

The Daubert Standard's Effects On Arizona Courts

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Although Arizona has made headlines for its controversial immigration law, there was a more notable game-changer in its product liability realm recently: Arizona's adoption of the Daubert standard in state court cases.

On May 10, 2010, Arizona enacted a law which requires that judges in state court cases follow the federal Daubert standard on expert evidence. The law is effective on July 29, 2010, and applies to both civil and criminal cases. It requires that judges take an active role in determining that an expert reached opinions in a reliable, scientific manner and that the opinions fit the facts of the case before the jury hears the expert evidence.

Up until now, Arizona had followed a version of the weaker Frye standard and judges merely had to ensure that an expert's proposed testimony was relevant and in some cases was of a nature that was "generally accepted" in a particular field when it applied. The Arizona-Frye standard was not even applicable to experts who purportedly reached opinions "by inductive reasoning based on his or her own experience, observation, or research." *Logerquist v. McVey*, 196 Ariz. 470, 490 (2000). Even when it was applied, there was no requirement that the expert reach opinions using a reliable method. *Id.* at 493-94 (Martone, J., dissenting).

Arizona passed legislation requiring the Daubert standard, rather than adopting it through a judicial path as some states have. Litigants had for years asked Arizona trial courts to adopt the Daubert standard. Appeals were made to the Arizona Supreme Court, asking the state's highest court to adopt Daubert.

Even the Arizona Court of Appeals had called for the Arizona Supreme Court to reconsider its continued rejection of the federal Daubert standard. See *Lohmeier v. Hammer*, 214 Ariz. 57, 71 (App. 2006). Nonetheless, the Arizona Supreme Court declined to do so. See *State v. Bible*, 175 Ariz. 549, 580 (1993) (discussing the Arizona-Frye standard and declining to adopt the federal Daubert standard); *Logerquist*, 196 Ariz. at 482-489 (discussing the merits of the Frye and Daubert standards and reaffirming use of Frye).

Under the Arizona-Frye standard, questionable expert evidence and "junk science" was rarely excluded. By contrast, in Arizona's federal court where the Daubert standard has been applied since 1993, expert challenges have been successful and at times disposed of cases that otherwise would have required a jury trial. See and compare *Cloud v. Pfizer Inc.*, 198 F. Supp. 2d 1118, 1137 (D. Ariz. 2001) (holding in product liability case that the plaintiff expert's testimony that a defective product caused plaintiff's injuries was unreliable and inadmissible under Daubert standard) with *Baroldy v. Ortho Pharm. Corp.*, 157 Ariz. 574, 583 (App. 1998) (holding in a product liability case that the plaintiff expert's testimony that a defective product caused plaintiff's injuries was admissible and the Arizona-Frye standard did not apply to an expert's hypothesis as to causation).

Arizona adopted a modified Daubert standard, requiring four guidelines for trial courts to consider before allowing a jury to hear expert evidence:

(1) whether the expert's testimony or technique can be tested;

(2) whether the theory has been subjected to peer review and publication;

(3) the known or potential error of the technique or theory; and

(4) whether the theory or technique has been generally accepted in the relevant field.

If the expert evidence is not reliable or does not fit the facts of the case, the court must preclude the expert from testifying. If the court precludes an expert from testifying, the court may well dismiss an otherwise unsupported case.

The change is significant because a RAND research study has shown that in civil cases, courts applying the Daubert standard are more likely to exclude challenged expert evidence than they were before. Challenged

expert evidence was excluded in as many as 70 percent of the cases post-Daubert in some years. Over time, success rates in challenges declined, likely resulting from an increased quality of the proffered witness testimony and/or a decrease in pursuing baseless claims. It cannot be disputed that Daubert has affected the analysis of judges who apply it and litigants who have responded to it.

Corporate interests, greatly affected by the economic downturn, supported and advocated the change. With its new law, Arizona joined the vast majority of states to adopt some version of the Daubert standard.

The opinions expressed are those of the authors and do not necessarily reflect the views of Portfolio Media, publisher of Law360.



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