Defending and Asserting Daubert Challenges in Construction Disputes

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In most construction cases, experts are required to provide opinions and testimony to support or defend claims of liability and damages. The subject of this testimony often involves determining fault for design and construction defects, which can be due, among other things, to errors and omissions in design; faulty construction, fabrication, or installation; problems during the submittal process; communication lapses; lack of coordination or supervision; or changes during construction. Expert testimony is also frequently required for the calculation of damages—repair or replacement costs, delay, inefficiency, and productivity claims, as well as an array of consequential damages including business interruption, profits, revenue stream, lost income, and bridge or mezzanine financing to name a few. The need for expert opinions and testimony impacts all parties, from owners, developers, and financial institutions, to design professionals, contractors, subcontractors, suppliers, and vendors.¹

The US Supreme Court’s 1993 decision in Daubert v. Merrell Dow Pharmaceuticals, Inc.² and its progeny have significantly impacted the presentation of expert opinions and testimony in construction cases. In the last 19 years, the body of law surrounding challenges to expert opinions and testimony has evolved from initially requiring special scrutiny only of novel scientific theories to the present standards under which a trial court serves as a “gatekeeper” to require that expert testimony and the methodology or technique upon which it is based be tested to ensure that it is relevant and reliable. This article will discuss the applicability of the Daubert standard to the presentation of expert testimony in construction disputes and analyze what is required to successfully present or defend a “Daubert challenge” to the admission of proffered expert testimony.

Dispositive Motions in the Daubert Hearing: The Daubert Challenge

Prior to Daubert, the legal standard for admission of novel scientific expert testimony in federal and state court cases was referred to as the “Frye Standard” or the “General Acceptance” standard.³ For more than 70 years, that standard imposed a requirement that the data and methodology used by an expert in developing an opinion based on a scientific theory be of the kind that was “generally accepted” by other practitioners within that particular expert’s discipline.⁴

The plaintiffs in Daubert were born with serious birth defects. In the lawsuit filed in state court, the plaintiffs claimed their defects were caused by their mothers’ ingestion of the drug Benedictine during pregnancy. The defendant removed the case to federal court and moved for summary judgment based on the affidavit of an epidemiologist who stated that no published epidemiological (human statistical) study had demonstrated a causal link between Benedictine and birth defects.⁵

In response, the plaintiffs’ experts submitted evidence that ingestion of the drug could cause birth defects. In the lawsuit filed in state court, the plaintiffs claimed their defects were caused by their mothers’ ingestion of the drug Benedictine during pregnancy. The defendant removed the case to federal court and moved for summary judgment based on the affidavit of an epidemiologist who stated that no published epidemiological (human statistical) study had demonstrated a causal link between Benedictine and birth defects.⁵

In response, the plaintiffs’ experts submitted evidence that ingestion of the drug could cause birth defects. However, because their conclusions were primarily based on animal studies, pharmacological studies, and a reanalysis of other published studies (which themselves had not been peer-reviewed), the US District Court found the experts’ opinions were not admissible to support causation. The court held that scientific evidence is admissible only if the principle upon which it is based is “sufficiently established to have general acceptance in the field to which it belongs”;

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the plaintiffs had not met the standard, and the court granted the defendant’s motion for summary judgment.\(^6\)

The Ninth Circuit affirmed, determining that the experts’ methodologies were not “generally accepted as reliable in the relevant scientific community.”\(^7\) The court declared that an expert opinion based on a methodology that diverges “significantly from the procedures accepted by recognized authorities in the field... cannot be shown to be ‘generally accepted as a reliable technique.’”\(^8\) In so doing, the court recognized that other courts of appeals considering the risks of Benedictine had refused to admit reanalysis of epidemiological studies that had neither been published nor subject to peer review.\(^9\) Those courts had found unpublished reanalysis “particularly problematic in light of the massive weight of the original published studies supporting [the defendant’s] position, all of which had undergone full scrutiny from the scientific community.”\(^10\) The Ninth Circuit thus rejected the reanalysis as “unpublished, not subjected to the normal peer review process and generated solely for use in litigation.”\(^11\) The court concluded that the plaintiffs’ evidence provided an insufficient foundation to allow admission of expert testimony that Benedictine caused their injuries and, accordingly, that the plaintiffs could not satisfy their burden of proving causation.

The Supreme Court vacated and reversed the Ninth Circuit’s decision. The Court found that the Frye standard did not survive the adoption of Federal Rule of Evidence 702 (“Rule 702”), which stated at the time:

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.\(^12\)

The Court concluded that nothing in the text of Rule 702 established the necessity of “general acceptance,” and nothing in the drafting history of the rule indicated the incorporation of the Frye standard.\(^13\)

The Court in Daubert cautioned that Rule 702 did not negate the trial court’s traditional “gatekeeper” role.\(^14\) Instead, that role was enhanced by Rule 702 to ensure that any scientific testimony or evidence admitted be relevant and reliable. The “gatekeeper” standard under Daubert requires that a judge make a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid, and whether that reasoning or methodology properly could be applied to the facts in issue.\(^15\) As a result, all expert testimony discussing scientific knowledge, and, more specifically, the methodology or technique upon which it was based, must be relevant, reliable, helpful, and “fit.”\(^16\)

In order to determine whether the proffered evidence is reliable, the Court set forth the following nonexhaustive factors to be considered:

1. whether the theory or technique presented as expert testimony and evidence can be (and has been) tested;
2. whether the theory or technique has been subjected to peer review and publication;
3. the known or potential rate of error;
4. the existence and maintenance of standards controlling the technique’s operation; and
5. “general acceptance.”\(^17\)

The Supreme Court emphasized that the inquiry was to be a “flexible” one, focused primarily on principles and methodology, not on the conclusions that they generate.\(^18\)

The US district court found that the experts’ opinions were not admissible to support causation.

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**Kumho Tire Extends the Daubert Factors to All Expert Testimony**

The intent of the Daubert ruling was to simplify and improve the standard applied to the admissibility of expert testimony and evidence. However, because the language of Daubert permitted several interpretations resulting in different outcomes, the following questions remained unanswered: (1) whether the Daubert analysis applied to all expert testimony or evidence; (2) whether the Daubert factors were mandatory or suggested; and (3) what standard of review would be applied to the decision to apply the Daubert factors.

The debate on these issues began with Chief Justice Rehnquist’s dissenting opinion in Daubert, wherein he warned of the pitfalls inevitably created when the Court offers “general observations” in its opinions. Justice Rehnquist noted:

[t]he Court constructs its argument by parsing the language “if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, ... an expert ... may testify thereto, ... .” Fed. Rule Evid. 702. It stresses that the subject of the expert’s testimony must be “scientific . . . knowledge,” and points out that “scientific” “implies a grounding in the methods and procedures of science” and that the word “knowledge” “connotes more than subjective belief or unsupported speculation.” From this it concludes that “scientific knowledge” must be “derived by the scientific method.” Proposed testimony, we are told, must be supported by “appropriate validation.” Indeed, in footnote 9,
the Court decides that “in a case involving scientific evidence, evidentiary reliability will be based upon scientific validity.”

Questions arise simply from reading this part of the Court’s opinion, and countless more questions will surely arise when hundreds of district judges try to apply its teaching to particular offers of expert testimony.

**Chief Justice Rehnquist's dissenting opinion in the Daubert decision warned of the pitfalls inevitably created when the Court offers "general observations" in its opinions.**

Does all of this dicta apply to an expert seeking to testify on the basis of “technical or other specialized knowledge”—the other types of expert knowledge to which Rule 702 applies—or are the “general observations” limited only to “scientific knowledge”? What is the difference between scientific knowledge and technical knowledge; does Rule 702 actually contemplate that the phrase “scientific, technical, or other specialized knowledge” be broken down into numerous subspecies of expertise, or did its authors simply pick general descriptive language covering the sort of expert testimony which courts have customarily received?  

In 1997, the Supreme Court in *General Electric Co. v. Joiner* further clarified the expert testimony standard. First, the Court stated that the proper standard for review of a court’s evidentiary rulings was the abuse of discretion standard. Second, the Court extended the trial judge’s discretionary authority under its gatekeeping function beyond consideration of the expert’s methodologies to include the expert’s rationale and conclusions.  

Finally, in 1999, the confusion forecasted by Justice Rehnquist caused by conflicting opinions was resolved, in large part, by the Court in *Kumho Tire Co., Ltd. v. Carmichael*. The plaintiffs sued *Kumho Tire*, a tire manufacturer and distributor, after a tire on a minivan blew out, resulting in a fatal accident. The plaintiffs submitted an expert opinion from a mechanical engineer who intended to testify that the blowout was caused by a defect in the tire. The expert based his opinion on a physical inspection of the tire, and the theory that in the absence of at least two of four specific physical symptoms indicating tire abuse, the tire failure of the sort that occurred in the case at hand was caused by a defect. The defendant moved to exclude the testimony and for summary judgment based on the application of the *Daubert* reliability factors, which the district court granted. The Eleventh Circuit, in reversing and remanding, concluded that the *Daubert* factors were incorrectly applied to the tire expert’s testimony because *Daubert* was limited to scientific testimony.

On appeal, the Supreme Court held that *Daubert* was applicable to all expert testimony, not simply scientific expert testimony. The Court also held that the *Daubert* reliability factors were not a definitive checklist or test but, rather, a group of the factors that, at the court’s discretion, may be considered when determining the admissibility of expert testimony.  

In making its determination, the Court analyzed the language and the legislative history of Rule 702. The language of the Rule made no distinction between scientific, technical, or specialized knowledge and the legislative history supported a broad application of Rule 702 to all types of experts. Moreover, the Court noted that the rationale behind *Daubert*’s gatekeeping function was that Rules 702 and 703 “grant expert witnesses testimonial latitude unavailable to other witnesses on the assumption that the expert’s opinion will have a reliable basis in the knowledge and experience of his discipline” and that this rationale supports the requirement that all expert testimony be reliable. The Court also opined that requiring a trial judge to differentiate between scientific and other knowledge in administering its gatekeeping function would be difficult and unlikely to produce clear legal lines capable of application to particular cases.

In 2000, as a result of the Court’s ruling in *Kumho Tire*, Congress amended Rule 702 to read as follows:

> 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 and/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.

These changes were adopted in response to *Daubert* and cases applying *Daubert*, including *Kumho Tire* and *Joiner*. The broad language of the amended rule provided the trial judge with significant discretion to determine the admissibility of all expert testimony.

**Daubert's Application to Nonscientific, Technical, and Other Specialist's Knowledge—Post Kumho Tire**

*Daubert* and *Kumho Tire* involve product liability claims. Since those decisions, the majority of reported cases of “*Daubert* challenges” to the admission of expert opinions and testimony have involved such claims. However, over the years, *Daubert* challenges have appeared in reported cases...
cases in other areas of litigation, including environmental, commercial, and construction law. The following sections in this article will discuss some of the more significant cases in which Daubert and Kumho Tire have been applied in construction disputes. They will examine Daubert’s current and potential future applications to construction cases by addressing what has been described as the trilogy of restrictions on expert testimony: (1) qualification, (2) reliability, and (3) fit (otherwise known as relevance). They will also address some of the more prominent subject matters found in construction expert testimony: (1) scheduling, (2) defects, and (3) damages. The goal of the last section is to assist the construction litigator in evaluating expert testimony, assessing the strengths and weaknesses of Daubert challenges, and providing a framework for asserting or defending such challenges.

Daubert’s Application to Construction Cases: Is the Construction Expert Qualified?
To testify, an expert witness must be qualified “by knowledge, skill, experience, training, or education.” For each expert, the court must determine whether the expert has “sufficient specialized knowledge” to assist the trier-of-fact with the issues in the case. There is no perfect recipe to follow when determining whether an expert witness possesses the requisite expertise, as “a broad range of knowledge, skills, and training qualify an expert.” An inquiry into an expert’s qualifications is fact-specific and should be determined on a case-by-case basis, governed by the specific circumstances of each case. For example, an expert may possess impressive credentials, but if the expert’s area of experience is collateral to the subject matter at issue, the expert may be deemed unqualified.

After initially establishing the expert’s qualification, “a district court must continue to perform its gatekeeping role by ensuring that the actual testimony does not exceed the scope of the expert’s expertise, which if not done can render expert testimony unreliable under Rule 702, Kumho Tire, and related precedents.” Once the testimony is admitted, it is up to the trier-of-fact to determine what credence to give the expert. Any challenges made regarding the expert’s qualifications will most likely come out in cross-examination. Further, if multiple experts testify, it is the jury’s role to weigh the strengths and weaknesses of competing experts’ qualifications.

Several cases provide a sampling of how courts have addressed challenges to construction experts’ qualifications in recent years under a variety of circumstances.

Weitz Co., LLC v. MacKenzie House, LLC
In Weitz Co., LLC v. MacKenzie House, LLC, an engineer was proffered to provide expert testimony on a number of construction issues, including scheduling delays, means and methods, and costs. In spite of this, his report extended into areas beyond his expertise and also into areas where expert testimony was improper. Because the report still contained plenty of opinions within his scope of expertise, and because the court was unwilling to go through the report line by line to separate proper from improper testimony, it broadly described the topics where his testimony would not be permitted. This list included:

- legal opinions, parties’ motivations, his interpretation of events and statements during negotiations, his view as to the proper interpretation of contract terms (whether those terms are ambiguous or not), and his subjective opinions about the people involved in this case or their capabilities.

Further, the court stated it would entertain objections at trial if the expert spoke beyond his qualifications.

Freesen, Inc. v. Boart Longyear Co.
The qualifications of the plaintiff’s damages expert were challenged in Freesen, Inc. v. Boart Longyear Co. The subject matter at issue was lost opportunity damages. The defendant challenged the plaintiff’s expert as lacking the necessary knowledge and expertise because (1) he had no experience calculating lost opportunity damages and (2) he had not written about, taught, or testified regarding lost opportunity damages. The plaintiff’s expert had been a CPA since 1974 and had more than 20 years of experience in the field of construction accounting.

The broad language of amended rule 702 provided the trial judge with significant discretion to determine the admissibility of all expert testimony.

Further, he was a certified fraud examiner, had received certification in financial forensics, was a member of and past chairman of the Illinois CPA Society Construction Contractors Committee, and was coauthor of a chapter in a Construction Law Handbook. Based on these credentials, the court found the plaintiff’s expert had the requisite experience and training to render the opinions at issue, as they fell within his competence as a CPA. The court held that the expert’s “alleged lack of experience in one specific area goes to the weight of his testimony, not its admissibility.”

United States ex rel. M.L. Young Construction Corp. v. Austin Co.
In United States ex rel. M.L. Young Construction Corp. v. Austin Co., the defendant disputed the qualifications of the plaintiff’s expert, contending that although the expert was qualified in general construction, he had not authored any articles related to the specific issues in dispute: construction scheduling and delay damages calculations.
The expert’s resume demonstrated previous experience in developing work schedules for construction projects and showed he served as a project manager for projects involving costs exceeding one million dollars.51 Further, while working as a consultant and expert witness, he analyzed construction projects involving construction schedules and delays, developed cost estimates, and calculated damages on numerous projects.52 Without more, the fact that the expert had not authored technical or other articles did not disqualify him from offering testimony.53

Is the Construction-Related Testimony Reliable?

“As with expert qualifications, the court has broad discretion to decide (1) the factors to be considered when determining reliability, and (2) the ultimate determination as to reliability.”54 For the often nonscientific testimony of construction experts, the Daubert factors may not be applicable or even helpful in determining reliability. For such testimony, the court should “make certain that an expert . . . employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.”55 Further, “[i]n making its reliability determination, the court should not decide the validity of the expert’s conclusions, but instead consider the soundness of the general principles or reasoning on which the expert relies and the propriety of the methodology that applies those principles to the facts of the case.”56

The factual basis for an expert’s testimony goes towards the credibility of the testimony, not its admissibility.57 “Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.”58 However, when an expert’s opinion is “so fundamentally unsupported that it can offer no assistance to the jury,” the opinion should be excluded.59

The following cases provide examples of reliability determinations made in construction disputes.

Steffy v. The Home Depot, Inc.

Challenged testimony in Steffy v. The Home Depot, Inc. provides multiple examples of reliability determinations.60 In Steffy, the plaintiffs used plywood obtained from the defendants to panel the interior of a building they were constructing.61 After spending time in the fully constructed building, the plaintiffs started experiencing negative health effects and noticed an unpleasant odor.62 The plaintiffs’ expert concluded that there were high levels of formaldehyde in the building, and the plywood was a substantial source of the formaldehyde.63

The defendants challenged the methodology used by the plaintiffs’ expert, claiming the plaintiffs’ expert failed to account for other potential alternative causes of formaldehyde in the air.64 The court found the plaintiffs’ expert’s methodology to be sufficiently reliable to permit the expert to testify.65 Plywood was a legitimate focus of the expert’s investigation, as the elevated formaldehyde levels would require a large source, and there were reports that handling the plywood caused some ill effects.66 Also, while waiting for the results of tests on the plywood (which ultimately showed significantly high concentrations of formaldehyde), the plaintiffs’ expert continued evaluating other potential sources of formaldehyde.67 Further, his opinion that a substantial component of formaldehyde in the air was offgassed from the plywood implied that there were some other sources of formaldehyde.68 For these reasons, the court found the fact that he did not perform tests on all other potential sources did not make his methodology unreliable and, instead, might affect the weight of his conclusions.69

In the same case, the plaintiffs challenged the expert testimony of the defendant’s expert, who concluded that the building’s HVAC system was inadequate to meet the building’s needs for fresh air, causing formaldehyde to accumulate instead of dissipate.70 The plaintiffs argued that the defendant’s expert testimony should be excluded because he did not conduct sufficient testing to qualify his results, making his testimony unreliable.71 More specifically, the plaintiffs contended the defendant’s expert relied solely on another expert’s testimony, and he did not conduct his own scientific testing.72 The court disagreed, noting that the defendant’s expert relied not only on the other expert’s testimony, but he reviewed research on formaldehyde in construction products and reviewed the applicable building codes, permits, and plans.73 More importantly, the plaintiffs had no support for their contention that the defendant’s expert could not rely on the engineering expert’s reports in formulating his opinion, and nothing in Rule 703 barred such reliance.74 Rule 703 provides:

The facts and data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted.

The court recognized that an expert “cannot merely become a mouthpiece for the opinions of another expert” but
found, in this situation, the defendant’s expert appropriately used the engineering expert’s reports along with other data to formulate an opinion within his area of expertise.75

**Steadfast Insurance Co. v. SMX 98, Inc.**

In **Steadfast Insurance Co. v. SMX 98, Inc.**, the court found an expert’s testimony regarding the reasonableness of a premium insurance rate charged to a contractor sufficiently reliable, even though the expert’s opinions were based on assumptions. The court based its conclusion on the fact that assumptions were not clearly erroneous or unfounded under the record, and any mistakes in the assumptions which go to the weight of the testimony could be covered in cross-examination.76

**Westfield Insurance Co. v. Weis Builders, Inc.**

In **Westfield Insurance Co. v. Weis Builders, Inc.**, the plaintiff’s expert’s testimony was challenged for lack of testing.77 The expert was a licensed architect with 16 years of experience in the design and installation of waterproofing systems.78 In an investigation of the cause of water leak problems, the expert created 20 destructive test openings and discovered that the water soluble film on the waterproofing membrane had not dissolved at four of the openings.79 Based on this, the expert concluded that the waterproofing membrane failed to perform and was, in part, responsible for the leaks.80 Although the expert acknowledged that he did not perform any testing on the waterproofing membrane itself, he personally observed instances where the film was defective.81 The court found that these observations, along with the expert’s extensive experience in the industry, were enough to make his testimony admissible,82 and that any disputes with his testimony could be explored in cross-examination.83

**Is the Construction-Related Testimony Relevant?**

Usually for testimony to “fit,” the opinion must be connected to the facts and law at issue. Expert testimony that is not related to the disputed issue is not relevant and, accordingly, cannot assist the trier-of-fact.84 Even relevant testimony should not be presented if it is not helpful to the trier-of-fact:

> There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute.85

Expert testimony on matters where the jury is capable of understanding and reaching a conclusion without the expert’s help and expert testimony that does nothing more than “mirror” testimony offered by fact witnesses should be excluded.86 For example, “[i]t is of limited assistance to a jury for a CPA to do simple mathematical calculations which a reasonable juror or lawyer could perform.”87 Further, an expert cannot testify regarding conclusions of law, such as the ultimate responsibility of the defendants, even though they might give enough information from which the jury can draw inferences regarding the ultimate issue.88

Below are examples of cases analyzing whether expert testimony is relevant.

**Steffy v. The Home Depot, Inc.**

In **Steffy**, the formaldehyde case previously discussed, the relevance of testimony by the plaintiffs’ real estate appraiser was questioned.89 The defective building was part of a larger piece of property, so the appraiser analyzed its contribution to the property as a whole by using the “Sales Comparison Approach” and the “Cost Approach.”90 The defendants recognized that these two methods were generally accepted and did not contest their reliability.91 Instead, the defendants argued that the appraisal was irrelevant because the appraiser did not apply the methods reliably to the facts of the case.92

Previous cases have ruled that expert testimony is irrelevant if the expert relies on assumptions that do not have support in the record.93 The plaintiffs’ appraiser looked at the “highest and best use” of the property to determine comparable properties when conducting his “Sales Comparison Approach.”94 When determining the “highest and best use,” the appraiser chose the current use, which was a “non-impact home based business.”95 The defendants pointed out the problem with this use: it was illegal under the zoning laws, and the “highest and best use” must be a legally permissible use.96 The court agreed, finding that assumptions that the township would ignore or amend its zoning were speculative and without adequate foundation.97 Because these assumptions formed the basis of the appraiser’s sales comparison approach, the court excluded his opinion using this valuation method.98 This determination did not automatically disqualify the cost approach method, which was not based on his “highest and best use” analysis.99

**A.A. Profiles, Inc. v. City of Fort Lauderdale**

The court excluded the testimony by the city’s damages expert in **A.A. Profiles, Inc. v. City of Fort Lauderdale** because the testimony was deemed irrelevant.100 The appellant set up
a wood-chipping business, which it named “Le Dump.”

Due to public concern that the appellant was actually operating a dump, complaints poured into the city. The city changed the zoning, preventing the appellant from operating its wood-chipping business on its property. This was considered a taking, and the court declared the appropriate measure of damages to be the modified market value test, not the lost income test as the appellees argued.

The city’s expert provided testimony regarding whether the appellant’s business would have succeeded, testimony that might have been relevant under the lost income test but not under the modified market value test. Hence, the testimony was excluded as irrelevant.

The testimony by the city’s damages expert was excluded in A.A. Profiles, Inc. v. City of Fort Lauderdale because the testimony was deemed irrelevant.

Hutton Contracting Co., Inc. v. City of Coffeyville
In Hutton Contracting Co., Inc. v. City of Coffeyville, the court granted the defendant’s motion to exclude certain opinions by the plaintiff’s expert. Regarding topics such as weather-related extensions and extensions for the inability to procure materials, the plaintiff’s expert testified regarding industry customs as gleaned from his experience. The industry customs described by the expert were in contrast to the clear and unambiguous language of the contract, and the expert did not contend that the contract should be considered ambiguous, which might have made industry customs relevant. Consequently, the testimony focused on an erroneous legal standard, making it irrelevant.

Billiot v. Cove Mountain Realty, Inc.
In Billiot v. Cove Mountain Realty, Inc., the court found an architect’s testimony regarding whether allegedly defective stairs complied with the building code admissible. The plaintiff argued that the issue of building codes was a question of law where no expert testimony was needed. The court agreed that any question as to which building codes applied to the cabin in issue would be a question of law. However, whether the stairs complied with the codes was a question of fact, and the testimony of an architect knowledgeable about the interaction between building codes and building construction would aid the trier-of-fact in reaching such a determination.

Daubert’s Application to Scheduling
Expert testimony regarding scheduling is typical in construction disputes. Scheduling experts might touch upon subjects such as causes of delays, the party responsible for delays, and damages caused by delays.

Construction schedules are usually prepared using the critical path method (CPM). CPM scheduling is described as:

an efficient way of organizing and scheduling a complex project which consists of numerous interrelated separate small projects. Each sub-project is identified and classified as to the duration and precedence of the work (e.g., one could not carpet an area until the flooring is down and the flooring cannot be completed until the underlying electrical and telephone conduits are installed). The data is then analyzed, usually by computer, to determine the most efficient schedule for the entire project. Many sub-projects may be performed at any time within a given period without any effect on the completion of the entire project. However, some items of work are given no leeway and must be performed on schedule; otherwise, the entire project will be delayed. These later items of work are on the “critical path.” A delay, or acceleration, of work along the critical path will affect the entire project.

Certain industry-accepted methods exist for analyzing CPM schedules with regards to delays. When determining the reliability of expert testimony regarding scheduling, the methodology used will be key. The more widely accepted the method, the more likely it will be found reliable by the court under a Daubert analysis.

The reliability inquiry does not necessarily end with the method used by the scheduling expert, as there are other questions that can be raised such as:

1. Whether the expert analyzed the accuracy and reasonableness of the as-planned schedule if it is going to be used as a baseline to measure against actual performance. If the schedule was too ambitious, it should be corrected before analyzing the amount of delay.

2. Whether the expert’s methodology has been properly applied to the facts of the case. The expert’s opinion should be supported by a thorough factual investigation, such as a review of project documents and interviews with key personnel. The expert can go one step further, and analyze potential delays caused by the expert’s own party, to preclude any arguments that the testimony is one-sided.

3. If there are multiple delays, whether the expert attempts to analyze the days of delay for each delay causing event or, if this is not possible, whether the analysis is broken into the greatest level of detail possible.
The following cases provide a varied sampling of how courts have addressed challenges to the relevance or reliability of expert testimony in construction cases.

**Weitz Co., LLC v. MacKenzie House, LLC**

In *Weitz Co., LLC v. MacKenzie House, LLC*, discussed previously, the defendants sought to exclude an expert’s delay and damage analysis. Their argument was generally that the expert failed to properly account for certain facts, making the analysis fatally flawed. However, the court noted such arguments go toward impeachment, not admissibility. Instead, it is the expert’s methodology that should be examined to determine admissibility. The expert used a “window” methodology, which compared the original, planned contract schedule to the actual, updated schedule. The court declared, “[t]his method is accepted in the industry as a means for evaluating the cause and length of delays.” Moreover, the application of this methodology to the facts in the case was not the type of analysis the court would expect to meet Daubert factors, such as peer review. The court should not decide whether the expert is right or wrong, but whether the opinion was sufficiently reliable to be presented to the jury. The *Weitz* court determined the opinion was sufficiently reliable, and any alleged shortcomings could be covered in cross-examination.

**RLI Insurance Co. v. Indian River School District**

Prior to the scheduling expert’s deposition in *RLI Insurance Co. v. Indian River School District*, his report was contested as unreliable because it failed to identify the critical path and failed to demonstrate a causal link between each critical path delay and resulting modifications to work. Although the report established delays beyond the contractor’s control, the court noted that such delays should not have affected the contractor’s progress if they were not on the critical path. While the expert used buzzwords suggesting he performed an analysis applying a critical path methodology, the exact methodology he used was not apparent from his report. As this was one of many problems recognized in the expert’s report, the court provided the plaintiff with a limited period of time to remedy the deficiencies in the report. With respect to the scheduling analysis, the court instructed the expert to identify his analysis methodology with “greater clarity and precision” and, more specifically, to “more clearly identify the critical path at the start of the Project in his discussion for the initial schedule, and throughout his entire analysis.”

**Daubert’s Application to Construction Defects**

With respect to expert testimony related to construction defects, some testimony will be based on traditional scientific factors while other testimony will be based on experience and knowledge. Under *Kumho Tire*, the testimony will need to go through the gatekeeping process to determine whether it is scientific or not. Challenges to construction defect testimony will often focus on the methodology or standards, or both, used by the expert. For example, challenges may be made if the expert did not use applicable industry standards when analyzing a defect, such as AASHTO, OSHA, or local building codes. On the other hand, because testimony regarding professional negligence is often based more on the expert’s experience and knowledge, challenges to the expert’s qualifications will be more common. For scientific testimony, if the challenged methodologies used by the expert are fairly complex, the party challenging admission may need to produce its own expert to sufficiently describe the flaws of the challenged testimony.

The cases below provide a sample of different types of disputed construction defect testimony.


In *Residences at Ocean Grande, Inc. v. Allianz Global Risks U.S. Insurance Co.*, the plaintiff challenged an expert report where the expert concluded that certain green board installed in the Trump Palace did not meet water resistance specifications. This defective green board absorbed water at a faster rate and was believed to be the cause of mold growth.

The plaintiff argued that the expert report was not reliable because the sample size was too small, the samples had been painted on, and too few samples were tested. The expert defended his testing, testifying it was consistent with ASTM protocols except for some deviations due to the samples provided by the plaintiff. The court held that, with respect to expert testimony, “absolute certainty is not required.”

Expert testimony is admissible that connects conditions existing later to those existing earlier provided the connection is concluded logically. Whether this logical basis has been established is within the discretion of the trial judge and the weaknesses in the underpinnings of the expert’s opinion go to its weight rather than its admissibility.

Thus, the court found the asserted deviations from ASTM protocols should go toward the weight of the report, not its admissibility. Also, the court found the report relevant as it believed it could assist the court in its
determination regarding the potential applicability of a “defective materials” exclusion in the contested insurance policy.\textsuperscript{139}

An interesting oddity in this case is that it was the plaintiff who commissioned the expert’s report.\textsuperscript{140} Not only did the plaintiff commission the report, but it also relied upon the report in various other litigations.\textsuperscript{141} The plaintiff’s attempts to selectively employ the report did not lend credence to its argument in the court’s eyes.\textsuperscript{142}

**First Assembly of God Church v. Fondren**

In *First Assembly of God Church v. Fondren*, the plaintiff alleged that the defendant neglected to install flange braces, as required by drawings and specifications, while constructing a multipurpose building for the plaintiff.\textsuperscript{143} As a result of this faulty construction, the building collapsed during a snowstorm.\textsuperscript{144} The defendant alleged that the plaintiff’s expert failed to use scientifically reliable means and methods in arriving at his opinions that the failure to install side column flange braces resulted in the collapse.\textsuperscript{145} More specifically, the expert only calculated resistance to bending of the columns, and not resistance to compression, shear, and other forces involved in the column’s function of holding up the roof.\textsuperscript{146}

The plaintiff’s attempts to selectively employ the report did not lend credence to its argument in the court’s eyes.\textsuperscript{147} The expert explained that there was no need for a more complex analysis into the collapse because the omission of the flange braces was extremely serious.\textsuperscript{148} If his analysis included the combined effects of bending, compression, and shear, he would have reached the same conclusion.\textsuperscript{149} According to his testimony, the calculations he performed were a simple but powerful tool in establishing the importance of the flange braces.\textsuperscript{150} Other than the calculations the expert omitted, the defendant did not raise any other objections to his methodologies.\textsuperscript{151} With respect to the missing calculations, the defendant made no argument as to why additional calculations were necessary, nor did the defendant present any expert testimony that the calculations were incorrect.\textsuperscript{152} The court concluded that the expert’s lack of testing on the combined effects of bending, compression, and shear did not justify exclusion, and any weaknesses in his testimony could be addressed on cross-examination.\textsuperscript{153}

**Phillips v. Water Bay Management Corp.**

In *Phillips v. Water Bay Management Corp.*, the plaintiff’s proffered safety expert argued that the stairs where the plaintiff slipped and fell were defective.\textsuperscript{154} The court held that references to OSHA or ADA standards were inadmissible as irrelevant and potentially confusing because such standards did not define the standard of care owed to a business invitee and, consequently, would not assist the trier-of-fact.\textsuperscript{155}

**Daubert’s Application to Damages**

The exclusion of expert testimony relied upon by a party to prove its damages can be devastating to a case. Using a widely accepted methodology, having assumptions tested, analyzing all relevant documentation, and subjecting work to peer review are all ways to bolster the reliability of expert testimony regarding damages.\textsuperscript{156}

The following cases address challenges to testimony regarding construction damages and often focus on the methodology used by the expert, such as whether the expert correctly applied the methodology to the law, whether the data used in the methodology needed to be provided, and whether a less accepted methodology was sufficiently reliable.

**GASA, Inc. v. United States**

In *GASA, Inc. v. United States*, the defendant sought to exclude the plaintiff’s expert from testifying regarding damages resulting from delays.\textsuperscript{157} The plaintiff was to begin its dredging work within ten days of the Notice to Proceed (NTP); however, the NTP was not issued until August 14, 2000, more than two months after the plaintiff was awarded the contract.\textsuperscript{158} The expert attributed the delayed NTP to the defendant and quantified the plaintiff’s damages from the delayed NTP as $317,224.99.\textsuperscript{159} He later revised the damages and calculated direct costs at $284,417.20.\textsuperscript{160} The defendant argued that the expert’s methodology was either nonexistent or nonsensical.\textsuperscript{161}

The plaintiff’s expert calculated his revised direct costs by summing the costs incurred prior to August 14, 2000, and subtracting amounts that did not reflect mobilization costs.\textsuperscript{162} The expert performed a simple mathematical calculation on the costs he believed were relevant.\textsuperscript{163} The court ruled: “[h]is method of calculation—the mere adding of a column of figures—is hardly controversial and is sufficiently reliable for the purposes of determining admissibility.”\textsuperscript{164} However, whether he added the correct amounts, or properly excluded the contractual cap on mobilization and demobilization cases, went to the weight of his testimony.\textsuperscript{165}

**Interplan Architects, Inc. v. C.L. Thomas, Inc.**

*Daubert* challenges were brought against both the plaintiff’s and the defendants’ damages experts in *Interplan Architects, Inc. v. C.L. Thomas, Inc.*\textsuperscript{166} The plaintiff was hired by defendant Thomas to prepare architectural documents for nine Speedy Stop convenience stores.\textsuperscript{167} Defendant
Thomas hired defendant Morris and defendant Hermes to provide architectural design and construction drawings for 13 different Speedy Stop stores. Defendant Thomas admitted to providing defendants Morris and Hermes with copies of at least some of the plaintiff’s architectural documents. The plaintiff discovered the infringing stores, registered copyrights for its architectural works and technical drawings, and brought suit against the defendants for copyright infringement.

The defendants challenged the plaintiff’s damages expert arguing his method of calculation was incorrect. If the plaintiff proved infringement, it could recover both actual damages and the infringer’s profits under the Copyright Act. There is a rebuttable presumption that the infringer’s profits attributable to the infringement are equal to its gross revenue. However, it is not enough to simply add up the infringer’s gross revenue from all its profit streams. Instead, the gross revenue must bear some reasonable relation to the infringement.

The plaintiff’s expert calculated defendant Thomas’s gross revenue by adding the realized revenue and projected revenue at the allegedly infringing Speedy Stop stores, resulting in gross revenue of over $500,000. The defendants objected, complaining that the plaintiff failed to demonstrate a causal link between the alleged infringement and the defendant’s gross revenue from the allegedly infringing stores. This is a difficult issue, as the defendant did not obtain direct profits by selling infringing works but, instead, made indirect profits by using the allegedly infringing stores to sell other products, including food and drink, that might have been sold irrespective of the plaintiff’s design. The court concluded that there must be some nonspeculative evidence that the gross revenue was caused or in some way affected by the design of the stores. For example, the plaintiff’s expert could have created a comparison between the revenue for defendant Thomas’s noninfringing stores and the allegedly infringing stores, with controls in place for variables such as location, traffic, and pricing. Instead, the plaintiff’s expert admitted he was unable to establish that defendant Thomas’s gross revenue was attributable to the architectural design, making his methodology and resulting conclusions unreliable.

On the other hand, the expert’s testimony regarding Morris’s and Hermes’s gross revenue was found reliable. The expert identified the gross revenue for these defendants that corresponded to the services each provided to Thomas in connection with the allegedly infringing stores. Gross revenue from their other design projects or lines of business were excluded, making the expert’s damages calculation reasonably related to the alleged infringement and reliable.

The plaintiff also challenged the testimony of one of the defendants’ experts. Defendant Thomas’s expert opined that store design had a “significantly small” impact on shoppers’ overall shopping experience and, thus, that the portion of profitability related to store design would be nominal. The court agreed that defendant Thomas’s expert’s opinions were improper ipse dixit (because I said so) and should be excluded. 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. When the expert opined about the degree to which design affected the shopper’s buying experience, he was presumably relying on data that supported his opinion. However, the expert never described the data upon which he relied in reaching his conclusions. Further, to the extent his opinion was based on the application of his extensive professional experience to the facts at hand, he failed to state how his experience directed his analysis. Consequently, the court excluded the expert’s opinion.

The defendants challenged the plaintiff’s damages expert arguing his method of calculation was incorrect.

**Busch v. Dyno Nobel, Inc.**

In *Busch v. Dyno Nobel, Inc.*, the district court excluded testimony by the plaintiff’s damages expert regarding the value of the plaintiff’s business and the value of lost profits. The lower court found that the expert’s conclusions did not rest on a reliable foundation, and his underlying reasoning and methodology were not sound or valid, making his anticipated testimony too speculative. The problem with this ruling was that the court failed to make any factual findings explaining its position. Although courts are not required to hold formal *Daubert* hearings, they must ensure that the record is adequate. Because the written decision failed to provide any insight into the analysis supporting the trial court’s ruling, the appeals court remanded, instructing the trial court to conduct a *Daubert* hearing to fulfill its gatekeeping responsibility.

**Safeco Insurance Co. of America v. S & T Bank**

In *Safeco Insurance Co. of America v. S & T Bank*, the reliability of the plaintiffs’ damages expert’s methodology was questioned. The plaintiffs’ expert literally wrote the book on calculating construction damages. His book was referenced by both parties as they attempted to define the method used by the expert in calculating damages. The plaintiffs argued that the expert employed the “Actual Cost Method,” a method preferred by most courts. In this method, the actual cost records of the contractor are used to itemize and total the cost of each piece of equipment or material and each man hour necessitated by the
The total cost method is considered a method of last resort when no better method is feasible.

In Pennsylvania, damages need only be proven to a reasonable certainty. The court believed the expert's testimony was a form of the modified total cost method but, more importantly, that its role was not to label the methodology but to determine whether it was reliable. After citing various cases, the court concluded that Pennsylvania and the Third Circuit have found that the total cost method and modified total cost method have provided reasonably certain damages calculations under certain circumstances. Because the costs data being analyzed was from a now defunct company, only limited documentation was available to the expert. However, when additional documentation was made available, the expert was able to confirm that his work was still accurate. His knowledge and expertise also permitted him to determine a reasonable markup rate. Under these circumstances, the court found the methodology sufficiently reliable, and the defendant could attack any alleged abuses during cross-examination.

The Future Impact of Daubert on Construction Claims

Is the Construction Expert Qualified?

Because construction cases often involve nonscientific expert testimony based on knowledge and experience instead of scientific testing, a trend found in recent cases is to recognize that although an expert may have some expertise in his or her field, the expert may lack the requisite expertise related to the particular subject matter at issue in the case. As the world becomes more specialized, it will become harder to endorse the testimony of an expert who has plenty of general experience but only limited experience with the particular issue in a case. Because the courts have discretion in determining whether an expert is qualified, and courts tend to shy away from granting challenges based on broad generalizations (e.g., the expert must have written articles or the expert must have earned a particular degree to be qualified), the rate of success of this specific type of challenge could increase. For example, if a case involves government contracts, it is more likely the expert will need to specialize in government contract work to be found qualified. Further, even if the expert is admitted, she could be pitted against an opposing expert who has specialized expertise. Lack of a similar expertise will be attacked on cross-examination and may likely sway jurors during the “battle of the experts.”

Is the Construction-Related Testimony Reliable?

With construction testimony often being nonscientific, the reliability determination will turn more toward the knowledge and experience of the expert instead of a particular scientific study. This can make an analysis into the expert’s methodology more abstract. When opinions are based more on an application of the expert’s knowledge and experience to the facts of the case, it is possible that courts will expect higher qualifications out of the expert. Further, to avoid challenges that the expert’s testimony is improper ipse dixit, the expert should fully describe how her experience and knowledge led to her conclusions.

Is the Construction-Related Testimony Relevant?

As construction matters become more complex, and more money is at issue, experts become even more prevalent. It is important to remember that experts are not always contributing to the case and assisting the trier-of-fact. There will still be subject areas where expert testimony might be unhelpful and, accordingly, unnecessary. The prevalence of experts should not prevent counsel from examining whether an expert is truly being helpful and not adding confusion to the case.

Daubert’s Application to Scheduling

At this time there are widely accepted methods recognized by the industry for analyzing schedules. Expert testimony will continue to be guided by these methods. However, change can be expected with regards to the qualification of scheduling experts. For example, there is a relatively new scheduling certification offered by the Association for the Advancement of Cost Engineering International (AACEI) for a Planning and Scheduling Professional (PSP). As qualifications become more specialized, certifications such as the PSP certification can help establish the requisite specialized knowledge with regard to scheduling. Also, as construction companies use new technologies for scheduling, experts might have to establish particularized qualifications with respect to those technologies.
Daubert's Application to Construction Defects
As previously discussed, construction defect testimony will often need to address any applicable standards used in the industry. It is important that experts be familiar with any changes to applicable standards. For example, as "green" construction rises in popularity, new issues might arise, including whether a project meets the standards required for LEED Project Certification. Testimony regarding outdated standards or that ignores new standards might be deemed unreliable and irrelevant.

Daubert's Application to Damages
Prior to Kumho Tire, financial experts were often permitted to testify based on their qualifications alone. Now that they are subject to the gatekeeping standard, they must be able to overcome any Daubert challenges. This means paying attention to the industry-accepted methods of calculating damages, sufficiently identifying any methods used, and demonstrating the requisite qualifications to testify regarding damages.

Suggested Approaches to “Testing” Experts Under Daubert: Learning From Others’ Mistakes
Patterns regarding the types of challenges that tend to be more successful and the types of challenges that are weaker can be gleaned from a close review of the cases referenced in this article. Keeping the lessons of these cases in mind, attorneys can benefit from considering the following questions when seeking to admit or strike experts:

• Did the expert clearly identify the methodology used and the data and assumptions relied upon?
• How widely accepted was the methodology used by the expert?
• Did the expert use applicable standards and, if not, did the expert provide a valid reason for ignoring such standards?
• Did the expert cite to any treatise or other authority?
• If the expert's testimony was based on knowledge and experience, did the expert possess specialized knowledge or a particular expertise related to the specific area at issue in the case?
• Even if qualified to testify on particular subjects, did the expert provide opinions beyond the expert's area of expertise?
• If the expert relied on assumptions, to what extent were the assumptions supported in the record?

Counsel should remember the court’s gatekeeping role is just that: an initial decision regarding admissibility. Testimony that is admissible but weak is likely to be challenged on cross-examination and through contrary expert testimony. For this reason, counsel should gauge the strengths and weaknesses of her own expert testimony under the Daubert and Kumho Tire standards and try to rectify as many weaknesses as possible prior to presenting expert testimony.

Below are examples of cases where either (1) the expert’s testimony was found inadmissible for multiple reasons or (2) multiple challenges to expert testimony were unsuccessful. These cases provide insight into how to bolster weaknesses in expert testimony or in certain Daubert challenges.

HNTB Georgia, Inc. v. Hamilton-King
In HNTB Georgia, Inc. v. Hamilton-King, the plaintiffs were injured and their brother was killed after being struck by a van in a bridge construction zone on Interstate 95.216 The three siblings had just been involved in a different car accident and were standing near their disabled vehicle when they were hit.217 The plaintiffs brought suit against the general contractor and the designer of the bridge-widening project.218 A Daubert challenge was brought against the appellees’ expert witness, a licensed engineer, who testified that the construction design plan violated the applicable standard of care because the plan did not call for shoulders or lighting during the construction period.219

Testimony regarding outdated standards or ignoring new standards might be deemed unreliable and irrelevant.

The court upheld the trial court’s ruling that, although the expert was qualified to testify as an engineering expert, his opinions were unreliable because he failed to identify the methods or principles employed in reaching his conclusions.220 The trial court pointed out: (1) the expert’s failure to cite to any treatise or other authority supporting his opinion that the plan was below standards; (2) the absence of any testing that could demonstrate evidence of similar accidents; and (3) the difficulty of ascertaining error rates in the use of engineering judgment.221 The trial court recognized that although testing and error rates were not required in every case, in this case the court was attempting, and failing, to find a foundation for the expert’s conclusions.222

The appellees contended that the expert’s experience provided an adequate foundation for his conclusions.223 The court acknowledged that expert testimony can be admitted based on knowledge and experience alone, but that is only when the expert had experience with the particular procedure or practice at issue.224 In contrast, the expert admitted he had no personal experience with the design or evaluation of construction traffic control plans.225 He
had never been qualified as an expert in a case involving bridge construction design, nor had he designed, reviewed, or evaluated a construction plan for a similar bridge construction project. Further, standards for such plans existed, and the expert’s conclusions went against those standards. Neither AASHTO nor the Manual on Uniform Traffic Control Devices required shoulders or lighting on the bridge. The court found that the expert’s conclusions, based solely on his own assertions, were unsupported and, therefore, unreliable.

**D&D Associates, Inc. v. Board of Education of North Plainfield**

In **D&D Associates, Inc. v. Board of Education of North Plainfield**, the court upheld the magistrate judge’s ruling excluding the testimony of the plaintiff’s expert. The plaintiff, D&D, was a general contractor working on various construction and renovation projects for schools in North Plainfield. The Board of Education for North Plainfield issued a notice of default against the plaintiff and terminated the plaintiff from the project. The plaintiff sued both the board and the board’s attorney alleging violations of civil rights, breach of contract, tortious interference, libel, slander, conversion, and fraudulent inducement.

The plaintiff’s expert was asked to render an opinion regarding whether the board’s attorney committed legal malpractice in connection with the preparation and review of bid documents. The expert’s opinion was that the attorney committed legal malpractice. The expert’s resume documented that he had more than 30 years of experience as an attorney in the state, but it did not reflect any particular expertise in the specific areas of construction and public bidding laws, which the magistrate judge determined was required. To prove he possessed specialized knowledge in these areas, the expert submitted a supplemental certification. The certification listed several school boards for which his office provided counsel. The court found the supplemental certification did not improve upon the expert’s qualifications, as the expert must establish his expertise, and the collective expertise of his office was not sufficient. Further, the expert noted that he was involved in 50 bidding projects and the construction of several school buildings, but the magistrate judge was not satisfied with general statements regarding experience. According to the court, the expert should have specifically explained his level of involvement with those matters, his familiarity with the process, and whether the prior bidding project procedures were analogous to the matter before the court.

Further, the expert’s report did not “fit” because the claims alleged did not address the quality of advice provided to the board. Instead, the allegations argued that the attorney breached a duty of care owed to the plaintiff. The court found a disconnect between the opinion and the allegations in the case. There was a similar “fit” issue with the expert’s opinions regarding damages. His report admitted he did not review the plaintiff’s damages, but he opined that it was “self-evident” that the plaintiff’s damages resulted from the attorney’s conduct. Thus, the court found the opinion evidence was only connected to the existing data by the *ipse dixit* of the expert, which is not enough to create the requisite “fit.”

**U.S.A. ex rel. Poong Lim/Pert Joint Venture v. Dick Pacific/Ghemm Joint Venture**

In **U.S.A. ex rel. Poong Lim/Pert Joint Venture v. Dick Pacific/Ghemm Joint Venture**, defendant DPG was hired by plaintiff Poong Lim as the prime contractor in a public works construction project replacing Bassett Hospital at Fort Wainwright. The plaintiff was hired as a subcontractor responsible for shop fabrication drawings, structural steel, and erection aids. The plaintiff argued DPG breached the subcontract and owed the plaintiff additional compensation. DPG denied the allegations, claiming it was the plaintiff who breached the subcontract.

The plaintiff challenged the qualifications of two of DPG’s experts. The first expert, the damages expert, was to testify as to the cost impacts caused by the delay and allegedly faulty manufacturing of the structural steel. The second expert, the quality expert, was to testify as to the quality of the steel, the shop drawings, and the plaintiff’s detailing work on the project. The plaintiff first attacked the damages expert’s testimony, arguing it should be excluded because he was not an accountant so he lacked the requisite qualifications to testify as to costs. The plaintiff could not cite any authority that an expert must be an accountant to testify as to costs, nor was the court willing to make that determination. The damages expert had an engineering degree with a minor in mathematics. He also had approximately 37 years of experience, including experience in construction management and as a project manager, developing and reviewing construction budgets, costs, and schedules. The court determined the damages expert was sufficiently qualified to testify concerning the construction delay costs at issue in the case.

The plaintiff next challenged the conclusions reached by both the damages expert and the quality expert. The plaintiff argued their opinions were flawed because neither expert went to great lengths to verify the information relied upon in making conclusions, and some of that
information was either incorrect or based on sources that were inadmissible, or the experts did not consider the impact if the facts differed. More specifically, the experts simply rubber-stamped DPG’s view of the facts without considering the plaintiff’s perspective.

The court was not swayed by the plaintiff’s arguments and denied the motion to exclude for two reasons. First, expert testimony does not need to be based upon facts within the expert’s personal knowledge and is often based upon facts assumed to be true. Second, experts can testify using controverted facts or just their own party’s version of the facts. Any challenges to the correctness of the experts’ testimony could be brought out in cross-examination.

The plaintiff also argued that the experts failed to adequately explain their methodologies and the methodologies used by those who prepared the information relied upon by each expert. The court recognized that in nonscientific cases, it is education, training, and experience that are more appropriate benchmarks of reliability instead of methodologies and theories. Both experts explained in detail (1) the information that each reviewed, (2) the sources of that information, and (3) any steps taken to verify the information. The reasonableness of assumptions underlying their opinions and criticisms of their methods were for consideration by the trier-of-fact as to the weight of the evidence.

A Battle of Experts

Daubert and Kumho Tire broadened the gatekeeping roles of courts to encompass expert testimony based on technical and specialized knowledge, not just scientific testing. Nonscientific knowledge, based on experience, skill, or education, is prevalent in construction cases. Experts in construction cases must now be prepared to defend against Daubert challenges by proving they are qualified and their testimony is relevant and reliable. Although courts should be flexible in their analysis of whether expert testimony should be admissible, some patterns and trends can be detected through case law. One of the most likely trends is that as the industry continues to become more specialized, experts will need to be more specialized as well. More Daubert challenges will be made on the ground that an expert has general experience but lacks specific experience related to the issue in dispute. Whether these challenges will prevent the admission of the expert’s testimony is yet to be seen. However, even if an expert survives a Daubert challenge, counsel should be prepared to have those same challenges scrutinized before the trier-of-fact. Beating a Daubert challenge is only the first step in the “battle of the experts.”

Endnotes


4. Id.

5. Daubert, 509 U.S. at 580.

6. Id. at 583–84.


8. Id. at 1130 (quoting United States v. Solomon, 753 F.2d 1522, 1526 (9th Cir. 1985)).

9. Id. at 1130–31.

10. Id. at 1130.

11. Id. at 1131.

12. FED. R. EVID. 702.


14. Id.

15. Id. at 588–89. The Court noted that whether a theory or methodology is scientific knowledge that can be tested is key to the inquiry. “Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry.” Id. at 593 (internal citations omitted).

16. Id. at 589–92.

17. Id. at 593–94.

18. Id. at 594-95. See also United States v. Mouzone, 696 F. Supp. 2d 536 (D. Md. 2009).

19. Daubert, 509 U.S. at 600 (Rehnquist, J., concurring in part and dissenting in part).

20. 522 U.S. 126 (1997) (the plaintiff failed to show that exposure to PCBs was the cause of his lung cancer).

21. Id. at 146.

22. Id.

23. 526 U.S. 137 (1999) (the Daubert analysis may be applied not only to scientific experts, but also to engineering experts and all other expert testimony).


27. Kumho, 526 U.S. at 159. See also Nancy E. Bonifant, Blackwell v. Wyeth: It’s Our Courtroom and We’ll Frye (Only) If We Want To—The Maryland Court of Appeals’s Unstated Adoption of Daubert, 69 Md. L. REV. 719 (2010).


29. Id. The Supreme Court ultimately concluded that the district court did not abuse its discretion when excluding the plaintiff’s expert because, under reconsideration, the district court found the expert’s testimony unreliable under any set of factors.

30. FED. R. EVID. 702.

31. Id. (Advisory Committee Notes).

32. Id. (text of the rule).


34. Steffy, 2008 WL 5189505, at *2 (citing In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 741 (3d Cir. 1994)).


36. Id. (internal quotations omitted).

38. Id. at *2.
39. Id.
40. Id.
41. Id.
42. Id. at *3.
44. Id. at *2.
45. Id. at *3.
46. Id.
47. Id.
48. Id.
49. Id.

51. Id.
52. Id.
53. Id.
55. Kuhno, 526 U.S. at 152.
58. Daubert, 509 U.S. at 596.
61. Id.
62. Id.
63. Id. at *3.
64. Id. at *4.
65. Id.
66. Id.
67. Id.
68. Id. at *5.
69. Id.
70. Id. at *10.
71. Id. at *12.
72. Id.
73. Id.
74. Id.
75. Id.
78. Id.
79. Id.
80. Id.
81. Id.
82. Id.
83. Id.

United States v. Amuso, 21 F.3d 1251, 1263 (2d Cir. 1994)).
88. Id.
90. Id.
91. Id. at *7.
92. Id.
93. Id. at *6.
94. Id. at *9.
95. Id. at *7.
96. Id. at *7–8.
97. Id. at *8.
98. Id. at *9.
99. Id.
100. 253 F.3d 576, 585 (11th Cir. 2001).
101. Id. at 579.
102. Id.
103. Id. at 579–80.
104. Id. at 583–84.
105. Id. at 585.
106. Id.
108. Id. at *12–13.
109. Id.
110. Id.
112. Id.
113. Id.
114. Id.
117. See CUSHMAN, supra note 115, § 17.03, at 515.
118. See id. § 17.03, at 516–17.
120. Id.
121. Id.
122. Id.
123. Id.
124. Id.
125. Id.
126. Id.
128. Id. at *6.
129. Id.
130. Id. at *6–7.
131. Id. at *6.
133. Id.
134. Id.
135. Id. 136. Id. at *3, n.3 (quoting Jones v. Otis Elevator Co., 861 F.2d 655, 662–63 (11th Cir. 1988)).
137. Id. (quoting Jones, 861 F.2d at 662–63).
138. Id.
139. Id.
140. Id. at *3.
141. Id. at *3, n.3.
142. Id.
144. Id.
145. Id. at *3.
146. Id.
147. Id. at *6–7.
148. Id. at *6.
149. Id.
150. Id.
151. Id.
152. Id. at *7.
153. Id. at *7.
155. Id. at *2.
156. See CUSHMAN, supra note 115, § 17.03, at 520–21.
157. 88 Fed. Cl. 752, 756 (2009). This opinion was not designated for publication by the court. However, it was erroneously published at this citation by the publisher.
158. Id. at 754.
159. Id. at 757.
160. Id.
161. Id.
162. Id.
163. Id.
164. Id.
165. Id.
167. Id.
168. Id. at *1–2.
169. Id. at *2.
170. Id.
171. Id. at *5.
172. Id. at *3.
173. Id. at *4.
174. Id.
175. Id.
176. Id.
177. Id. at *5.
178. Id.
179. Id. at *7.
180. Id.
181. Id.
182. Id. at *5.
183. Id.
184. Id.
185. Id. at *17.
186. Id.
188. Id. at *17.
189. Id.
190. Id. at *18.
191. Id.
193. Id.
194. Id.
195. Id. at *12.
196. Id.
198. Id. at *7.
199. Id.
200. Id. at *7, 9.
201. Id. at *7.
202. Id.
203. Id.
204. Id. at *8, 9.
205. Id. at *8.
206. Id.
207. Id.
208. Id.
209. Id.
211. Id. at *10–11.
212. Id. at *10.
213. Id.
214. Id.
215. Id. *10–11.
216. 697 S.E.2d 770, 772 (Ga. 2010).
217. Id.
218. Id.
219. Id. at 772–74.
220. Id. at 773.
221. Id.
222. Id.
223. Id. at 774.
224. Id.
225. Id.
226. Id.
227. Id.
228. Id.
230. Id.
231. Id.
232. Id.
233. Id.
234. Id.
235. Id. at *4–5.
236. Id. at *5.
237. Id.
238. Id.
239. Id.
240. Id.
241. Id.
242. Id. at *6.
243. Id.
244. Id.
245. Id.
246. Id.
248. Id.
249. Id.
250. Id.
251. Id.
252. Id. at *2.
253. Id.
254. Id.
255. Id.
256. Id.
257. Id.
258. Id.
259. Id.
260. Id.
261. Id.
262. Id.
263. Id. at *3.
264. Id.
265. Id.
266. Id.
267. Id.