



June 25, 2019

FLORIDA SUPREME COURT CHANGES COURSE AND ADOPTS THE DAUBERT STANDARD FOR EXPERT TESTIMONY

by Evan M. Tager and Matthew Waring

When we reported in November 2018 on the Florida Supreme Court's decision in *DeLisle v. Crane Co.*, we predicted that the Court's decision to reject the "*Daubert* standard" for expert testimony might be "short-lived," given that three of the Justices who had joined the majority—all of whom were generally perceived as "liberal" jurists—were about to retire and be replaced by a Republican governor. Last month, in *In re Amendments to the Florida Evidence Code*, the new roster of Justices proved us right and adopted *Daubert*. We aren't surprised by the outcome, though we didn't expect it to come quite so soon.

To refresh your memory about the issues here, in federal courts (and most state courts), the admissibility of expert testimony is determined under the reliability standard announced by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* But a few states still apply the "*Frye* standard," which looks only to whether the scientific technique used by a proposed expert witness is "sufficiently established to have gained general acceptance in the particular field in which it belongs" and does not consider the reliability of that technique in the context of the case.

Before 2013, Florida was a *Frye* state. But in 2013, the Florida Legislature enacted legislation amending the Florida Rules of Evidence to incorporate the *Daubert* standard. Since then, the legislation has been the topic of much litigation concerning whether and to what extent it was valid.

Under the separation-of-powers principles of the Florida Constitution as construed by the Florida Supreme Court, the state legislature has the authority to adopt rules of "substantive law," but only the court itself has the ability to determine rules of procedure. The court declined, in 2017, to adopt the *Daubert* legislation under the court's authority to make procedural rules, citing "constitutional concerns"—in particular, fears that *Daubert* would "undermin[e] the right to a jury trial and deny[] access to the courts." The upshot of this ruling was that the Legislature's action could stand only if the adoption of *Daubert* was a "substantive" change that the Legislature was entitled to make without the Florida Supreme Court's concurrence.

In *DeLisle*, the Florida Supreme Court held by a 6-3 vote that the Legislature's attempt to adopt the *Daubert* standard was procedural rather than substantive, and hence unconstitutional. The *DeLisle* decision thus kept the *Frye* standard in place for litigation in Florida state courts.

Evan M. Tager is a Partner, and **Matthew Waring** is an Associate, with Mayer Brown LLP in the firm's Washington, DC office. Mr. Tager is the *WLF Legal Pulse's* Featured Expert Contributor on Judicial Gatekeeping of Expert Evidence.

Shortly after *DeLisle* was decided in November 2018, however, three members of the majority in the case—Justices Pariente, Lewis, and Quince—reached Florida’s judicial mandatory-retirement age and retired. We predicted that after new Republican Governor Ron DeSantis appointed replacements for these Justices, the court might either overrule *DeLisle*’s holding that the Legislature’s adoption of *Daubert* was a “procedural” change, “or, more likely, simply adopt *Daubert* under its own rulemaking authority.”

The court’s decision last month took the latter approach, adopting *Daubert* under the court’s own rulemaking authority. The decision—announced in a per curiam opinion without additional briefing or argument—explained that the “constitutional concerns” that had prompted the court to refuse to adopt *Daubert* in 2017 “appear unfounded.” The court noted that *Daubert* is the prevailing standard for expert testimony in federal courts and 36 states and that there is no sign that it has “denied parties’ rights to a jury trial and access to courts” in those court systems.

The court also held that the *Daubert* standard “remed[ies] deficiencies of the *Frye* standard”: whereas *Frye* excludes only novel, unaccepted scientific techniques, *Daubert* requires that *all* expert testimony be relevant and reliable, imposing more effective controls on the introduction of inappropriate testimony. And, the court noted, adopting *Daubert* would “create consistency between the state and federal courts” in Florida, thereby helping to “lessen forum shopping.”

The Florida Supreme Court’s ruling is welcome news for businesses that are sued in Florida state court. As the court noted, *Daubert* empowers trial courts to play a much more active gatekeeping role than the *Frye* standard, and it applies to all forms of expert testimony. The result of the decision, therefore, will be that unreliable, result-oriented expert testimony may now be excluded in Florida state courts to the same extent as in federal court—and that plaintiffs therefore will have less of an incentive to choose to litigate in state court.

One note of caution is warranted, however. The court’s opinion noted that certain other “constitutional” and “substantive concerns . . . have been raised about the amendments” adopting *Daubert*, but declined to address these concerns, stating that they must be “left for a proper case or controversy.” The full scope of Florida’s embrace of *Daubert* thus remains to be seen. But for the time being, defense counsel litigating in Florida state courts have a valuable new tool for opposing improper expert testimony.