Twelve Years and Two Governors Later
THE MISSOURI LEGISLATURE TAKES A SECOND STAB AT MAJOR TORT REFORM

*John F. Wilcox, Jr and Ben Stringer**

Twelve years ago this firm authored an article describing major tort reform legislation that passed in Missouri in 2005.[1] 2005 was the first time in eighty-four years that Republicans controlled the General Assembly and the governor's office. This control was short lived as Democrats won back the governor's mansion with Jay Nixon's election in 2008, and maintained this control until Eric Greitens' victory in 2016.

Apparently the age-old adage that history repeats itself applies to tort reform legislation. Republican legislators used control of the legislature and governor's office in 2005 to pass tort reform legislation many felt was overdue. Missouri courts subsequently watered down many of these reforms. In 2017, Republican legislators again took advantage of unified government to pass the most ambitious tort reform legislation in the last two decades.

These legislative reforms will have a direct impact on the transportation industry and its insurers. House Bill 153 adopts the *Daubert* Standard for expert witness testimony. House Bill 339/714 gives insurers more rights regarding time-limited demands and § 537.065 Agreements. Senate Bill 31 requires parties to present the "actual cost" of medical treatment, and prevents juries from awarding Plaintiff's special damages beyond what is necessary to satisfy the actual cost of medical treatment.

These changes, which became effective August 28, 2017, are discussed in more detail below.

1. House Bill 153 — The *Daubert* Standard

House Bill 153 was Truly Agreed To and Finally Passed On March 15, 2017 and signed by Governor Greitens on March 28, 2017. This bill, or a similar version, was first introduced in the legislature in 2014, and was passed in 2016 before being vetoed by Governor Nixon.

States use the *Daubert* Standard, the *Frye* Test, or a variation of the two in determining whether an expert witness' testimony is admissible at trial. Missouri's standard for admission of expert testimony is governed by Mo. Rev. Stat. § 490.065, but prior to HB 153, practitioners and judges debated whether Missouri's statute utilized the *Frye* Test or the *Daubert* Standard. Now, there is no debate and Missouri will employ the *Daubert* Standard. The *Daubert* Standard is more stringent than the *Frye* Test, and will narrow what expert testimony is admissible in Missouri. Under *Daubert,* the judge is the "gate-keeper" and has wide discretion regarding what expert testimony is admitted at trial.[2]

Adoption of the *Daubert* Standard is a welcome change for the defense bar. Now the court must make four specific findings when admitting expert testimony at trial: 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; the testimony is based on sufficient facts or data; the testimony is the product of reliable principles and methods; and, the expert has reliably applied the principles and methods to the facts of the case.[3] If the judge cannot make one of these four findings, the expert's testimony is inadmissible at trial.

Under *Frye,* an expert's testimony is admissible if the testimony is deduced from a scientific principle or discovery which has gained "general acceptance" in the particular field for which it belongs (the general acceptance test is now a "*Daubert* factor," discussed below).[4] *Frye* is primarily concerned with the result and *Daubert* is primarily concerned with the methodology used to reach the result.[5] The judge is primarily concerned with how an expert reached her conclusions or opinions and not with what the expert's conclusions or opinions are.

How will Missouri trial judges make the four findings required by

*Dysart Taylor Cotter McMonigle & Montemore, P.C. (Kansas City, Missouri)

§ 490.065? *Daubert* and its progeny have created a non-exhaustive list of questions trial judges may consider, known as the "*Daubert* factors." These factors include: whether the expert's technique or theory can be challenged in any objective sense; whether the technique or theory has been subject to peer review or publication; the known or potential rate of error for the technique or theory when applied; the existence and maintenance of standards and controls; and, whether the technique or theory has been generally accepted in the field.[6] Other factors courts have found relevant include: whether the testimony proffered is based on research independent from the expert's work on the particular litigation; whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion; were obvious alternatives accounted for; was the expert as careful as she would be in her normal course of work independent from the litigation; and, is the field of expertise claimed by the expert known for reaching reliable results.[7]

What steps should practitioners take to prepare for the *Daubert* Standard? First, read the statute. This may seem obvious but many people skip this step. Second, familiarize yourself with *Daubert* and its progeny. There is no guarantee Missouri courts will apply *Daubert* exactly as other jurisdictions have but the twenty-four years of case law remains a valuable resource. Third, be prepared for *Daubert*-type briefs and hearings. Heightened standards of admissibility mean more work for getting your experts admitted and more opportunities to get the opposing party's experts denied. Finally, always request that the court identify for the record the specific factors it relied upon in admitting an opposing party's expert testimony. This will make it substantially easier to present the issue to a reviewing court if you believe the judge erred in admitting an expert's testimony.

2. House Bill 339/714 — Time-Limited Demands and § 537.065 Agreements

House Bill 339/714 was Truly Agreed To and Finally Passed April 26, 2017 and signed Governor Greitens on July 5, 2017. This bill is intended to give liability insurers more protection against unfair settlement practices in Missouri by addressing time-limited settlement demands and § 537.065 Agreements.[8]

For years, Missouri has been considered a challenging venue for insurance companies in the context of bad faith litigation. Many lawyers in the state have made careers out of 'setting up insurers' for bad faith. Two primary methods have been used by claimants. The first involved time limited demands. Time-limited demands within the policy limits were offered with little or no time for the insurer to conduct an investigation, and if they declined to accept the demand, claimants and insureds used these offers as a basis for a bad faith refusal to settle or a vexatious delay claim.

In the situation in which an insurer denied coverage or agreed to defend under a reservation of rights, plaintiffs and defendants often entered into § 537.065 Agreements. In essence, these agreements provided that the plaintiff would agree to collect only against the defendant's insurance proceeds. In return, the defendant would agree to allow a 'lay down' judgment to be taken against it. At the trial in which damages would be determined, the insurance company was not allowed to intervene. This effectively prohibited the insurance carrier from defending the merits of the claim against the insured and allowed the plaintiff to attempt to collect the entire judgment from the insurance carrier, regardless of the applicable policy limit.

House Bill 339/714 bill creates § 537.058, which imposes new fairness standards for settlement demands used to support claims of bad faith refusal to settle.[9] A time-limited demand to settle must reference § 537.058 and be sent to an insured's liability insurer by certified mail return-receipt requested.[10] Such request must include: the time period the demand will remain open to the liability insurer (no less than ninety (90) days from the time the insurer receives the demand); the amount of money requested or a request for the applicable policy limit; the date and location of the loss; the claim number (if known); a description of all known injuries sustained by claimant; the party or parties to be released if such demand is accepted; a description of the claims to be released if such demand is accepted; and an offer of unconditional release of the insurer's insured from all present and future liability for that occurrence under § 537.060.[11]

Insurers can now verify the information included in these demands. The demand must be accompanied by a list of healthcare providers who have provided treatment or evaluation to the claimant since the date of the injury with a HIPAA compliant authorization to allow the insurer to obtain the claimant's medical records.[12] If the claimant asserts a loss of wages, earnings, compensation, or profits the demand must include a list of the claimant's employers since the date of the injury.[13] A demand not meeting these requirements is inadmissible as proof of a reasonable opportunity to settle in any bad faith suit brought by or on behalf of a claimant.[14]

HB 339/714 completely repealed and replaced § 537.065.[15] An insurer may defend an insured with or without reservation. The insurer now has a right to intervene in the underlying tort suit against its insured.[16] Before a judgment can be entered against an insured who has entered a § 537.065 Agreement the insurer must receive notice of the contract and be given a minimum of 30 days to intervene as a matter of right in any pending lawsuit for damages.[17] The right of intervention in the underlying action is a major victory for insurers who

in the past have been penalized by their insureds participating in lay-down trials.

3. Senate Bill 31 — "Actual" Cost of Medical Treatment & Evaluation

Senate Bill 31 was Truly Agreed To and Finally Passed May 11, 2017 and approved by Governor Greitens on July 5, 2017. This bill, or a similar version, was first introduced in the legislature in 2015, and was passed in 2016 before being vetoed by Governor Nixon.

The bill repealed and replaced § 490.715.[18] The legislature amended this section in 2005 to create a *rebuttable presumption* that the dollar amount necessary to satisfy the financial obligation to the health care provider represents the *value* of the medical treatment rendered. Subsequent case law, such as *Deck v. Teasley,* more or less removed the presumption and held that juries could consider evidence beyond the actual cost of medical treatment such as the amount billed for medical care.[19] Under the new § 490.715, *value* has been replaced by *actual cost.* Before SB 31 parties could introduce evidence of the value of medical treatment rendered. Now parties can only introduce evidence of the actual cost of medical treatment rendered. Actual cost is "a sum of money not to exceed the dollar amount paid by or on behalf of a plaintiff or a patient whose care is at issue plus any remaining dollar amount necessary to satisfy the financial obligation for medical care or treatment by a health care provider after adjustment for any contractual discounts, price reduction, or write-off by any person or entity."[20] This protects defendants from doctors and medical providers who furnish plaintiffs with high value medical bills but accept significantly reduced payment as satisfaction for their services.

4. Conclusion

The transportation industry and its insurers scored major victories during the 99th General Assembly of the Missouri legislature. Missouri will now utilize *Daubert,* which should limit the amount of junk science and unfounded expert testimony admitted at trial. Insurers will be far less burdened by unscrupulous time-limited demands and § 537.065 agreements between their insureds and claimants. Juries in Missouri will now only consider the actual cost, rather than the value, of medical treatment rendered to a plaintiff when awarding special damages. On paper, these changes are monumental but how the courts choose to interpret and apply these changes will determine the true impact of 2017's tort reform efforts.

Endnotes

1 Patrick K. McMonigle & John F. Wilcox Jr., *Missouri Passes Major Tort Reform Legislation Which Will Have Dramatic Effects On Trucking Litigation,* The Transportation Lawyer, 2005, at 44.
2 Fed. R. Evid. 702 (*see* Notes of Advisory Committee on 2000 amendments).
3 Mo. Rev. Stat. § 490.065 (effective Aug. 28, 2017).
4 *Frye v. U.S.,* 293 F. 1013, 1014 (D.C. Cir. 1923).
5 *Daubert v. Merrell Dows Pharm., Inc.,* 509 U.S. 579, 595 (1993).
6 Fed. R. Evid. 702 (*see* Notes of Advisory Committee on 2000 amendments).
7 *Id.*
8 James Maloney, *Time-Limited Demand and .065 Legislation Passed,* MODL Quarterly Report Special Legislative Issue, at 1, 9.
9 *Id.*
10 Mo. Rev. Stat. § 537.058(2) (effective Aug. 28, 2017).
11 *Id.* at § 537.058(2)(1)-(8).
12 *Id.* at § 537.058(3).
13 *Id.*
14 Maloney, *supra* note 8.
15 H.B. 339/714, 99th Gen. Assemb. (Mo. 2017).
16 Mo. Rev. Stat. § 537.065(2) (effective Aug. 28, 2017).
17 *Id.*
18 S.B. 31, 99th Gen. Assemb. (Mo. 2017).
19 *See Klotz v. St. Anthony's Med. Ctr.,* 311 S.W. 3d 752 (Mo. 2010); *Deck v. Teasley,* 322 S.W. 3d 536 (Mo. 2010); *Montgomery v. Wilson,* 331 S.W. 3d 332 (Mo. Ct. App. 2011).
20 Mo. Rev. Stat. § 490.715 (effective Aug. 28, 2017).