Published on *The National Law Review* https://natlawreview.com

Talc About Daubert v. Frye in Missouri and Florida

Article By:

IMS Legal Strategies

When I was a baby, my father would routinely douse me in handfuls of talcum powder. I looked like an infant ghost – pure white face, snowy hair, frosty handprints scattered around the house. Everywhere you looked, a fluffy white residue lingered.

And, we only used “the good stuff” – Johnson’s Baby Powder, with its “clinically proven mildness,” whatever that means.

Today, talcum powder, specifically the industry-leading manufacturer Johnson & Johnson, is under attack by plaintiffs, experts, and scientists claiming that the American staple is causing cancer. So far this year, these litigious fights have yielded two eight-figure jury awards, and hundreds more lawsuits are coming.

For attorneys, the name *Daubert* is legendary. The *Daubert* doctrine has spread across the nation over the last quarter-century, essentially becoming law in over 75% of the United States.

One of the last states to adopt *Daubert* was Florida in 2013, doing so with supreme zeal – even applying the doctrine retroactively to pending cases.

Almost exactly three years later, the Florida Supreme Court now sits poised to potentially reject *Daubert* and return the Sunshine State to its previous standard, which used both the *Frye* doctrine and another similarly less restrictive “pure opinion” test. Just months ago, the Florida State Bar’s governors voted 33-to-9 to recommend that *Daubert* be rejected, and the state’s high court is expected to hear oral arguments this summer.

Meanwhile, 700 miles north, the opposite is occurring in Missouri. The state is facing its own *Daubert* debate, and may find itself following the vast majority of states with respect to expert witness admissibility. The Missouri Legislature passed a measure that would require the courts to adopt *Daubert*, but the state’s governor says he will veto the bill.

Fueling the debate in the Show Me State – and bringing an argument typically reserved for legal scholars and jurists into the realm of public opinion – is the unique fact that Missouri is also home to both major talcum-powder victories this year. These decisions and awards, whether binding or simply persuasive precedent, will be impossible to ignore for the lines of litigants and pools of jurors expected to assemble in the onslaught against Johnson & Johnson.

The Talcum Expert

“Last month, a St. Louis jury heard a ‘star witness’ testify on the link between talcum powder and ovarian cancer,” writes U.S. Chamber Institute for Legal Reform president Lisa Rickard, in a *St. Louis Post-Dispatch* editorial. “A connection between talc and ovarian cancer is, even in its most forward-leaning interpretation, merely a hypothesis, but, Missouri’s low standard allowed the expert to testify. The jury was persuaded and Johnson & Johnson paid $55 million to a woman claiming its product caused her ovarian cancer.”

Rickard notes that the American Cancer Society found no definitive link between talc and cancer, and that two years ago the U.S. Food and Drug Administration refused to put a warning label on talcum powder because there was no conclusive evidence of such cancer risks.

She also notes that it was the same “star witness” who testified in both cases -- *Hogans et al v. Johnson & Johnson et al*, and *Ristesund v. Johnson & Johnson*, both in the Circuit Court of the City of St. Louis. The jury awarded $72 million and $55 million, respectively.

“Unfortunately, the jury’s decision goes against 30 years of studies by medical experts around the world that continue to support the safety of cosmetic talc,” said Carol Goodrich, spokesperson for Johnson & Johnson. “Multiple scientific and regulatory reviews have determined that talc is safe for use in cosmetic products and the labeling on Johnson’s Baby Powder is appropriate.”

But was it really the jury that made the decision, or was it the judge and loose legal doctrine - permitting the jury to hear so-called “junk science?”

With talcum powder and cancer, that certainly does not appear to be the case. The fact is that scientists have been claiming links between talc and ovarian cancer since the 1970s, and while there may be as many studies that disprove the link as there are that establish one, the belief that there is a linkage is not new, novel, or without merit.

Does *Daubert* Even Matter?

Some legal experts think we are all wasting our breath even debating the topic and that none of this matters anyway.

“Nearly every treatment of scientific evidence begins with a faithful comparison between the *Frye* and *Daubert* standards,” write Professors Edward Cheng and Albert Yoon in an evergreen 2004 legal research article published by Brooklyn Law School. “Since 1993, jurists and legal scholars have spiritedly debated which standard is preferable and whether particular states should adopt one standard or the other. These efforts beg the question: Does a state’s choice of scientific admissibility standard matter? A growing number of scholars suspect that the answer is no. [W]e found no evidence that *Frye* or *Daubert* makes a difference.”

Yet, the war wages on – particularly this summer in Florida and Missouri.

“Justice would be best served if the court upholds the will of the Legislature and keeps the more stringent [*Daubert*] standard,” writes the *Orlando Sentinel* in a May editorial. “Raising the bar for testimony from expert witnesses is an achievement. It deserves the high court's blessing.”

The editorial opines that it is really only the plaintiff’s attorneys who want to revert back to the

lesser *Frye* standard, while businesses, professionals, and criminal attorneys on both sides prefer *Daubert*.

“[The plaintiff’s bar] lobbied hard against this bill, because heightened expert standards mean some of their high-dollar cases that hinge on questionable evidence may no longer reap a huge payout,” Rikard similarly writes in her *St. Louis Post-Dispatch* editorial.

There is no doubt that those lawyers typically opposed to the more strict *Daubert* test are generally composed of the plaintiff’s attorneys, specifically those focused on personal injury and medical malpractice actions. In fact, finding a correlation between those states in which the plaintiff’s bar is exceptionally influential and those jurisdictions that retain the *Frye* test may not prove to be too difficult.

“For the scientific evidence field, the results suggest that debates about the practical merits and drawbacks of *Daubert* versus *Frye* may be largely superfluous, and that that energy should be refocused,” Professors Cheng and Yoon conclude. “In addition, our findings lend support to those scholars advocating for the uniform adoption of *Daubert* by the states. Perhaps it is time to move on from *Frye* versus *Daubert* and to focus more broadly on how judges in practice make decisions about science.”

National Law Review, Volume VI, Number 181