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Admissibility of Expert Testimony in Federal and State Court

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In light of the recent Court of Appeals decision in Parker v. Mobil Oil Corporation1 restating the distinction between state and federal courts on the admissibility of expert testimony, an analysis of the issue is valuable for practitioners.

Under the Federal Rules of Evidence ("FRE"), Rule 702 governs the admissibility of expert testimony.2 Prior to enactment of the federal rules, the federal courts adhered to the "general acceptance" test established in Frye v. United States.3 "The long-recognized rule of Frye…is that expert testimony based on scientific principles or procedures is admissible but only after a principle or procedure has 'gained general acceptance' in its specified field."4 In Daubert v. Merrill Dow Pharmaceuticals,5 the United States Supreme Court held that the Federal Rules of Evidence superceded Frye, and the general acceptance test was no longer required. In Daubert, the Supreme Court announced that the trial court must perform a gate keeping function in determining the admissibility of expert testimony. The Supreme Court provided certain factors that would assist the lower courts in determining admissibility. The Daubert factors were not intended to be exhaustive and included (1) whether the technique or theory utilized by the expert can be tested and had been tested; (2) whether the technique or theory had been the subject of peer review and publication; (3) the potential rate of error and "the existence and maintenance of standards controlling the techniques operation;" and (4) the general acceptance of the expert's theory or technique in the relevant scientific community. These factors were intended to be flexible considerations for the trial courts.6

The Second Circuit Court of Appeals has utilized the Daubert factors for determining the admissibility of expert testimony on several occasions. In 2002, the Second Circuit extensively discussed the Daubert factors and the gate keeping function of the District Court in detail in Amorgianos v. National Railroad Passenger Corporation.7 The Second Circuit stated that the trial court must first look at the proffered testimony to determine whether it is relevant under FRE Rule 401. Second, the trial court must establish that the testimony has a reliable foundation as required by FRE Rule 702. In determining the reliability of the testimony, the court utilized the Daubert factors. The Second Circuit also stated "[i]n undertaking this flexible inquiry, the District Court must focus on the principles and methodology employed by the expert, without regard to the conclusions the expert reached or the District Court's belief as to the correctness of those

conclusions."8 In General Electric v. Joiner,9 the Supreme Court noted that, while the trial court is directed to review an expert's principles and methodologies when performing its gate keeping function under Daubert, "conclusions and methodology are not entirely distinct from one another."10 The court stated "nothing in either Daubert or the Federal Rules of Evidence requires a District Court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert.11

In 2005, the Second Circuit employed the Daubert factors in Ruggiero v. Warner Lambert.12 In Ruggiero, the District Court ruled the proffered testimony was inadmissible under FRE 702 after applying the Daubert factors.13 More recently in Nimely v. City of New York,14 the Second Circuit refused to permit expert testimony because the methodology underlying the testimony failed under Daubert. The court noted "it is a well-accepted principle that Rule 702 embodies a liberal standard of admissibility for expert opinions, representing a departure from the previously widely followed, and more restrictive, standard of Frye."15 The Second Circuit also noted that, in addition to satisfying FRE 702, the expert testimony is also subject to FRE 403.16 The Second Circuit noted the importance of FRE 403 as it relates to expert testimony "given the unique weight such evidence may have in a jury's deliberations."17

Unlike the federal system, in New York, the Frye test remains the standard for admitting expert testimony.18 Where the federal judge must apply FRE 702 before admitting such evidence, a party in the New York State court system must challenge expert testimony on the basis of Frye. In order to mount such a challenge, a party has three options. First, a party can move for summary judgment if the expert's testimony is essential to the other parties' case arguing that the proffered evidence fails to meet the Frye standard and, in the absence of such testimony, the whole case must fall. Additionally, a party can move in limine requesting a determination as to the admissibility of the expert's testimony on the basis that such evidence fails to satisfy the Frye's general acceptance test. But CPLR 3101(d)(1)(i) can create obstacles to this motion in light of the limited expert disclosure required by CPLR 3101(d)(1)(i). Finally, a party can request a voir dire examination of the expert during trial when the expert is offered.

The New York Court of Appeals has reaffirmed Frye three times since Daubert was decided by the U.S. Supreme Court. In the 1994 case People v. Wesley,19 the court concluded that DNA evidence was admissible under Frye because such evidence was "generally accepted as reliable in the relevant scientific community."20 In the 1996 case People v. Wernick,21 the Court of Appeals reaffirmed the need for a Frye hearing "in all instances when a party seeks to present novel scientific or psychiatric or medical evidence."22 The Frye test can also be raised in a motion for summary judgment. In Heckstell v. Pincus,23 the estate of a patient who died after taking a smoking cessation drug sought to introduce expert testimony establishing a link between the drug

and the patient's death.24 The trial court granted the defendant's motion for summary judgment because the "plaintiff's expert opinions [were] conclusory or [relied] upon a novel theory of causation that does not satisfy the Frye rule."25 The party seeking to introduce the expert testimony bears the burden of establishing general acceptance under Frye.26

The Court of Appeals recently revisited the Frye standard in Parker v. Mobil Oil Corporation.27 In Parker, the plaintiff sought to introduce expert testimony linking his 17-year workplace exposure to benzene to his leukemia. The defendant sought to preclude the evidence because the experts were unable to determine the plaintiff's actual level of exposure. The Court noted that Frye was the New York standard for admitting expert testimony notwithstanding the suggestion by some amici to adopt the Daubert factors.28 The court stated that in addition to analyzing the admissibility of expert testimony under Frye, the trial court must make sure the evidence has a proper foundation to ascertain whether the generally accepted methods were properly utilized.29 The court stated that in Parker "there is no particular novel methodology at issue for which the Court needs to determine whether there is general acceptance. Thus the inquiry is more akin to whether there is an appropriate foundation for the expert's opinions, rather than whether the opinions are admissible under Frye."30 In analyzing the foundation for the expert testimony, the court cited federal cases applying the Daubert factors. The Court noted "[w]e recognize that these cases employ a Daubert analysis. However, they are instructive to the extent that they address the reliability of the expert's methodology."31 The court concluded that the evidence was properly excluded because the expert's testimony failed to establish a causal link between benzene exposure and the plaintiff's disease.32

It remains to be seen whether the utilization of the Daubert factors in Parker to assess the foundation of expert testimony will be seen as the initial erosion of the state's reliance on Frye and the beginning of a state shift towards FRE 702 and Daubert.

[1] *Parker* v. *Mobil Oil Corporation*, 7 N.Y.3d 434 (2006).
[2] "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." Fed. R. Evid. 702.
[3] *Frye* v. *United States,* 293 F. 1013 (D.C.Cir. 1923).
[4] *People* v. *Wesley*, 83 N.Y.2d 417, 422 (1994) (*citing Frye*, *supra*, 293 F. at 1014).
[5] *Daubert* v. *Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).
[6] The Supreme Court extended the *Daubert* factors to non-scientific evidence, such as technical

or specialized knowledge, in *Kumho* v. *Tire Company Carmichael*, 526 U.S. 137 (1999).
[7] *Amorgianos* v. *National Railroad Passenger Corporation*, 303 F.3d 256 (2nd Cir. 2002).. In *Amorgianos*, the plaintiff sought recovery for injuries to his nervous system he claimed to have suffered as a result of exposure to paint fumes. He intended to offer the testimony of an industrial hygienist who would testify as to the concentration of the paint fumes. The District Court precluded this testimony on the basis that the expert failed to reliably follow his own methodology. *Id. at* 268.
[8] *Amorgianos*, *supra*, 303 F.3dat 266. "[T]he District Court should undertake a rigorous examination of the facts on which the expert relies, the method by which the expert draws an opinion from those facts, and how the expert applies the facts and the methods to the case at hand." *Id.* 267.
[9] *General Electric Company* v. *Joiner,* 522 US 136 (1997).
[10] *Id.* at 146.
[11] *Id.* "A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *Id.*
[12] *Ruggiero* v. *Warner Lambert Company*, 424 F.3d 249 (2nd Cir. 2005)
[13] The plaintiff in *Ruggiero* maintained that her husband's cirrhosis and death resulted from the use of Rezulin, a diabetes medication. *Ruggerio*, 424 F.3d at 253. The District Court refused to allow the plaintiff's expert to testify that the Rezulin caused the disease and death because the expert could not point to any studies that established such causal link. *Id at* 254.
[14] *Nimely* v. *City of New York*, 414 F.3d 381 (2nd Cir. 2005). In *Nimely*, the Second Circuit found that the District Court erred in allowing the defendant's forensic pathologist to testify about defendants' theory of shooting because it was premised on the assumption that the two defendants were not lying about the series of events.
[15] *Id* at 395.
[16] FRE 403 states "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."
[17] *Nimely*, *supra*, 414 F.3d at 397.
[18] *See Zito* v. *Zabarsky*, 812 N.Y.S.2d 535 (2nd Dept. 2006) ("New York has not adopted the *Daubert* standard, but rather continues to adhere to the Frye test for determining the admissibility of novel scientific evidence.")
[19] *People* v. *Wesley*, 83 N.Y.2d 417 (1994).
[20] The court stated "the issue here concerns the acceptance by the relevant scientific community of the reliability of DNA evidence." *Id.* at 421.
[21] *People* v. *Wernick*, 89 N.Y.2d 111 (1996).
[22] *Id.* at 117. "This Court has often endorsed and applied the well-recognized rule of *Frye.*" *Id.*

at 115.
[23] *Heckstall* v. *Pincus*, 797 N.Y.S.2d 445 (1st Dept. 2005).
[24] *Id.* at 447.
[25] *Id.*
[26] *Zito* v. *Zabarsky*, 812 N.Y.S.2d 535, 537 (2nd Dept. 2006).
[27] *Parker* v. *Mobil Oil Corporation,* 7 N.Y.3d 434 (2006).
[28] *Id.* at 447.
[29] *See also Wesley, supra*, 83 N.Y.2d at 429 ("The focus moves from the general reliability concerns of Frye to the specific reliability of the procedures followed to generate the evidence proffered and whether they establish a foundation for the reception of the evidence at trial.")
[30] *Id.*
[31] *Id.* at 448 fn.4.
[32] *Id.* at 450.

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