Experts in 2012: The Good, The Bad, and The Ugly

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Experts in 2012: How Courts have construed the FRCP 26 Amendments and Recent Daubert and Frye Rulings
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1. Introduction

With recent amendments to Federal Rule of Civil Procedure 26 and a proliferation of Motions to Strike/Exclude Expert Testimony under the Court's responsibility as a gatekeeper of information that is to be considered by a jury, keeping apprised of recent rulings on these issues is key to effectively using experts in defending mass tort claims. This article explores the changes to Rule 26, including how courts have handled discovery disputes involving experts, and reviews recent Daubert and Frye decisions that may assist in having an opponent's experts testimony stricken before presentation to a jury.

2. Amendments to Federal Rule of Civil Procedure 26

Effective December 1, 2010, Federal Rule of Civil Procedure 26 was amended to protect draft expert materials and some attorney-expert communications from discovery. See Fed. R. Civ. P. 26(b)(4)(B)-(C). New Rule 26(b)(4) works in conjunction with also recently amended Rule 26(a)(2) to govern discovery and disclosure from experts, respectively. With respect to Rule 26(b)(4), the amendments inserted two new sections, (B) and (C):

(4) Trial Preparation: Experts.

> (B) Trial-Preparation Protection for Draft Reports or Disclosures. Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.
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> (C) Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses. Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:
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> > (I) relate to compensation for the expert's study or testimony;
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> > (II) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or
> >
> > (II) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

Rule 26(a)(2)(B) now provides that an expert report must contain the "facts or data considered by the witness in forming [the opinion to be expressed]," while the old Rule was more expansive and required the report to contain "the data or other information considered by the witness in forming [the opinions to be expressed]." See Chevron Corp. v. Shefftz, 754 F. Supp. 2d 254, 263 (D. Mass. 2010) (explaining the changes to Rule 26(a)(2)(B)(ii)) (alterations in original); see also Sara Lee, Corp. v. Kraft Foods, Inc., 273 F.R.D. 416, 419 (N.D. Ill. 2011) (same). Section 26(b)(4)(C) applies work-product protections to communications between the party's attorney and a "testifying expert." Sara Lee, 273 F.R.D. at 419. The Sara Lee Court did, however, highlight an exception under Rule 26 (b)(3)(A)(ii), which allows discovery if "the party seeking discovery 'has substantial need for the materials to prepare and cannot, without undue hardship, obtain their substantial equivalent by other means.'" Id. (quoting Fed. R. Civ.

P. 26(b)(3)(A)(ii)).

a. Purposes of Rule 26 Amendments

Under old Rule 26, interpretation by courts was inconsistent. See Chevron, 754 F. Supp. 2d at 264 (noting that the First Circuit never addressed these inconsistencies). The majority applied a "bright-line rule" under which matters considered by an expert in formulating an opinion, including attorney work product, were automatically discoverable. Id. at 264 n.71 (citing S. Yuba River Citizens League v. Nat'l Marine Fisheries Serv., 257 F.R.D. 607, 612 (E.D. Cal. 2009) (collecting cases on majority interpretation)). On the other hand, a minority found that disclosure of core work product to a testifying expert did not affect the protection accorded to such information. Id. (citing Yuba River, at 613). The majority interpretation created "undesirable effects" under the old Rule. Id. (citing 2010 Advisory Committee Notes to Fed. R. Civ. P. 26); see also Sara Lee, 273 F.R.D. at 419 (finding that the majority's "broad expert discovery carried with it several unfortunate consequences"). Such effects included increased discovery costs and impeded effective communication between attorneys and their experts, apparently inducing some parties to retain two separate sets of experts—one for consultation and another to testify. Sara Lee, 273 F.R.D. at 419 (citing 2010 Advisory Committee Notes to Fed. R. Civ. P. 26).

As the Court in Sara Lee explained, the advisory committee intended its change "to 'limit disclosure to material of a factual nature by excluding theories or mental impressions of counsel.'" Id. (quoting same). According to a Magistrate Judge in the District Court of Colorado, the Advisory Committee made clear "that the amendments are meant to alleviate the perceived uncertainty and rising costs associated with attorneys' limited interactions with their retained experts as a result of court opinions allowing discovery of an expert's draft reports and of all communications with counsel." Republic of Ecuador v. Bjorkman, No. 11-cv-01470-WYD-MEH, 2012 BL 1828, at *6 (D. Colo. Jan. 4, 2012) (citing 2010 Advisory Committee Notes). Specifically, amended Rule 26(b)(4)(B) is "aimed at protecting an expert's drafts, which may contain the attorney's work product, and Rule 26 (b)(4)(C) provides specific protection for attorney-expert communications. Id. at *7.

b. "Just and Practicable" – When Does New Rule 26 Apply?

Rules 26 governs "all proceedings" pending on December 1, 2010 insofar as application of the Rule is "just and practicable." Chevron, 754 F. Supp. 2d at 263. In Chevron, the Court found it just and practicable to apply the new rule because "the old Rule 26 faced conflicting interpretations," and the parties "had ample notice of the provisions of the new rules that will apply and should have been able to prepare accordingly." Id. at 264. The petitioner in Chevron had filed its application to order discovery on October 22, 2010, and the respondent agreed that it could produce documents responsive to the subpoena on December 1, 2010 if the Court ordered it to do so. Id. The Court commented further that "even with new Rule 26, the petitioner should have "ample opportunity to depose Respondent and discover the facts underlying his opinion." Id.

In Daugherty v. American Express Co., the defendant argued that it would not be just and practicable to apply the amendments because discovery of the expert's file was sought by subpoena prior to December 1, the case was commenced three years earlier, and the expert was a key witness who offered new opinions despite having received no new information. No. 3:08-CV-48, 2011 U.S Dist. LEXIS 30486, at *12-13 (W.D. Kent. Mar. 23, 2011). Discovery in Daugherty was set to close on December 1, 2010, but the Court extended discovery to December 14. Id. at *13. The expert's deposition took place on December 9, 2010. Id. Without providing analysis, the Court stated that its belief that "it is just and practicable to apply the 2010 amendments to this case." Id. "Accordingly, Plaintiff need only disclose communications relating to [the expert's] compensation, identifying facts or data provided by Plaintiff's attorney . . . which were considered by the expert in forming his opinion, and identifying assumptions provided by Plaintiff's attorney which were relied upon by [the expert]. . . ." Id. at *13-14 (citing Fed. R. Civ. P. 26(b)(4)(C)(i)-(iii)); see also United States v. 73.92 Acres of Land, No. 3:09cv802-TSL-MTP, 2011 U.S. Dist. LEXIS 87661, at *2 n.1 (S.D. Miss. Aug. 8, 2011) (quoting Daugherty as support for applying the 2010 amendments and rejecting the defendants' request to depose the plaintiff's former counsel of record).

Most recently, the District Court of Colorado in Bjorkman performed the most thorough analysis to date addressing the applicability of the 2010 Amendments. Bjorkman, 2012 BL 1828 at *3-6. The Bjorkman Court quoted Fed. R. Civ. p. 86(a) to guide its analysis:

Pursuant to Fed. R. Civ. P. 86(a):

> These rules and any amendments take effect at the time specified by the Supreme Court, subject to 28 U.S.C. § 2074. They govern:
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> (1) proceedings in an action commenced after their effective date; and
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> (2) proceedings after that date in an action then pending unless;
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> (A) the Supreme Court specifies otherwise; or
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> (B) the court determines that applying them in a particular action would be infeasible or work an injustice.

Id. at *3. After finding that the proceeding commenced after the effective date as part of an action pending on that date, the Court held that the Supreme Court has specified "nothing other than that provided in Rule 86(a)" and application of the 2010 amendments would not be infeasible or work an injustice. Id. at 4-6. As a result, the Bjorkman Court found "that the 2010 Amendments shall apply to this proceeding in a pending action pursuant to Fed. R. Civ. p. 86(a)(2)." Id. at *6.

(1) Agreement By the Parties

If the parties have agreed to the application of the amended rules, courts will enforce these agreements. For example, the plaintiffs in Sara Lee asserted that previous e-mails between the parties' attorneys clarifying what documents and communications fell within their agreement evinced an agreement to provide expert communications beyond what is required by amended Rule 26. 273 F.R.D. at 418. The Court disagreed, quoting the words of plaintiffs' own counsel that "the parties agreed to limit the production of attorney-expert communications to 'any substantive e-mails or other documents that we sent to our experts regarding facts, opinions, or the bases for opinions that are discoverable under Rule 26(b)(4)(C) [a provision added by the 2010 amendments]." Id. (emphasis and alteration in original). The Court therefore decided to apply amended Rule 26. Id.; see also Gaur v. City of Hope, No. 2:11-cv-006510SJO-RZ, 2011 U.S. Dist. LEXIS 112994, at *11-12 (C.D. Cal. Sept. 30, 2011) ("The parties agree that the amendments . . . shall apply to this case. Thus, materials protected from disclosure pursuant to amended Rule 26(b)(4) are not subject to discovery and will not be listed on privilege logs.); Nat. Western Life Ins. Co. v. Western Nat. Life Ins. Co., No. A-09-CA-711-LY, 2011 U.S. Dist. LEXIS 21967, at *4 (W.D. Tex. Mar. 3, 2011) ("The parties in this case have agreed to be bound by the 2010 amendments to Rule 26.").

The parties in CIVIX-DDI, LLC v. Metropolitan Regional Information Systems, Inc. brought a joint motion for an order clarifying and establishing that the 2010 amendment to Rule 26(b)(4) applied and governed discovery in the matter. 273 F.R.D. 651, 652 (E.D. Va. 2011). The CIVIX-DDI Court found it significant that "the parties bring this motion jointly, and neither advances any reason whatsoever to suggest that the application of amended Rule 26(b)(4) to this case might be unjust, impracticable, or infeasible." Id. However, the Court still analyzed whether application would be just and practicable since "one of both the parties evidently remains fearful that the other will seek to discover expert witness trial preparation materials notwithstanding any stipulated agreement they might reach on the issue. . . ." Id. Here, the Court found it just and practicable where discovery did not commence until "well after December 1, 2010" and when "there remains ample time for the parties to conduct thorough discovery of testifying expert opinions on substantive grounds, without also inquiring into draft expert reports and attorney-expert communication." Id. at 652-53.

(2) Inconsistent Application

Considering discovery of different experts in the same underlying arbitration, two Magistrate Judges in Florida and Colorado have made conflicting decisions. The Magistrate Judge in the Northern District Court of Florida distinguished his case from multiple other cases applying the new Rule, finding that "[d]espite these cases, I believe that the new Rule 26(b)(4)(C) does not apply here." In re Application of: The Republic of Ecuador, No. 4:11mc73-RH/WCS, 2010 U.S. Dist. LEXIS 143796, at *21 (N.D. Fla. Aug. 24, 2010) (filed Aug. 24, 2011; note an apparent mistake in Lexis' decision date as the opinion cites multiple cases decided after August 24, 2010). Under the old Rule, the Judge ordered production of the requested documents from the defendant's expert. Id. at *26. The major difference between Republic of Ecuador and other cases that have addressed the amended Rule was the discovery sought information for use in a Bilateral Investment Treaty arbitration, governed by the rules of the United Nations Commission on International Trade Law. Id. at *1. Also significant, the expert had

been retained for use in prior court litigation, but his expert reports were cited by the party in filings with the arbitral tribunal. Id. at *21. Although the party had filed copies of the complete reports with the arbitral tribunal, the Judge explained that this was the "custom in the arbitral tribunal," and the party did not intend to call the expert as a witness in those proceedings, nor had the party retained the expert specifically for the arbitration proceedings. Id. Since the expert "would not be required to provide a written report pursuant to Fed. R. Civ. P.26(a)(2)(B) if the arbitration proceeding were a proceeding in a district court," the Magistrate Judge decided "new rule 26(b)(4)(C) should not apply." Id.

Additionally, the Judge in Republic of Ecuador explained that even if the expert would be governed by the amended Rule's protections, the old Rule 26 would apply under the case's unique circumstances. Id. Indeed, "if the new Rule should apply to [the expert] because he was retained . . . to provide testimony in the [prior] litigation, that testimony occurred before the new Rule took effect." Id. Finally, the Judge held that no work product or attorney-client privilege was available, concluding that "[u]nder these circumstances, I believe that it is more just to apply the version of Rule 26 in existence when [the expert's] testimony was prepared and submitted in the [prior] litigation, rather than the new version of Rule 26(b)(4)(C)." Id. at *23 (citing American Property Const. Co. v. Sprenger Lang. Foundation, 274 F.R.D. 1, 4 n.5 (D.D.C. 2011).

In direct contrast, the Magistrate Judge in Bjorkman allowed the same defendant to withhold documents protected under the new Rule with respect to another of the defendant's experts. Bjorkman, 2012 BL 1828 at *7-8. The Judge in Bjorkman agreed with the defendants that the plaintiffs "had notice of the 2010 Amendments well before they came into effect and there was nothing stopping Petitioner from filing the present petition before the effective date of the Amendments." Id. at *5. Like Republic of Ecuador, the discovery related to the same underlying Treaty Arbitration, which had been initiated in September 2009. Id. Not only was it significant in Bjorkman that the petitioner had not explained or justified its delay in filing the petition to order discovery until June 2011, but the Judge also rejected the petitioner's argument that there was no legitimate expectation of privacy in the expert's reports when they were submitted prior to December 1. Id. The Judge reasoned that the petitioner had "fail[ed] to demonstrate how such fact, if true, would be any more unjust than all other cases in which an expert report is submitted before the December 1, 2010 Amendments, but for which discovery is sought after the Amendments took effect." Id. at *5-6. Accordingly, the Bjorkman Judge held: "[j]ust as the pre-Amendment rules and case law applied to both Petitioner and Respondent before December 1, 2010, so too will the newly revised rules apply to both parties post-Amendments." Id. at *6.

Directly contradicting the Republic of Ecuador decision, the Bjorkman Judge found that, with respect to the expert's draft reports, the Advisory Committee made clear "that '[t]his protection applies to all witnesses identified under Rule 26(a)(2)(A) whether they are required to provide reports under Rule 26(a)(2)(B) or are the subject of disclosure under Rule 26(a)(2)(C).'" Id. at *7. Consistent with Republic of Ecuador, the Judge in Bjorkman stated that Rule 26(b(4)(C) protection "is limited to communications between an expert witness required to provide a report under Rule 26(a)(2)(B) and the attorney for the party on whose behalf the witness will be testifying. . . ." Id. at *7-8 (emphasis added). Also like Republic of Ecuador, the petitioner argued that the expert had not been retained or specially employed to provide expert testimony in the Treaty Arbitration and "would be considered a non-reporting testifying expert in this matter." Id. at *8. While the Republic of Ecuador Judge apparently agreed with this argument, the Magistrate Judge in Bjorkman disagreed; "it is undisputed in this matter that Petitioner seeks discovery of [the expert] in his role as an expert witness required to submit a report pursuant to Rule 26(a)(2)(B) in the underlying litigation." Id.; compare Republic of Ecuador, at *21 (stating that the copies of the complete expert reports were filed "[a]s is this custom in the arbitral tribunal"). Therefore, an important distinction after Republic of Ecuador and Bjorkman appears to be whether the Judge finds that filing expert reports in the arbitration proceeding was a "requirement" of that tribunal or merely a "custom" in such a proceeding.

c. Henriksen v. United States

In Henriksen v. United States, the Northern District Court of Illinois actually applied different versions of Rule 26(b)(4)(B) to opposing parties despite the plaintiffs' contention that "the parties should be subject to the same version of Rule 26 and that applying different versions of the same rule to the parties . . . is unjust and impracticable.'" No. 09-C-2398, 2011 U.S. Dist. LEXIS 46227, at *6 (N.D. Ill. Apr. 29, 2011). Here, the plaintiffs had disclosed their experts prior to December 1, while the Government waited to disclose

its experts until after December 1. Id. As a result, the reports of plaintiffs' experts were discoverable before the new Rule took effect, but the plaintiffs' could not have discovered the Government's expert reports since the Government had not disclosed its experts by December 1. As the Court explained, however, "although the drafts of Plaintiffs' expert's reports were 'discoverable' under the prior rule, they were not actually discovered – that is, requested – by the Government. . . ." Id at *7. Since neither side had possession of the other side's draft expert reports, the Court found that the plaintiffs' request "would lead to the 'asymmetrical' result of allowing one-sided access to draft expert reports." Id. The Court therefore found the plaintiffs' position to be "contrary to the tenor of the amended rule and in fact would lead to the more impracticable and unjust result in this case." Id. at *6. Also influencing the Court, plaintiffs had failed to file a motion to compel immediately after the Government alerted them that the draft report was not discoverable. Id. at *7-8. Consequently, the Court found that the plaintiffs' "wait[ing] to raise the issue until the final pretrial conference, nearly three months after the close of expert discovery" gave the Court "another reason to deny their request." Id. at *8.

d. Other Issues Related to New Rule 26

(1) Scope of "Facts or Data"

Since amended Rule 26(a)(2)(B)(ii) allows disclosure of only "facts or data" and Rule 26(b)(4)(C)(ii) creates an exception for "facts or data" communicated by an attorney, an issue remains as to the scope of the phrase, "facts or data," in this context. Courts have typically relied on the Advisory Committee Notes in explaining that 'facts or data' "should still be 'interpreted broadly to require disclosure of any material considered by the expert, from whatever source, that contains factual ingredients. The disclosure obligation extends to facts or data 'considered' by the expert in forming the opinions to be expressed, not only those relied upon by the expert." Chevron, 754 F. Supp. 2d at 264 (quoting 2010 Advisory Committee Notes to Fed. Civ. P. 26) (emphasis added). Specific to Rule 26(b)(4), the revision "should not 'impede discovery about the opinions to be offered by the expert or the development, foundation, or basis of those opinions.'" Id. (quoting same). In Sara Lee, the Court found that the "requested materials contain neither 'facts or data' nor 'assumptions that the party's attorney provided,' so that they are not discoverable even under the 'testifying expert' rubric." Sara Lee, 273 F.R.D. at 420. After an in camera review of the requested materials, the Sara Lee Court concluded that the expert was not a testifying witness where he "merely advised Defendants on how they might conduct a pilot survey. . . ." Id.

Another federal Court, in Skycam, Inc. v. Bennett, refused to order the production of an attorney's notes made in connection with interviews of witnesses and preparation of expert reports. No. 09-CV-294-GKF-FHM, 2011 U.S. Dist. LEXIS 68725, at *3 (N.D. Ok. June 27, 2011). Here, the defendants sought production of these notes hoping to argue that the experts had not substantially participated in preparing their expert reports. Id. at *4 n.1. The Court however quickly disposed of the argument by stating: "under Fed. R. Civ. P. 26(b)(4), as amended effective December1, 2010 (and applied retroactively to this issue), plaintiffs' attorney's notes are not discoverable." Id.

(2) In re: Asbestos Products Liability Litigation

In one of the more recently filed cases addressing the amendments, the Eastern District Court of Pennsylvania considered the work-product privilege for expert physicians in a products liability context. No. MDL 875, 2011 U.S. Dist. LEXIS 143009, at *18 (E.D. Penn. Dec. 13, 2011). The specific issue involved the production of "transmittal letters" that plaintiffs had provided three doctors. Id. These letters "may have furnished certain information about exposure, medical and smoking history to the doctors and may have been utilized by them in the formation of any letters or reports provided to counsel to support a claim." Id. Objecting to production, the plaintiffs argued that the "transmittal letters" were work product and subject to the protection set out in Fed. R. Civ. P. 26(b)(3)(A). Id. In response, the defendants pointed out that Rule 26(b)(3)(A) explicitly provides that it is "subject to" Rule 26(b)(4), a provision "which must be analyzed in that the transmittal letters provide certain information to the expert physicians." Id. at *19. In light of these arguments and Rule 26(b)(4)(C), the Court decided that the question is "whether information provided constitutes 'facts or data' or 'assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.'" Id. at *20.

In addition to their contention that the letters are protected as communications between a party's attorney and expert witnesses, the plaintiffs argued that the letters constituted "drafts of expert reports," which are explicitly protected under amended Rule 26. Id. at *20-21. In support of this argument, evidence showed

that the plaintiffs provided the doctors information in the form of draft correspondence, prepared as letters on the doctors' letterheads that would then come back to the plaintiffs' counsel. Id. at *20. In these letters, there would be certain spaces left blank (or partly filled out by the plaintiffs' counsel) indicating exposure history, medical history, and certain anticipated conclusions or medical opinions. Id. Before considering whether the letters contained discoverable material, the Court rejected the draft report argument by referring to Rule 26(b)(4)(C), which provides: "Rule 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report . . . regardless of the form of the communications, except. . . ." Id. at *21 (emphasis in original). Thus, the Court decided draft reports were among the communications subject to "the exceptions that pertain to the identification of 'facts or data' or 'assumptions' that are at issue here." Id.

The Court therefore held "the information and format that [the plaintiff] provided to its diagnosing doctors regarding individuals' exposure, medical and smoking histories [falls] squarely within the definition of 'facts or data' considered by the expert, which the amendments will not protect under Rule 26(b)(3)(A) or (B)." Id. at *21-22. Like other courts, the Pennsylvania District Court next quoted the Advisory Committee Notes for support: "the intention is that 'facts or data' be interpreted broadly to require disclosure of any material considered by the expert, from whatever source, that contains factual ingredients." Id. at *22 (emphasis in original) (quoting 2010Advisory Committee Notes on Fed. R. Civ. P. 26, Subdivision (a)(2)(B)).

In conclusion, the Court held that "defendants are entitled to any documents (in their original format) [the plaintiff] provided the doctors that the doctors 'considered,' including draft letters, as they are 'communications' that identify 'facts or data' and 'assumptions.'" Id. Significantly, the Court explained further that "this material is discoverable regardless of whether it is presently in the possession of any of the doctors, [the plaintiff], or anyone under their control." Id.

(3) Draft Reports

Again, one significant change in new Rule 26(b)(4) is that experts' draft reports are no longer discoverable. See Henriksen, 2011 U.S. Dist. LEXIS 46227, at *6. After deciding that draft reports were covered by the exceptions, the District Court in Asbestos Products Liability Litigation provided more general guidance in footnotes. 2011 U.S. Dist. LEXIS 143009 at *22-25 n.10 & 11. The Court initially acknowledged that "the Amendment has been recently codified, [so] it remains to be determined how courts will interpret its provisions." Id. at *23 n.10. The Court then quoted a commentator who noted that "an 'unanswered question is whether counsel will be able to use Rule 26(b)(4)(B) to trump Rule 26(b)(4)(C)(ii-iii)—can counsel protect from discovery facts or data considered by or assumptions relied upon by a retained expert by providing some in a draft report.'" Id. (quoting George Lieberman, Experts and the Discovery/Disclosure of Protected Communication, 78 Defense Counsel Journal 220, 227 (Apr. 2011)). Predictably, the Court explicitly endorsed the commentator's view that "[c]ourts would not seem to be receptive to such an obvious loophole, and caution dictates against embarking upon such a course without the support of new case law in support of such a practice,'" Id. (quoting same).

The Court also addressed whether a doctor's handwritten notes would fall under the draft report provision of Rule 26(b)(4)(B), and stated that such notes "were not 'draft reports,' but rather reflect [the doctor's] own interpretations of the . . . results he was retained to analyze for [the plaintiffs]." Id. at *23 n.11. Because they are not draft reports, "they should be considered 'the expert's testing of material involved in litigation, and notes of any such testing,' which are not 'exempted from discovery' by Rule 26." Id. at *24 n.11 (quoting 2010 Advisory Committee Notes on Fed. R. Civ. P. 26, Subdivision (b)(4)).

(4) Reporting vs. Non-Reporting Expert Witnesses

Further issues stem from the amendments regarding attorney communications with expert witnesses who will testify but are not required to file an expert report. As the Eastern District Court of California has pointed out, the new rule is "silent as to communications between a party's attorney and non-reporting experts." United States v. Sierra Pacific Indus., No. VIV S-09-2445 KJM EFB, 2011 U.S. Dist. LEXIS 60372, at *8 (E.D. Cal. May 26, 2011). However, the Court provided the following language from the 2010 Advisory Committee Notes:

> The protection is limited to communications between an expert witness required to provide a report under Rule 26(a)(2)(B) and the attorney for the party on whose behalf the witness will be testifying, including any 'preliminary' expert

> opinions. . . . The rule does not itself protect communications between counsel and other expert witnesses, such as those for whom disclosure is required under Rule 26(a)(2)(C). The rule does not exclude protection under other doctrines, such as privilege or independent development of the work-product doctrines.

Id. at *18-19 (quoting 2010 Advisory Committee Note to Fed. R. Civ. P. 26). Consequently, the issue arises as to whether a party has waived the attorney-client privilege when it discloses testifying, but non-reporting, expert witnesses. One example where the distinction between reporting and non-reporting experts has been significant is testimony by employee opinion witnesses. Other potential examples include "former employees, in-house counsel, independent contractors, treating physicians, and accident investigators." Id. at *31-32.

In Graco, Inc. v. PMC Global, Inc., the New Jersey District Court considered the issue where the plaintiff's employee opinion witnesses who had not yet been named as testifying witnesses and did not regularly give expert testimony, but had submitted affidavits containing expert opinions. No. 08-1304 (FLW), 2011 U.S. Dist. LEXIS 14717, at *38 (D.N.J Feb. 14, 2011). The defendant had noticed the depositions of two of the plaintiff's employees and served requests for documents to be produced at the deposition, including all documents considered or relied upon in drafting the affidavits, all drafts of the affidavits, and all communications with those individuals concerning their affidavits. Id. at *4. Objecting to the requests, the plaintiff asserted that the employee declarants "should be treated as non-experts and maintain[ed] that the material requested is protected by the attorney-client privilege or work-product privilege." Id. After acknowledging "a significant divergence between the 1993 version (and related case law) and the 2010 version of Rule 26," the Court considered the 2010 Advisory Committee Notes "persuasive regarding intent related to relevant provisions of Rule 26." Id. at *38-39. Based on the plaintiff's "affirmative reliance on the facts and opinions set forth in [the witnesses'] respective affidavits," the Court found that the employee opinion witnesses "should be considered 'testifying witnesses.'" for Rule 26 analysis. Id. at *39 (citations omitted). Accordingly, the Graco Court decided the following with respect to the employee opinion witnesses:

> (1) [Defendant] is not entitled to a written report . . . pursuant to current, and amended, Rule 26(a)(2) and the 2010 Advisory Committee Note;
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> (2) [Defendant] is entitled to a disclosure stating the subject matter and a summary of the facts and opinions proffered . . . pursuant to amended Rule 26(a)(2)(C) and the 2010 Advisory Committee Note and supplements thereto pursuant to amended Rule 26(a)(2)(E);
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> (3) [Defendant] is not entitled to any drafts, regardless of form, of expert reports, affidavits, or disclosures pursuant to amended Rule 26(b)(4)(B) and the 2010 Advisory Committee Note;
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> (4) [Defendant] is entitled to all relevant discovery regarding the facts/data considered, reviewed or relied upon for the development, foundations, or basis of their affidavits/declarations . . . pursuant to amended Rules 26(b)(4)(B) and (C) and the 2010 Advisory Committee Note;
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> (5) Communications between [the plaintiff's] counsel and the Employee Opinion Witnesses are protected by the attorney-client privilege [citation omitted];
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> (6) [Defendant] is not entitled to documents and tangible things prepared in anticipation of litigation or for trial without showing it has a substantial need for the materials to prepare its case and, cannot, without undue hardship, obtain their substantial equivalent by other means pursuant to amended Rule 26(b)(3)(A) and the 2010 Advisory Committee Note;

Id. at *39-42.

Conversely, the California District Court in Sierra Pacific found that "Graco (which is not controlling here) provides little assistance to address the issue presented in this motion." Sierra Pacific, 2011 U.S. Dist. LEXIS 60372 at *31. Similar to Graco, the defendants in Sierra Pacific moved to compel the United States to produce testimony and documents relating to communication between two of the United States' designated expert witnesses and attorneys for the United States and another plaintiff. Id. at *6. These witnesses were employees of the United States and the other plaintiff who had investigated a large fire at issue, for which they had prepared an Origin and Cause Report. Id. at *6-7. The United States cited

Graco to argue that its attorney's communications with employee witnesses were protected. Id. at *29. The Sierra Pacific Court was not persuaded by the decision in Graco in part because "the analytical basis for that result is not explained. Graco discussed at length the text of the 2010 amended Rule 26 and the advisory committee notes, but it engaged in little analysis in support of its conclusion." Id. at *30.

During its analysis, the Sierra Pacific Court provided general guidance regarding non-reporting expert witnesses: "[s]ome of these non-reporting witnesses should not be treated differently than reporting expert witnesses. For example, there is no immediately apparent policy reason to treat an employee expert whose duties regularly involve giving expert testimony any differently than an employee expert whose duties involve only intermittently giving expert testimony." Id. at *32. On the other hand, "some non-reporting witnesses, such as treating physicians and accident investigators, should be treated differently than reporting witnesses with respect to the discoverability of their communications with counsel." Id. (citing Minutes, Civil Rules Advisory Committee Meeting (April 20-21, 2009) p.14) ("The Committee did not want to protect communications by one party's lawyer with treating physicians, accident investigators, and the like. An employee expert, moreover, may be an important fact witness."). In conclusion, the Court stated "at least in some cases, discovery should be permitted into such witnesses' communications with attorneys, in order to prevent, or at any rate expose, attorney-caused bias." Id. at *33.

In its case, however, the Sierra Pacific Court decided that "counsel's communications with [its employee experts] should not be protected." Id. The Court reasoned that the experts were "hybrid fact and expert witnesses" and "have percipient knowledge of the facts at issue in this litigation. . . . If their communications with counsel were protected, any potential biases in their testimony regarding the causes of the fire would be shielded from the fact-finder." Id. While the Court "decline[d] to hold that designating an individual as a non-reporting witness waives otherwise applicable privileges in all cases, . . . in this particular factual scenario, the United States waived its privilege and work-product protection by disclosing [the employees] as expert witnesses." Id. at *33-34. The United States also made an argument that the decision would force it to protect its communications by retaining the witnesses for a nominal fee, thus transforming them into reporting experts, but the Court refused to rule on the permissibility or effect of such an action "given the history of this discovery dispute." Id. at *34-35.

(5) Witnesses Who Wear "Two Hats"

New Rule 26's additional distinction between testifying experts and non-testifying experts creates another issue when "courts must determine which standard applies to an expert who wears 'two hats' by serving as both a non-testifying consultant and a testifying expert." Sara Lee, 273 F.R.D. at 419. Indeed, "for non-testifying consultants, the Rules provide an even higher barrier to discovering attorney-expert communications." Id. Typically, "a party may not 'discover facts known or opinions held by an expert who has been retained or specifically employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness.'" Id. (quoting Fed. R. Civ. P. 26(b)(4)(D)). When addressing experts who wear "two hats" under old Rule 26, most courts had held "that a single expert may serve in both roles but that the broader discovery for testifying experts applies to everything except 'materials generated or considered uniquely in the expert's role as consultant.'" Id. at 419-20 (quoting In re Commercial Money Ctr., Inc., Equip. Leasing Litig., 248 F.R.D. 532, 538 (N.D. Ohio 2008) (emphasis in original)).

In Sara Lee, "two of the nation's largest hot dog manufacturers" had accused each other of false and deceptive advertising. Id. at 417. Before the Court was a motion to compel certain information regarding an expert of the defense who was retained to testify about one of the plaintiff's advertisements and "to consult, but not testify, about another." Id. The Illinois District Court applied the stronger protections applicable to non-testifying witnesses to the particular communications at issue by concluding "that the requested materials relate solely to [the expert's] role as consultant, even taking into account the preference for disclosure when dealing with an expert who wears two hats." Id. at 420 (emphasis added). In coming to this conclusion, the Court emphasized that the expert had not expressed any opinion regarding the second advertisement, "and he will not offer any testimony with respect to it at trial." Id. The Court explained that "[n]one of the communications contain facts, data, or assumptions that [the expert] could have considered in assembling his expert report, and thus Defendants had no duty to disclose the communications and Plaintiff no right to discover them." Id. (citing Fed. Rule Civ. P. 26(a)(2)(B) and 26(b)(4)(C)). Significantly, the Court commented that such "expert-attorney communications arguably

may have been discoverable under the pre-amendment Rule 26, but no more." Id.

In a slightly different scenario, the plaintiffs in Nat. Western Life Ins. sought discovery of e-mail communications between the defendant's testifying expert and its non-testifying expert, as well as any drafts of the expert report that were sent between the two. 2011 U.S. Dist. LEXIS 21967 at *4. Here, the plaintiff argued that the non-testifying expert was "more than a mere consultant to [the testifying expert] and that, in fact, he actually co-authored the [Expert] Report." Id. at *3. The Court disagreed and held that "under the current version of Rule 26(a)(2)(B), [the defendant] was only required to produce 'facts or data' relied upon by [the testifying expert] in forming his opinion." Id. at *6. The Court then concluded that the defendant had complied with Rule 26 by producing the testifying expert's Expert Report and all e-mails between the two experts containing facts or data. Id.

(6) Rule 35 Exams

Fed. R. Civ. P. 35(a) provides that, for good cause shown, a court "may order a party whose mental or physical condition . . . is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner." Two defendants in Terrell v. Harder Mechanical Contractors, Inc. argued that under the expanded protection of amended Rule 26(b)(4)(C) they should not be required to share an expert with a third defendant whose interests conflicted with their own. No. C-10-01080 CW (DMR), 2011 U.S. Dist. LEXIS 44861, at *7 (N.D. Cal. Apr. 19, 2011). In a sexual harassment and discrimination case, the third defendant had requested a separate Rule 35. Id. The defendants argued that "they must be able to freely communicate with their expert in order to assist them in defending against both Plaintiff's and [their co-defendant's] claims." Id. Apparently, "sharing an expert would render it impossible for the expert 'to confidentially, competently, or ethically advise' the three Defendants, given that they are 'in direct conflict with each other.'" Id. at *8.

The California District Court found the defendants' conflict-of-interest argument unpersuasive, explaining that the mental exam had "little if any bearing on" the conflict between defendants, that issue being which defendant would be liable if the plaintiff proved harassment or discrimination. Id. at *10. Acknowledging the "recently expanded protection of communications between counsel and testifying experts," the Court found that "such protection does not support the conclusion that every defendant in a multi-defendant case is automatically entitled to a separate mental exam." Id. at *11. Rather, the Court considered the defendants' proposed result to be "both untenable and inconsistent with the principle of proportionality in discovery that is also found in Rule 26." Id. at *12 (citing Fed. R. Civ. P. 26(b)(2)(C)(i)). The Court however did recognize the defendant's right to develop its own expert testimony about the plaintiff's emotional distress and ordered the other defendants to provide a copy of the audiotape recording of their expert's exam to the third defendant within five days. Id. Furthermore, the Court denied the Rule 35 request without prejudice, explaining that the defendant retains the right to move for an additional exam if the defendant's own expert can make a particularized showing after reviewing the audiotapes that the defendant would be prejudiced if it is not able to conduct its own exam. Id. at *13-14.

3. Daubert/Frye Update

The United States Court of Appeals for the District of Columbia established the Frye test in 1923 by articulating the following:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

Frye v. United States, 293 F. 1013, 1014 (D.D.C. 1923).

Seven decades after Frye, the United States Supreme Court in Daubert rejected the general acceptance test because FRE 702 does not expressly require general acceptance, and the requirement is inconsistent with the federal rules' relaxation of the traditional barriers to "opinion testimony." Anderson v. Akzo Nobel Coatings, Inc., 260 P.3d 857, 861 (Wash. 2011) (citing Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 588, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)). Applying the Daubert test, courts "must determine if the reasoning or methodology underlying the testimony is scientifically valid and can be applied to the facts at hand." Id.

The Frye test and the Daubert test have been respectively referred to as the "general acceptance" and the "reliability" tests. Id. (citing David E. Bernstein, Frye, Frye, Again: the Past, Present, and Future of the General Acceptance Test, 41 Jurimetrics J. 385, 388-89 & n.31 (2001)). In addition to these tests, most jurisdictions apply their own statutory versions of FRE 702 to expert testimony, which may or may not incorporate aspects of either test. See, e.g., id. at 859 ("Generally, the admissibility of expert testimony in Washington is governed by ER 702."); Edry v. Adelman, 786 N.W.2d 567, 570 (Mich. 2010) (stating that "admissibility of expert witness testimony is governed by MRE 702. . . . This Court has stated that MRE 702 incorporates the standards of reliability that the United States Supreme Court described to interpret the equivalent federal rule of evidence in Daubert. . . ."). In Anderson, the Washington Supreme Court reasoned that "[s]ince the real challenge was whether the proffered testimony had a proper foundation," the issue should be resolved under state evidence rules 702 and 703. Id. (citations omitted). Applying the state evidence rules instead of Frye, the Anderson Court described the Frye test as "an additional tool used by judges" and explained that once Frye is satisfied, the evidence must still meet other "significant standards of admissibility." Id. at 864.

a. Frye Decisions

A minority of states maintain strict adherence to the Frye test, and the trend toward Daubert in recent decisions appears even stronger in the civil context. See, e.g., id. at 861 (stating that "[d]espite the national trend toward Daubert, we declared our continued adherence to the more stringent Frye test [at least in criminal cases]. In civil cases, we have neither expressly adopted Frye nor expressly rejected Daubert.") (internal citations omitted). The Anderson Court, however, "assume[d] without deciding" that Frye was the appropriate test for civil cases because the parties and lower courts had assumed Frye was applicable. Id. at 862; see also Chestang v. IPSCO Steel (Alabama), Inc., 50 So.2d 418, 438 (Ala. 2010) (refusing to issue an "advisory opinion" addressing IPSCO Steel's request that the Court overrule its prior decision adopting Frye by now adopting the Daubert test).

(1) "Generally Accepted in the Scientific Community"

The Anderson Court recently summarized Washington State's Frye jurisprudence:

> The primary goal is to determine "whether the evidence offered is based on established scientific methodology." Both the scientific theory underlying the evidence and the technique or methodology used to implement it must be generally accepted in the scientific community for evidence to be admissible under Frye. "If this is a significant dispute among qualified scientists in the relevant scientific community, the evidence may not be admitted," but scientific opinion need not be unanimous.

Id. at 862 (quoted citations omitted) (emphasis in original).

Along these lines, the Supreme Court of Maryland recently considered the application of the state's Frye-Reed test (referring to the Maryland decision adopting Frye) to an expert's analysis "where the underlying data and methods for gathering this data are generally accepted in the scientific community but [were] applied to support a novel theory." Blackwell v. Wyeth, 971 A.2d 235, 248 (Md. 2009). For guidance, the Maryland Court turned to opinions of federal courts that "have had occasion to scrutinize the reliability of the analytical framework utilized by an expert in formulating a novel theory of science . . ., recognizing that they utilized the Daubert standard rather than Frye." Id. at 253. After reviewing federal decisions, the Court acknowledged that "[t]he 'analytical gap' concept also has been employed by some of our sister states in a Frye analysis." Id. at 254 (referring to Goeb v. Tharaldson, 615 N.W.2d 800, 816 (Minn. 2000) and Kane v. Motorola, Inc., 335 Ill. App. 3d 214, 221-22 (2002)).

Ultimately, the Blackwell Court concluded that "[g]enerally accepted methodology . . . must be coupled with generally accepted analysis in order to avoid the pitfalls of an 'analytical gap.'" Id. at 255. The Court called the expert's conclusion "ethereal because the bases of the expert's opinion, including the theory of causation, and the methodologies, are not 'generally accepted as reliable within the expert's particular scientific field," and "the data he relies upon was not tested nor gathered for the purpose of testing the hypothesis that thimerosal in vaccines causes autism." Id. Finally, the Court emphasized that none of the expert's research "aimed at establishing a link between thimerosal and autism . . . is based upon a sound methodology." Id.

Specifically, the Blackwell case involved the admissibility of the expert's differential diagnosis test to prove general causation in a products liability action against a manufacturer of vaccines containing thimerosal. Id. at 259. Relying exclusively on the federal court's opinion in Doe v. Ortho-Clinical Diagnostics, Inc., 440 F. Supp. 2d 465 (M.D.N.C. 2006), the Maryland Supreme Court found the following:

> It is well settled that "[g]enerally, it is not appropriate to rely on a differential diagnosis to prove general causation" [quoting Ortho-Clinical, at 477]. Indeed, "[a] differential diagnosis that fails to take serious account of other potential causes may be so lacking that it cannot provide a reliable basis for an opinion" [quoting Ortho-Clinical, at 471]. It is noteworthy that other courts have acknowledged that [this expert's] methodology of differential diagnosis is fundamentally flawed, because he improperly "rules in" thimerosal as a potential cause of autism, and he cannot rule out the high likelihood that autism in any given individual was caused purely by genetic factors that do not require an environmental trigger [citing Ortho-Clinical, at 465].

Blackwell, 971 A.2d at 259-60.

In the criminal context, the Illinois Supreme Court in People v. McKown considered whether a horizontal gaze nystagmus (HGN) test was generally accepted in the relevant scientific community as an indicator of alcohol impairment related to an aggravated DUI charge. 924 N.E.2d 941, 944 (Ill. 2010). Responding to testimony that HGN testing is generally accepted within the law enforcement community as a field-sobriety test, the Court held that law enforcement is "not a scientific field. Therefore, general acceptance within law enforcement circles cannot be the basis for finding scientific evidence admissible under Frye." Id. at 953. Rather, "the relevant scientific fields that embrace the testing for and observation of HGN include medicine, ophthalmology, and optometry." Id. "Thus, the question of general acceptance must be determined from the testimony of experts and the literature in these scientific fields, and not from the testimony or writings of law enforcement officers or agencies." Id. Despite its holding, however, the Court noted that it "has never been a requirement under Frye" that the expert "be a member of the scientific field to which the evidence belongs." Id. at 953-54 n.3. In fact, "a police officer trained as an accident-reconstruction expert may be qualified to testify regarding the use of certain principles of physics to determine how fast a vehicle was traveling at the moment of impact, even though the expert is not a physicist." Id.

Upon deciding the relevant scientific community, the McKown Court next turned to the "general acceptance" requirement. Id. at 954. The Court decided that "before we can determine whether a scientific principle is generally accepted, we must define the purpose for which it is being used at trial." Id. On remand, the trial court had concluded that both ophthalmology and optometry generally accept the principle that the HGN test may be an indicator of alcohol consumption. Id. The trial court had further stated "that the use of HGN test results at trial 'should be limited to the conclusion that a 'failed' test suggests that the subject may have consumed alcohol and may [have] be[en] under the influence.'" Id. (alterations in original). But "[t]here should be no attempt to correlate the test results with any particular blood-alcohol level or level of intoxication." Id. The Illinois Supreme Court agreed and found that "[c]onsumption of alcohol is a necessary precondition to impairment due to alcohol. Therefore, any evidence of alcohol consumption is relevant to the question of impairment." Id. (citation omitted). Accordingly, the Court adopted the trial court's finding that HGN testing is generally accepted in the relevant scientific fields and that evidence of HGN test results is admissible for the purpose of proving that a defendant may have consumed alcohol and may, as a result, be impaired." Id. at 955 (emphasis added).

(2) Novel Scientific Evidence

In Anderson, the Washington Supreme Court held that the Frye test is not implicated "if the theory and the methodology relied upon and used by the expert to reach an opinion on causation is generally accepted by the relevant scientific community." Anderson, 260 P.3d at 859. In an action for negligence and wrongful discharge, the defendant had successfully moved in limine to strike most of plaintiff's experts for failing to meet the Frye standard, and consequently was awarded summary judgment on the negligence claim, which depended on the proposed testimony. Id. at 860. The Anderson Court reversed, however, and held the Frye test "is only implicated where the opinion offered is based upon novel science." Id. at 866; see also McKown, 924 N.E.2d at 944 (finding "the Frye test is necessary only if the scientific principle, technique or test offered by the expert to support his or her conclusion is 'new' or 'novel') (citation omitted)).

Specifically, the Frye test applies "where either the theory and technique or method of arriving at the data relied upon is so novel that it is not generally accepted by the relevant scientific community." Id.

In reaching its decision, the Anderson Court first acknowledged that "the relevant scientific community has yet to seriously research whether exposure to the specific type of organic solvents present in Akzo's auto paint can cause the specific type of birth defects at issue." Id. at 863. Disagreeing with the trial court's finding that "under Washington common law there must be a general consensus of scientific causation," the Washington Supreme Court explained that it had "never considered whether, as a threshold matter, there must be scientific consensus that a specific type of exposure causes a specific type of injury before expert testimony is admissible under Frye." Id.

In clarification, the Anderson Court stated: "Frye envisioned an evolutionary process with novel techniques passing through an 'experimental' stage during which they would be scrutinized by the scientific community until they arrived at a 'demonstrable' stage." Id. at 864 (citing Frye). Significantly, the Court found the "difference in degree of confidence to satisfy the Frye 'general acceptance' standard and the substantially lower standard of 'preponderance' required for admissibility in civil matters has been referred to as 'comparing apples to oranges.'" Id. at 865 (quoted citation omitted). "To require the exacting level of scientific certainty to support opinions on causation would, in effect, change the standard for opinion testimony in civil cases." Id. (citing Reese v. Stroh, 128 Wash.2d 300, 310 & 312 (1995) (C. Johnson, concurring)). For emphasis, the Court explained that if it were to "require 'general acceptance' of each discrete and evermore specific part of an expert opinion, virtually all opinions based on scientific data could be argued to be within some part of the scientific twilight zone." Id. at 866.

(3) Permissive Application of Frye

Recent Frye decisions in some jurisdictions suggest a very low threshold for admissibility. In Summers v. Certainteed Corp., the Pennsylvania Supreme Court considered an expert's causation testimony supporting plaintiffs' strict liability claims involving asbestos. 997 A.2d 1152, 1155 (Pa. 2010). Here, the expert concluded "to a reasonable degree of medical certainty" that "[e]ach and every exposure to asbestos has been a substantial contributing factor to the abnormalities noted." Id. at 1161. The Court rejected the appellate court's conclusion that the expert's opinions were "factually and legally insufficient to establish the causes of Appellants' condition," and explained that "trial judges are required 'to pay deference to the conclusions of those who are in the best position to evaluate the merits of scientific theory and technique when ruling on the admissibility of scientific proof.'" Id. at 1160-61 (quoting Grady v. Frito-Lays, Inc., 839 A.2d 1038, 1045 (Pa. 2003) (citing Frye)). At the summary judgment stage, the Court reasoned that the requirement to take all facts and reasonable inferences in a light most favorable to the non-moving party "clearly includes all expert testimony and reports submitted by the non-moving party or provided during discovery. . . ." Id. Therefore, "the trial judge must defer to those conclusions, [citing Grady; Frye], and should those conclusions be disputed, resolution must be left to the trier of fact." Id. (citing Miller v. Brass Rail Tavern, Inc., 664 A.2d 525, 528 (Pa. 1995)).

Disagreeing with the majority's permissive application, the concurrence in Summers called for a stricter Frye analysis. Id. at 1167-68 (Saylor J., concurring). Initially, Justice Saylor guessed that the trial court may have believed inquiry into the admissibility of the expert's testimony under Frye was not implicated, on the theory that the methodology employed was not novel. Id. at 1167 (citation omitted). According to Saylor, however, Pennsylvania trial courts "should maintain a meaningful screening role in determining the admissibility of evidence adduced from those laying claim to special expertise." Id. Under Saylor's definition of the term "novel," the trial court should apply a Frye test to "any scientific method which cannot be fully explained in terms of generally accepted scientific theory upon a close evaluation." Id. at 1168. Recognizing that Daubert is "understood as the more liberal standard, its purpose remains to guard against consideration by jurors of unreliable evidence disguised as scientifically-based expert opinion." Id. (citations omitted). Justice Saylor was particularly opposed to the majority's "default to a let-the-jury-decide approach to the admissibility of scientific evidence," and he explained that "a physician's pronouncement that the cause of an injury was a particular condition should not be insulated from judicial scrutiny purely because it is the type of things physicians say." Id. Rather, "it is a fair inquiry for courts to meaningfully consider whether the physician's specific methodology for arriving at the conclusion is supported by generally accepted scientific principles, as a prerequisite to admitting the

opinion into evidence." Id. (emphasis in original).

Likewise, the dissent in Summers took issue with the majority's decisions to allow a jury to hear the case based solely on the expert's testimony that "'each and every' exposure to asbestos was not just a factor, but a substantial contributing factor to that shortness of breath." Id. at 1171 (Eakin J., dissenting) (emphasis in original). In addition to believing that the expert's "every breath" theory was suspect, Judge Eakin described the expert's conclusion as "difficult" in light of each appellant having "so many other conditions." Id. (referring the appellants' histories of cigarette smoking and medical issues). Finding no error in rejecting the proffered opinion on its face, Judge Eakin stated the following: "[e]ach asbestos fiber, each cigarette, each cheeseburger is literally but a drop in the proverbial bucket—a bucket unquestionably full, but to call each drop substantial mocks the legal concept of the word. Common sense tells us the doctor simply overstated the matter." Id.

b. Daubert Decisions

(1) Reliability

In Sherwin-Williams Co. v. Gaines, Sherwin-Williams challenged the reliability of plaintiff's causation experts in a product-liability case where the jury had awarded $7 million to the plaintiff based on its finding that he had been brain damaged from exposure to lead in paint. 75 So.3d 41, 42 (Miss. 2011). The Mississippi Supreme Court considered whether the trial court erred in determining the expert's opinion, that lead poisoning caused cognitive impairments, was reliably based on science and the facts presented. Id. at 43. Explaining the importance of reliable expert testimony, the Court stated: "Mississippi Rule of Evidence 702 and our familiar Daubert standard require trial courts to act as 'gatekeepers' with regard to expert opinion testimony, because juries tend to place great weight on the testimony of experts and can be misled by unreliable opinions." Id. at 45 (citations omitted).

Here, the Sherwin-Williams Court disagreed with the trial court and held that the experts' opinions were not reliable. Id. In support of its decision, the Court stated that "[a] dose-response ratio is critical to determining the causal connection between a poison and an injury," but in this case "the only known dose—or ingestion of lead—is represented by [plaintiff's] elevated blood lead levels from September 1993." Id. at 45-46. By "extrapolat[ing] both dose and duration with only circumstantial supporting evidence," the experts engaged in a "classic logical fallacy: post hoc ergo propter hoc ['After this, therefore, because of this']." Id. at 46. The Court emphasized that the bases for the experts' testimony—"that [the plaintiff] was ingesting and being poisoned by lead the entire time he lived in the house—was mere speculation and inadmissible." Id.; see also McKee v. Bowers Window & Door Co., Inc. 64 So.3d 926, 935-36 (Miss. 2011) (concluding that expert testimony regarding allegedly defective windows was nothing more than "unsupported speculation or subjective belief" where the expert reviewed no outside sources, could cite no industry standards except his own personal standard, and effectively utilized "no methodology, much less a scientifically recognized one").

The trial judge in Sherwin-Williams had failed to consider multiple arguments concerning the reliability of the plaintiff's experts, regarding them "as challenges to the weight and not the admissibility of the experts' testimony." Id. Addressing this issue, the Mississippi Supreme Court felt obligated to provide the following guidance: "[o]ur trial judges work exceedingly hard and have discretion in how they discharge their gatekeeping duty, but we take this opportunity to reiterate that such duty includes making sure that the opinions themselves are based on sufficient facts or data and are the product of reliable principles and methods." Id. (citations omitted).

Addressing the admissibility standard for medical causation testimony, the Supreme Court of Colorado, in Estate of Ford v. Eicher, found that the trial court had applied an incorrect legal standard in its reliability analysis when it determined "as a threshold matter that the plaintiff's causation expert did not hold his opinion to the required degree of reasonable medical probability." 250 P.3d 262, 265 (Colo. 2011). The Eicher Court held instead that "the trial court should have analyzed the admissibility of the experts' testimony under [Colorado Rule of Evidence] 702." Id. at 266. "Under CRE 702, concerns about the degree of certainty to which the expert holds his opinion are sufficiently addressed by vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof rather than exclusion." Id. (citing People v. Shreck, 22 P.3d 68, 77 (Colo. 2001) (citing Daubert, at 596)). The Court therefore held: "expert medical testimony need not be rendered with 'reasonable medical probability or certainty' to be admissible." Id. (citations omitted).

The Eicher Court also addressed whether the trial court

erred in excluding another doctor's expert causation testimony on the fact that his theory was not testable and error rates could not be assessed. Id. at 268. With respect to testability and error rates of the doctor's theory that intrauterine forces caused the injury, the Court stated the following:

> First, excluding testimony because the theory cannot be tested and error rates cannot be assessed focuses the reliability analysis too narrowly. The nature of the intrauterine forces theory makes it impossible and unethical to test. It follows that error rates cannot be assessed. While the testability and error rates of a scientific theory are factors a trial court may consider in assessing reliability, the trial court may give these factors more or less weight or disregard them altogether if the case so requires. The CRE 702 inquiry is designed to be flexible to accommodate precisely this type of situation. A theory's inability to satisfy some of the suggested reliability factors will not automatically render the theory unreliable.

Id. at 268-69 (emphasis in original).

(2) Factual Foundation

In a personal injury case involving a three-car accident, the Supreme Court of Delaware found that the trial judge had properly exercised his discretion in determining that certain expert testimony was inadmissible under Daubert and Delaware Rule of Evidence 702(1). See Perry v. Berkley, 996 A.2d 1262, 1271 (Del. 2010). The trial court had expressed concern that plaintiff's causation expert had not been aware of plaintiff's prior back condition and treatments for pain. Id. at 1266. The plaintiff argued that the trial court should have denied defendants' motion in limine because the problem with the expert's testimony "goes to the 'weight and credibility of the testimony rather than the admissibility.'" Id. at 1267. After mentioning the 2000 Amendment to Federal Rule 702, the Perry Court held that this issue was controlled by the following language from the Advisory Committee Notes to the 2000 Amendment: "the question whether the expert is relying on a sufficient basis of information—whether admissible information or not—is governed by the requirements of Rule 702." Id. at 1268. The Court next referenced language from the Federal Rules of Evidence Manual:

> If an expert has engaged in insufficient research, or has ignored obvious factors, the opinion must be excluded. . . . In other words, the expert must have a sufficient foundation for the testimony. . . . The Advisory Committee recognized that there was a gap in the Rules, and also that the Court in Daubert implicitly required a foundation requirement for expert testimony.

Id. (quoting 3 Stephen A. Saltzburg, et al., Federal Rules of Evidence Manual § 702.02[10], at 702-48 (8th ed. 2002)).

Applying these principles, the Perry Court found that "[w]eight and credibility challenges . . . relate to an expert's skill or knowledge in being able to tie the facts of the case to the opinion he or she plans to give." Id. at 1270. Accordingly, the Court concluded that the lower court had properly held that the expert "did not have a correct understanding of the facts of the case, thereby completely undermining the foundation of his expert opinion and not merely his credibility." Id. at 1271.

(3) Qualification by Experience

In a products liability action where plaintiff alleged that a window manufacturer and the window seller were liable for leaking windows, the Mississippi Supreme Court considered whether a proposed expert was qualified based on his experience as a general contractor. McKee, 64 So.3d at 934-35. The Court first clarified that "[w]ithout question, '[a] witness may qualify to give an expert opinion through his experience only.'" Id. (quoted citation omitted). However, while the expert's "twenty-four years of experience as a general contractor likely would have qualified him as an expert in the broad field of general contracting," he was not offered "as an expert in that general field, but rather in the specific field of window manufacture and design, assessing the purported defectiveness of the subject windows." Id. at 935. Here, the expert had admitted "that he had no special education, training, or experience specific to windows, and he had never worked for a window manufacturer or seller." Id. The Court therefore decided "this case [is] fundamentally distinguishable from those cases in which a witness was qualified as an expert by experience." Id. (citations omitted).

In Rodriguez v. State, however, the Delaware Supreme Court held recently that the trial court did not abuse its discretion in finding that a latent fingerprint examiner was qualified to testify as an expert in tire track and

shoeprint analysis. 30 A.3d 764, 770 (Del. 2011). The Rodriquez Court explained that it had "adopted the interpretation of [Delaware] Rule 702 set forth by the United States Supreme Court in Daubert and Kumho Tire for Federal Rule of Evidence 702." Id. at 768-69 (citing M.G. Bancorporation v. Le Beau, 737 A.2d 513, 522 (Del. 1999)). The Court then quoted language from Kumho Tire providing that "[t]he purpose of the trial judge's gatekeeping role 'is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.'" Id. at 769 (quoting Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 152, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999)).

The Rodriguez Court pointed out that the expert had participated in an FBI course of instruction that covered tire track and shoeprint analysis, had independently studied a leading treatise on the discipline, and had previously testified on the analysis of tire tracks and shoeprints in Delaware courts. Id. at 769. The expert "also demonstrated knowledge of the variables that would affect impression, including the type of surface and degree of tire inflation." Id. Based on these facts, the Court found that the witness's expertise in fingerprint analysis was relevant to his experience with impression evidence: "[w]hile tire track and shoeprint analysis may be viewed as a distinct forensic discipline from fingerprint analysis because it involves mass-produced items, the analytic process is similar." Id. "Specifically, tire tracks, shoeprints, and fingerprints are all forms of impression evidence." Id. at 769-70. The Court thus decided that "while [the expert's] substantial experience in fingerprint analysis does not alone support his admission as an expert in other forms of impression analysis, the trial judge did not abuse his discretion in considering that experience and training as relevant." Id. at 770.

(4) Permissive Application of Daubert

Similar to some Frye jurisdictions, courts in certain states undergo a relatively more permissive Daubert analysis. For instance, the Indiana Supreme Court recently provided some background on Indiana Evidence Rule 702 and Daubert in Turner v. State, 953 N.E.2d 1039, 1049-50 (Ind. 2011). The Turner Court explained that "Daubert concerns the application of Federal Rule of Evidence 702," which is "somewhat different" than Indiana Evidence Rule 702. Id. at 1050. The Court "therefore [considered] Daubert helpful, but not controlling, when analyzing testimony under Indiana Evidence Rule 702(b)." Id. Additionally, "in light of the differences between Indiana Rule 702 and Federal Rule 702, we have previously declined to follow Kumho Tire in applying the Daubert reliability analysis to non-scientific expert testimony." Id. (citations omitted). According to the Turner Court, adoption of Indiana Rule 702 "reflected an intent to liberalize, rather than to constrict, the admission of reliable scientific evidence." Id. Indeed, "[e]vidence need not be conclusive to be admissible. 'The weakness of the connection of the item [of evidence] to the defendant goes toward its weight and not its admissibility.'" Id. (quoting Owensby v. State, 467 N.E.2d 702, 708 (Ind. 1984)).

To support his contention that the State's expert failed to satisfy the requirements of Daubert, Turner proposed what the Court considered "in essence, a 'fit' argument." Id. at 1051. The Indiana Court rejected this argument, stating that "Daubert is merely instructive in Indiana, and we do not apply its factors as a litmus test for admitting evidence under Indiana Evidence Rule 702(b)." Id. The Turner Court then stated:

> it is not dispositive for our purposes whether [the expert's] theory or technique can be and has been tested, whether the theory has been subjected to peer review and publication, whether there is a known or potential error rate, and whether the theory has been generally accepted within the relevant field of study.

Id. Further demonstrating the permissive nature of Indiana's Daubert analysis, the Court acknowledged that the expert's conclusion was "equivocal." Id. "And when pressed during the pretrial hearing [the expert] could not cite any article, study, or anecdotal report in which an examiner was able to make the linkage [the expert] made." Id. On direct examination at trial, the expert in Turner had "described his additional 'testing' in very informal terms. . . . Also, [the expert] could not recall specifics of the study he claimed to have read supporting his finding." Id. Despite these problems, the Indiana Supreme Court found that the "uncertainty" of the expert's opinion, "as well as the lack of formal testing and his inability to pinpoint other research, all inform the fact finder's judgment on weighing this evidence, but does not render the evidence inadmissible." Id.

(5) Daubert Objections

In another Mississippi product-liability case that involved an allegedly defective automobile, the plaintiffs argued

that the automobile manufacturer had not preserved error for appeal because "no proper Daubert challenges were made prior to trial or during trial." Hyundai Motor America v. Applewhite, 53 So.3d 749, 754 (Miss. 2011). While the manufacturer conceded that it never sought pretrial exclusion of the expert testimony, it did object to the testimony at trial and raised the reliability issue in its motion for a directed verdict and again in its post-trial motion for judgment notwithstanding the verdict. Id. In response, the Applewhite Court explained that "[w]hile the trial judge has discretion with regard to when and how to decide whether an expert's testimony is sufficiently reliable to be heard by a jury, this does not eliminate the requirement that the party opposing the evidence make a timely objection to its being admitted into evidence. Id. at 755 (citing Mississippi Rule of Evidence 103(a)(1)). The expert witness at issue in Applewhite had already left the witness stand when the manufacturer moved to strike his testimony under Mississippi Rule of Evidence 702 and Daubert. Id. Consequently, the trial judge "refused to grant the motion, stating that the 'cow [was] out of the barn.' In other words, the trial judge rightly refused to strike [the expert's] testimony because the defendant had failed to make a contemporaneous objection and the testimony was already before the jury." Id. (citation omitted).

On the other hand, the Applewhite Court found that the manufacturer had raised a timely Daubert objection to the testimony of a different expert, plaintiff's design engineer. Id. After the engineer had testified to his qualifications, but before he had given his expert opinions, the manufacturer argued to the trial judge that he was not qualified to render opinions on the automobile's design. Id. After the judge overruled the objection and the engineer had testified regarding his methodology, the manufacturer objected again and argued that the engineer's opinion was not based on "reliable principles and methods," but the trial court ultimately found the testimony sufficiently reliable. Id. at 756. Because the manufacturer had filed a timely objection with respect to the engineer expert, the Mississippi Supreme Court considered the reliability of that expert's testimony. Id. However, the Court found that the manufacturer had argued essentially that the engineer should not have relied on first expert's reconstruction and opinions regarding the severity of the crash. Id. The Court would therefore need to consider the first expert's reliability, and the Court had already decided that the manufacturer had failed to timely object to the first expert's testimony. Id. The Court ultimately declined to find any error, because this argument was, "in actuality, another attempt to attack the validity of [the first expert's] testimony. . . ." Id.

(6) Damages Expert

The plaintiffs in Bayer CropScience LP v. Schafer proposed expert testimony on past and future economic damages resulting from the defendant's negligent contamination of the United States' rice supply. 2011 Ark. 518, ---S.W.3d ----, at *1 (Ark. Dec. 8, 2011). The Arkansas Supreme Court first referred to its adoption of the Daubert analysis in Farm Bureau Mut. Ins. Co. of Ark. v. Foote, 14 S.W.3d 512 (Ark. 1993), and explained that "[under] Foote and Daubert, a circuit court must make a preliminary assessment of whether the reasoning or methodology underlying the expert testimony is valid and whether the reasoning and methodology used by the expert has been properly applied to the facts in the case." Id. at *17 (citation omitted).

Regarding proof of damages, the Arkansas Court explained "that a plaintiff must present proof that would enable a jury to fix damages in dollars and cents, and damages will not be allowed which are speculative, resting only upon conjectural evidence of the opinion of the parties." Id. at *18 (citations omitted). "But this court has also stated that in those instances where damages simply cannot be proven with exactness, when the cause and existence of damages have been established by the evidence, recovery will not be denied merely because the damages cannot be determined with exactness." Id. (citation omitted). The expert in Bayer CropScience was an economic and financial analyst, a certified public accountant, an attorney, and an engineer. Id. He testified that his analysis revealed a linear relationship between the prices of world rice and Arkansas rice, and based on this relationship, he had calculated past losses using a "the classical ordinary-least-squares regression model." Id.

In allowing the expert's testimony regarding future damages, the Arkansas Supreme Court stated that he "based his estimates of future damages on his calculations of past damages, which [the defendant] does not contend are unreliable." Id. at *19. The expert "used those past-damages figures to extrapolate future losses, based on his judgment that the price of Arkansas rice would continue to lag behind the world price for a minimum of two years." Id. According to this Court, the expert had therefore "explained the bases for his opinions. Any weakness in the factual underpinning of an expert's opinion may be explored on cross-examination, and such a weakness goes to

the weight and credibility of the expert's testimony." Id. (citations omitted).

(7) Class Certification

Addressing whether evidence was sufficient for class certification in a land damages class action, the Supreme Court of Colorado found that its case law did not "require a trial court to determine, at the class certification stage, whether the expert testimony will be admissible at trial." Jackson v. Unocal Corp., 262 P.3d 874, 886 (Colo. 2011). At this stage, "the issue for the trial court is whether the expert testimony establishes a C.R.C.P. 23 requirement to its satisfaction." Id. Therefore, the approach in Colorado "does not mandate a Shreck hearing with its full evidentiary and legal arguments at the class certification stage." Id. Significantly, the Colorado Court recognized that its holding "differs from at least two federal appellate court cases," and provided the following summary:

> In Sher v. Raytheon Co., the Eleventh Circuit held that a trial court erred by failing to determine the admissibility of expert testimony pursuant to Daubert . . . at the class certification stage. [419 Fed. Appx. 887, 890 (11th Cir. 2011)]. Similarly, in American Honda Motor Co., Inc. v. Allen, the Seventh Circuit held that "when an expert's report is critical to class certification, . . ., a trial court must conclusively rule on any challenge to the expert's qualifications or submissions prior to ruling on a class certification motion." [600 F.3d 813, 815-16 (7th Cir. 2010)]. That is, in the Seventh Circuit, district courts must hold a full Daubert hearing prior to class certification. [Id. at 816].

Unocal Corp., 262 P.3d at 886. The Court reiterated: "[w]e do not mandate such a requirement in Colorado." Id.

After finding that a Daubert-like hearing was not required, the Unocal Corp. Court explained further that "after certification, a trial court may hold a Shreck hearing and determine whether the plaintiff has an admissible class-wide theory of proof that can be presented at trial." Id. at 887. "After all, if the expert testimony is ultimately deemed inadmissible under Shreck, the plaintiff may be unable to present common questions at trial, thereby requiring the trial court to decertify the class." Id.

(8) 2012 Federal Daubert Decisions

In 2012, multiple interesting Daubert decisions have already been made by federal courts. For example, the Tenth Circuit has recently demonstrated its reluctance to overturn district courts' Daubert decisions: "[t]o the district court's application of Daubert, we 'afford substantial deference' and do not disturb its decision without 'a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." Cornwell v. Union Pacific R.R., No. 10-5151, 2012 BL 371, at *7 (10th Cir. Jan. 3, 2012) (quoting Hollander v. Sandoz Pharm. Corp., 289 F.3d 1193, 1203-04 (10th Cir. 2002)). The Cornwell Court was convinced that the district court had not abused its discretion in excluding three of plaintiff's experts in a wrongful death action in which the decedent's husband alleged Union Pacific's negligent, reckless, and intentional wrongdoing in the operation and maintenance of a locomotives' horn as well as in the construction and maintenance of a railroad crossing. Id. at *1-2.

The First Circuit has also recently upheld a district court's decision to exclude expert testimony. See Samaan v. St. Joseph Hosp., No. 11-1480, 2012 BL 3582 (1st Cir. Jan. 9, 2012). In Samaan, the Court focused on the relevancy of the expert's opinions as opposed to reliability, stating, "[i]n the world of the blind, the one-eyed man is king; and Daubert relevancy is the sentry that guards against the tyranny of experts." Id. at *27-28. At issue were the causation opinions of plaintiff's expert, Dr. Tikoo, in a medical malpractice action. Id. at *22. The plaintiff argued that "Dr. Tikoo's qualifications were impressive and that his statistical methods were "comfortably within the realm of acceptable science." Id. Though the Court did not mention Frye, these arguments resemble the type of evidence that arguably may be admissible under a typical Frye test. Under Daubert, however, the First Circuit responded to plaintiff's argument by explaining that the lower court "did not seriously question either Dr. Tikoo's credentials or the reliability of his methods; the problem, as the court saw it, was that the results produced through that methodology left an analytical gap." Id. Consequently, the lower court's finding was "about the inadequacy of the fit; and in reviewing it, we can for the most part leave to one side the expert's qualifications, his numerical calculations, and the scientific community's acceptance of the study on which he relied." Id. Rejecting Dr. Tikoo's conclusion that the plaintiff more likely than not would have recovered had he received the drug t-PA based on his odds ratio analysis, the Court found "that while the odds ratio

analysis shows that a t-PA patient may have a better chance of recovering than he otherwise would have had without t-PA, such an analysis does not show that a person has a better than even chance of avoiding injury if the drug is administered." Id. at *25-26. For further emphasis, the Court stated: "Daubert demands relevancy, and Dr. Tikoo's testimony falls short of this requirement. As a result it does not support a finding of causation under Maine law. The testimony was, therefore, inadmissible under Daubert and Rule 702." Id. at *27.

The District Court of Massachusetts recently provided another interesting Daubert decision in Bricklayers & Trowel Trades Intl. Pension Fund v. Credit Suisse First Boston, No. 02-12146-NMG, 2012 BL 9988 (D. Mass. Jan. 13, 2012). In excluding the expert's opinion, the Court stated: "[u]ntil now, no expert has been precluded from testifying in this Session of the United States District Court for the District of Massachusetts." Id. at *19. The Court stressed its tendency to trust the jury with expert testimony in all but the most extreme circumstances: "[t]his judicial officer is inclined to let experts testify. The crucible of cross-examination is the usually best way to assess the reliability of expert testimony." Id. According to the Bricklayers Court, "[j]uries are the hallmark of our legal system and they deserve far more credit than they are given to discern the truth though the fog of competing expert testimony." Id. Despite this strong opinion in favor of a permissive gatekeeping role, the Court held: "[g]iven, however, the pervasiveness of Dr. Hakala's methodological errors and the lack of congruity between his theory and the data, the Court is compelled to exercise its role as gatekeeper and to exclude his event study as unreliable." Id.

In Bricklayers, the named plaintiff in a securities class action offered the expert testimony of Dr. Hakala to support fraud claims of a class of individuals who purchased common stock of AOL-Time Warner. Id. at *1. The theory of recovery in this case involved a fraud-on-the-market scenario where the defendants allegedly had made overly optimistic and intentionally misleading reports artificially inflating the stock price of AOL-Time Warner. Id. at 3. As plaintiff's expert, Dr. Hakala prepared an event study to measure the impact of these allegedly fraudulent statements and omissions. Id. at *4. The Court explained that an event study "is an accepted method of measuring the impact of alleged securities fraud on a stock price and often plays a 'pivotal' role in proving loss causation and damages in a securities fraud case." Id. at *5-6 (quoting In re Williams Sec. Litig., 496 F. Supp. 2d 1195, 1272 (N.D. Okla. 2007). The expert's use of a generally accepted method may have satisfied a strict application of the Frye test in a state still applying Frye, but the federal Court had no reason to mention that possibility. The Court did state, however, that "there is no great dissention in the financial econometric community about how to conduct a proper event study." Id. at *6. It therefore appears that the manner in which Dr. Hakala performed a "generally accepted" event study, rather than the study itself, was the aspect of his testimony that the Court found objectionable.

In its analysis, the Bricklayers Court considered defendants' four arguments against the admissibility of Dr. Hakala's testimony: (1) that he studied the wrong "event days," (2) that he overused "so-called 'dummy variables,'" (3) that he disregarded prior disclosures, and (4) that he failed to control for "confounding factors." Id. at *8. Regarding the appropriate "event days," the Court explained that "an economist should select as the event days to be studied the days the allegedly fraudulent misrepresentations were made and the days the market learned the truth." Id. at *9. While Dr. Hakala admitted he had not proceeded in this fashion, the Court found that his unconventional approach "does not necessarily subvert his study. . . . It does, however, compel this Court to scrutinize his selection of event days." Id. While scrutinizing Dr. Hakala's selection of event days, the Court found his event study to be "replete with event days that appear to have been selected more for their volatility than for their actual relationship to defendants' alleged fraud." Id. at *10. The Bricklayers Court thus concluded "as did United States District Judge Rya Zobel in In re Xcelera.com Sec. Litig., No. 00-11649-RWZ, 2008 WL 7084626, at *2 (D. Mass. Apr. 25, 2008), that '[q]uite simply, [Dr. Hakala's] theory does not match the facts." Id. at *11 (alterations in original).

In addition to adopting a judge's prior conclusion regarding the same expert's choice of event days, the Court's analysis of Dr. Hakala's use of dummy variables suggests that it felt compelled by earlier decisions in other jurisdictions involving Dr. Hakala. In fact, the Court found that "this is not the first time that Dr. Hakala has been criticized for overusing dummy variables." Id. at *12 (referring to Xcelera.com and In re Northfield Labs., Inc. Sec. Litig., 267 F.R.D. 536, 548 (N.D. Ill. 2010)). In both of those decisions, the courts "excluded Dr. Hakala's event studies after concluding that his overuse of dummy variables rendered them unreliable." Id. In Bricklayers, Dr. Hakala used dummy

variables for "a greater number of days and a higher percentage of the study period . . . than he did in event studies in Northfield and Xcelera." Id. at *12-13. As a result, the Court in Bricklayers found: "[i]f those courts were correct in excluding his event studies . . ., as this Court believes they were, it follows a fortiori that his event study should be excluded here." Id. at *13.

Next, the Bricklayers Court addressed the defendants' "prior disclosures" and "confounding factors" arguments. With respect to prior disclosures, the Court found: "Dr. Hakala's event study is also unreliable because it repeatedly ignores the efficient market principle. . . . Plaintiffs may not at the same time presume an efficient market to prove reliance and an inefficient market to prove loss causation." Id. at *14-15. Turning to the "confounding factors" argument, the Court stated that "confounding factors pervade Dr. Hakala's event study" because on many event days information on AOL's business was released from many different sources, and some information was positive while some was negative. Id. at *17. The issue, however, was "not just that many event days are hopelessly confounded and not readily attributable to the defendants' misconduct; it is, more importantly, that Dr. Hakala made unreasonable judgments about which factors likely caused stock price movement on event days." Id. at *17-18. Despite concluding that Dr. Hakala should be excluded, the Court again demonstrated its preference to allow experts to testify in almost every circumstance: "[h]ad Dr. Hakala's event study suffered from only one of the four methodological defects identified by this Court, or suffered from those flaws jointly but to a lesser degree, today's ruling might have been different." Id. at *19.

A couple of other federal Daubert decisions in 2012 have demonstrated the Frye test's continued impact, even under Daubert analysis. Echoing Frye in a product liability context, the District Court of Minnesota recently held the following: "[f]rom the description of Hansen's testing methodology, the Court is satisfied that, for purposes of the Daubert standard, Hansen reached his conclusions using a generally accepted methodology." CIC Partners v. Sunbeam Products, Inc., No. 09-3274 (SRN/SER), 2012 BL 11262, at *10 (D. Minn. Jan. 12, 2012); see also AMW Sports, LLC v. State Farm Fire & Casualty Co., No. 10-651-SCR, 2012 BL 3464, at *6 (M.D. La. Jan. 9, 2012) (finding that "Plaintiffs have not shown that [the expert's] methodology is generally accepted in the insurance industry to determine whether to pay a substantial business or commercial loss claim when the insured has invoices and receipts which can be compared to what is listed in the Proof of Loss"). While Frye's "generally accepted" standard remains a factor under Daubert, the persuasiveness of the Frye test is evident in the courts' couching their conclusions in Frye¬-like language.

In CIC Partners, the action arose out of an apartment fire that was allegedly caused by a Sunbeam heating pad, which had not been turned on or used for a period of several weeks before the fire. Id. at *1-2. Sunbeam sought to exclude the opinions of plaintiff's experts, Paul Hansen and Ronald C. Rahman, on the grounds that they "failed to use reliable methodology in investigating the fire and in rendering their opinions." Id. at *7. Addressing Hansen's proffered opinion first, the Court found "it sufficiently reliable to be admitted under Rule 702 and Daubert." Id. at 9. The Court reasoned that "Hansen reached his conclusions using a generally-accepted methodology" because "his examination of the fire scene 'proceeded along the general guidelines as outlined in NFPA 921 and other guidelines typically used in the fire investigation profession." Id. at *10. Despite the fact that "Hansen may not have performed every method of fire scene investigation set forth in NFPA 921," the Court found that he "appears to have utilized many of the techniques set forth in the guidelines." Id. Given the Court's satisfaction with the use of generally accepted guidelines despite Hansen's suspect adherence to such guidelines, the analysis appears to further stray toward Frye and away from Daubert. Likewise, the Court's analysis of Rahman's expert opinions blurs the distinction between Daubert and Frye. Rahman had testified that "when investigating fires, he tries to follow the NFPA guidelines, using the scientific method." Id. at * 15 (emphasis added). The Court did not mention whether Rahman followed such guidelines during this investigation. Although the proponent of expert testimony supposedly must show its reliability, the CIC Partners Court explained that there was "nothing about his approach that demonstrates unreliability or some unusual, or innovative departure from techniques used by fire investigators." Id. "That Rahman does not describe each step of his methodology in lock-step with the NFPA 921 guidelines is not fatal to the admissibility of his testimony." Id.

In contrast to CIC Partners, the Middle District Court of Louisiana excluded plaintiff's expert because it had not shown that the expert's "methodology is generally accepted in the insurance industry. . . ." AMW Sports, 2012 BL 3464 at *6. In this case, the expert Kermith Sonnier opined that "the Proof of Loss that was

submitted by Claimant is correct in accordance with the policy of insurance and should be timely paid by State Farm." Id. at *3. The Court, however, found his methodology "fatally flawed," where he "essentially reached his ultimate opinion by ignoring the insured's, i.e. plaintiff AMW Sports, LLC's, business records. Sonnier simply concluded that the Proof of Loss statement was sufficient." Id. at *4. Thus, the Court found Sonnier's failing to compare the Proof of Loss with available invoices and receipts rendered his opinions unreliable and his methodology inconsistent with generally accepted methods of the insurance industry. Id. at *6-7.

About Jessie Zeigler

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Jessie is the assistant practice leader for the firm's Products, Torts and Insurance Group, focusing on products liability, environmental and healthcare litigation. Her products liability practice includes pharmaceutical, food, supplements, asbestos and automotive products defense. Jessie also has substantial experience with environmental litigation, OSHA matters and healthcare liability defense.

Food and Beverage: Jessie co-chairs the firm's Food and Beverage Industry Group. She has substantial experience in successfully assisting food clients with recalls and defending food liability claims. She co-chaired the ABA's first Food and Supplements Conference at Coca-Cola in February 2011 and presently co-chairs this subcommittee.

Products Liability and Mass Torts: Jessie works on class actions and MDLs for various types of product cases and has experience with recalls under the FDA's watch. She was national co-counsel for an automotive manufacturing company in an MDL involving multiple class actions. She serves on the expert team in a pharmaceutical company's litigation. She served on the national expert team for diet drug litigation and retained and worked with experts for trials nationwide. She also has conducted quality assurance audits of trial team preparations nationwide for MDL cases set for trial. She speaks at national conferences on products liability issues. She is currently defending an international product manufacturer against two class actions including product liability and Magnuson-Moss warranty claims.

Environmental and Mass Torts: Jessie has vast experience in environmental litigation, including water rights, mass torts and contamination cases. She recently was granted summary judgment for a large manufacturer against claims that its products contained asbestos that harmed the plaintiff in a suit involving more than 30 defendants. She is lead counsel in a natural gas price hedging dispute. She assists clients with employee injury/death investigations and OSHA investigations/citations. She also served as lead counsel in a water storage fee case against the U.S. Army Corps of Engineers, a case of first impression nationwide. She successfully obtained summary judgment on the key issue in the case. She defended a communications company in contamination litigation that involved third party complaints against nearly a dozen defendants. She also handles other mass tort actions, including toxic torts. Her experience encompasses actions involving the U.S. EPA, TDEC, OSHA, citizen suits and private rights of action.

Healthcare: Jessie serves as litigation counsel in professional liability actions involving catastrophic personal injury and wrongful death claims for a major academic medical center and one of the largest single-specialty medical groups in the southeastern United States.

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- Pharmaceutical company – diet drug litigation: Jessie served on the national expert team and conducted quality assurance reviews of MDL cases remanded for trial nationwide.
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- Major food company – food contamination: Jessie defended a claim that a food product allegedly caused bacterial meningitis in an infant.
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Education

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