merely instructive or have rejected it entirely. While more state courts likely will adopt the *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.

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121. See *Satcher v. Commonwealth*, 421 S.E.2d 821, 835 (Va. 1992) (quoting *Spencer v. Commonwealth*, 393 S.E.2d 609, 621 (Va. 1990)).

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 *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.”).

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

124. See *State v. Walstead*, 351 N.W.2d 469, 487 (Wis. 1984).

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

126. *Orkin Exterminating Co. v. Carder*, 575 S.E.2d 664, 669 (Ga. Ct. App. 2002); *Norfolk S. Ry. Co. v. Baker*, 514 S.E.2d 448, 451 (Ga. Ct. App. 1999).

*The Daubert Trilogy in the States*

