Alert

April 26, 2017

Subrogation & Recovery Alert

News Concerning Recent Subrogation and Recovery Issues

COZEN O'CONNOR

Could Daubert be Dying in Florida?

On February 16, 2017, the Florida Supreme Court issued an opinion in *In Re: Amendments to the Florida Evidence Code*, No. SC16-181, in which the court declined to adopt the *Daubert* standard, on procedural grounds, for admissibility of expert testimony. Although, as discussed below, this decision was not on the merits of a formal appeal from a litigated case and was a "procedural" decision, it could send a signal. Florida may revert back to the *Frye* standard for admitting expert opinions in the near future, which, in some instances, can be more favorable and less rigorous for subrogating carriers to meet in litigated cases in Florida state courts.

In order to appreciate the significance of the court's message in the recent opinion, it is necessary to begin with a comparison of the two expert standards. Generally, the *Daubert* standard, which arose out of the case of *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), provides that an expert is qualified if: (1) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (2) the testimony is based on sufficient facts or data; (3) the testimony is the product of reliable principles and methods; and (4) the expert has reliably applied the principles and methods to the facts of the case. On the other hand, the *Frye* standard, which arose out of the case of *Frye v. United States*, 293 F. 1013, 104 (D.C. Cir. 1923), states that in order to introduce expert testimony it need only be "sufficiently established to have gained general acceptance in the particular field in which it belongs," which is essentially a one factor test compared to the multi-factor test under *Daubert*. Indeed, under *Frye*, experts were generally admitted as witnesses even when opinions were based on experience and training alone. Whereas the *Daubert* factors have, given their formation, naturally led to legions of attorneys filing motions to disqualify experts based on one or all of the factors. In short, *Frye* can be seen as a much more flexible and forgiving standard for litigants.

Next, the background of the court's opinion is also important to gauge the significance of *In Re: Amendments to the Florida Evidence Code*. The issues at play arise out of a 2013 change in Florida law that added the *Daubert* standard to the evidence code as a requirement for admitting experts in state courts in Florida.[1] Shortly after the law was passed in 2013, the now ongoing debate started amongst civil litigators about whether the *Daubert* standard or *Frye* standard better served Florida residents and which should govern the admissibility of expert testimony. At the end of 2015, the Florida Bar's Code and Evidence Committee voted 16-14 to reject the 2013 legislation adopting the *Daubert* standard in the evidence code and advised the Supreme Court that the state should return to the *Frye* standard. It here where the court's opinion in *In Re: Amendments to the Florida Evidence Code* comes into perspective and provides a signal to litigants that the court appears ready to overrule the 2013 legislation on substantive grounds given the next opportunity to do so.

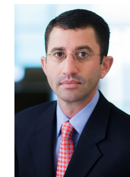
Nevertheless, the court did caution readers that "we decline to adopt the Daubert amendment to the extent that it is procedural, due to the constitutional concerns raised, which must be left for a proper case or controversy." The dissent issued along with the opinion questioned the holding because *Daubert* has been applied since 1993 in federal courts. As the decision here was not on the merits, the Florida state law adopting the *Daubert* standard still technically applies and would govern in pending or future litigation until a substantive decision is issued by the Florida Supreme Court. Even so, *In Re: Amendments to the Florida Evidence Code* sends a clear signal that *Daubert* may be dying and on life support in Florida.

It is likely to be a few years before there is a final decision from the Florida Supreme Court. But recovery professionals and subrogation counsel everywhere who handle matters in Florida should keep an eye on the issue and be aware that future claims could be governed by the less rigorous *Frye* standard if you choose to litigate in state court in Florida.

Joseph F. Rich

Member

jrich@cozen.com
Phone: (786) 871-3941
Fax: (786) 220-0204



Joshua R. Goodman

Chair, Subrogation & Recovery, Southeast Region

jrgoodman@cozen.com
Phone: (305) 704-5946
Fax: (866) 248-2897

Related Practice Areas

- Subrogation & Recovery

If you are interested in reading the full opinion, it can be found here.

For additional information on this developing area of the law, please feel free to contact Joesph F. Rich at jrich@cozen.com or (786) 871-3941 or Joshua R. Goodman at jrgoodman@cozen.com or (305) 704-5946.

[1] This arose out of an Amendment in 2013 to Florida Statute Sec. 90.702, which essentially added the *Daubert* factors by adopting language virtually identical to Federal Rule of Evidence 702.