



Information and settlement: Empirical evidence on *Daubert* rulings and settlement rates[☆]



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ABSTRACT

In 1993, the Supreme Court established a new standard for the admissibility of expert evidence with its decision in *Daubert v. Merrell Dow Pharmaceuticals*. Although whether *Daubert* actually has increased the reliability of expert evidence remains an open question, empirical research generally suggests that *Daubert* has increased the judicial role in expert testimony as the number of challenges has increased. An unexplored topic to date is how *Daubert* outcomes impact litigation outcomes. This paper aims to fill that gap by examining how *Daubert* outcomes in federal district court affect the likelihood and timing of settlement. This paper also fits into the larger empirical literature that explores how information flows impact settlement. The sample of 2127 *Daubert* motions made in 1017 private cases from 91 federal district courts, spanning from 2003–2014, and involving 57 different causes of action provides the most comprehensive overview of *Daubert* practice in federal courts to date. The main empirical results suggest that defendant *Daubert* wins (plaintiff wins) are associated with a reduction (increase) in the likelihood of settlement. Results from duration analysis suggest that longer pendency time for *Daubert* motions are associated with lower settlement rates (a 4–7% reduction in the rate of settlement for every month that a *Daubert* motion goes undecided). Decomposition finds that the indirect effect of *Daubert* pendency (delay due to the reduction in communication between parties while *Daubert* motions pend before the court) accounts for the majority (70%) of the measured reduction in the settlement rate. One way that courts might reduce the cost of litigation if they were to adopt “*Lone Pine*”-type procedures that structure expert discovery and concomitant *Daubert* motions early, especially when expert testimony is required to prove certain elements of a claim.

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1. Introduction

In 1993, the Supreme Court established a new standard for the admissibility of expert evidence with its decision in *Daubert v. Merrell Dow Pharmaceuticals*.¹ *Daubert*, provided an interpretation of Federal Rule of Evidence 702 that replaced the “general acceptance” standard under *Frye v. United States*,² with one that focuses on methodological rigor. Subsequent Supreme Court decisions in *Gen. Electric Co. v. Joiner*³ and *Kumho Tires Co. v. Carmichael*,⁴ make clear that the court is to act as the gatekeeper, and that the *Daubert* standard applies not only to scientific evidence, but to all expert testimony. As codified by amendments to Federal Rule of Evidence

702, expert testimony is admitted only if it is based on “sufficient facts or data,” and “the product of reliable principles and methods” that are “reliably applied . . . to the facts of the case.”⁵ When assessing expert testimony, therefore, courts now must also assure that only scientifically valid expert evidence reach the trier of fact. As one notable *Daubert* scholar has explained:

[I]n a very short period of time, expert evidence law in federal courts (and states following the federal lead) underwent revolutionary changes. As of the early 1980s, with few exceptions, any qualified expert was permitted to testify on any relevant subject. By 2000, even the most qualified experts need to prove that their testimony was based on reliable principles and methods, and those principles and methods were applied reliably to the facts of the case.⁶

Several studies have attempted to determine the extent to which *Daubert* has impacted expert testimony by examining

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¹ 509 U.S. 579 (1993).

² 293 F. 1013 (D.C. Cir. 1923).

³ 522 U.S. 136 (1997).

⁴ 526 U.S. 137 (1999).

⁵ Fed. R. Evid. 702 (b)–(c).

⁶ Bernstein (2013).

reported cases, dockets, or surveying judges and attorneys. For example, [Krafka et al.](#) survey judges and attorneys engaged in federal civil practice.⁷ They find that after *Daubert*, attorneys file more motions to exclude expert testimony, and that judges apply more scrutiny to these motions. Early work by [Waters and Hodge](#) examines civil and criminal dockets in Delaware Superior Court, and interviews parties and judges.⁸ They find that *Daubert* had little impact on litigation. Using similar methodology, a more recent study by [Flores et al.](#) examines pre and post-*Daubert* civil practice in South Carolina federal district court, and finds that plaintiffs tend to put forth fewer experts and that defendants tend to make more expert challenges.⁹ [Groscup et al.](#) analyze language in federal and state appellate opinions to determine the impact of *Daubert* on judicial behavior.¹⁰ They find evidence of increased judicial scrutiny, but no indication of lower admissibility rates. Similarly, [Dixon and Gil](#) examine a sample of reported opinions from 1980–1999, and find evidence that *Daubert* increased the standard for admissibility and that parties responded by taking more care in putting forth expert testimony.¹¹ In more rigorous empirical work, [Cheng and Yoon](#) use difference-in-difference approach to compare removal rates from states that had adopted a *Daubert* standard to those that had not as a proxy for the impact of *Daubert*.¹² They argue that their findings imply little practical difference between *Frye* and *Daubert* standards. Finally, in more recent econometric work, [Helland and Klick](#) examine the extent to which variation in state adoption of a *Daubert* standard impacts the characteristics of expert witnesses in state court, and they find no evidence that a state's adoption of *Daubert* leads to more qualified experts.¹³ Although the impact of *Daubert* on the reliability of expert evidence appears to remain an open question, these studies generally suggest that *Daubert* has increased the judicial role in expert testimony as the number of challenges has increased.

An unexplored topic to date, but an important one given the increased judicial role in expert testimony, is how *Daubert* outcomes impact litigation outcomes. This paper addresses this gap in the literature by examining the relationship between *Daubert* outcomes in federal district courts and the likelihood and rate of settlement. This study also fits into the larger empirical literature that explores how information flows impact settlement. Litigation theory generally predicts that asymmetric information or errors in assessing the viability of a case can prevent settlement.¹⁴ Researchers have examined how discovery,¹⁵ the familiarity between opposing parties,¹⁶ or case management reforms¹⁷ can impact the odds of settlement. Further, recent work by [Boyd and Hoffman](#)—the closest to the present study—finds evidence that the flow of motion practice provides various types of information to parties that helps promote settlement.¹⁸ Because *Daubert* rulings reveal information about the likely success of a

plaintiff's case, this study examines the extent to which they serve as inflection points for settlement.¹⁹

This paper also contributes by providing rich information on *Daubert* practice in federal courts. Previous *Daubert* studies have relied on relatively small samples—for example [Waters and Hodge](#) relied on a sample of 240 cases from one court, and [Flores et al.](#)'s sample comprised only 191 cases, again from one court. This study uses a sample that consists of 2127 *Daubert* motions made in 1017 private cases from 91 federal district courts, spanning from 2003–2014, and involving 57 different causes of action. This large and diverse sample provides to my knowledge the most comprehensive overview *Daubert* practice in federal courts to date.

The main empirical results suggest that defendant *Daubert* wins (plaintiff wins) are associated with a reduction (increase) in the likelihood of settlement. I find that although there is no statistical relationship between longer *Daubert* motion pendency times and the likelihood of settlement, the data suggest that *Daubert* rulings are important inflection points for settlement. Consistent with theory (and anecdotal evidence from earlier studies), results from competing risk regressions suggest that longer pendency times for *Daubert* motions are associated with lower settlement rates. Specifically, after controlling for court, nature of suit, year, expert type, and party type, there is a 4–7 percent reduction in the rate of settlement for every month that a *Daubert* motion goes undecided. Importantly, settlement is not merely delayed by the time that the *Daubert* ruling is delayed. By examining two different beginning points for time at risk—case filing and *Daubert* ruling—I am able to identify a the indirect impact on the settlement rate due to the reduction in communication between parties while *Daubert* motions pend before the court. This decomposition suggests that the indirect effect of *Daubert* pendency accounts for the majority (70%) of the measured reduction in the settlement rate. This result provides support for prior literature that has found that exchange of information through motions and rulings facilitates faster settlement.²⁰

Given the widespread use of expert testimony in litigation²¹ and the steep cost of discovery,²² the strong negative association between *Daubert* pendency and settlement rates indicates that courts should avoid unreasonable delay in ruling on *Daubert* motions. One way that courts might reduce the cost of litigation is by adopting a type of “*Lone Pine*” procedure, which would structure expert discovery and concomitant *Daubert* motions early, especially when expert testimony is required to prove certain elements of a claim.²³

The remainder of this paper is organized as follows. Section 2 describes the sample collection procedure and provides summary statistics. Section 3 presents the main empirical results on the association between *Daubert* outcomes and timing and settlement. Section 4 discusses modifying expert testimony practice with the use of *Lone Pine*-type procedures, and Section 5 concludes.

⁷ [Krafka et al. \(2002\)](#) (survey of judges and attorneys). See also [Gatowski et al. \(2001\)](#).

⁸ [Waters and Hodge \(2005\)](#).

⁹ [Flores et al. \(2010\)](#). See also [Flores et al., 2008](#). Effects of *Daubert* on expert evidence practices in federal district court of South Carolina. The Grant Sawyer Center for Justice Studies (same), at <http://www.defendingscience.org/sites/default/files/upload/SKAPP-PROJECT-FINAL-REPORT-3-18-08.pdf>.

¹⁰ [Groscup et al. \(2002\)](#).

¹¹ [Dixon and Gill \(2002\)](#).

¹² [Cheng and Yoon \(2005\)](#).

¹³ [Helland and Klick \(2012\)](#).

¹⁴ See [Shavell \(2004\)](#) and [Waldfogel \(1996\)](#). For theoretical antecedents, see, e.g., [Bebchuck \(1984\)](#), [Priest and Klein \(1984\)](#) and [Keith Hylton](#).

¹⁵ See, e.g., [Kuo-Chang \(2007\)](#).

¹⁶ [Johnston and Waldfogel \(2002\)](#).

¹⁷ See, e.g., [Spurr \(1997\)](#).

¹⁸ [Boyd and Hoffman \(2012\)](#).

¹⁹ See [Flores et al., supra note 9](#), at 32 (quoting a South Carolina attorney who notes that *Daubert* rulings “play an important role in helping the parties evaluate their relative positions in the case and help parties understand the case in a way that helps them resolve it.”).

²⁰ See, e.g., [Boyd and Hoffman \(2012\)](#).

²¹ See [Cheng and Yoon, supra note 12](#) at 482; [Krafka et al., supra note 7](#), at 11.

²² See [Searle Center on Law, Regulation, and Economic Growth \(May 2010\)](#) (surveying fortune 200 companies and finding average discovery cost per case to range from \$621,880–\$2,993,567); [Rand Institute for Civil Justice \(2012\)](#) (median production costs ranging of \$1.8 million); [Hubbard \(Feb. 18, 2014\)](#) (estimating a range of preservation costs of \$12,000 per year for small companies and \$38 million per year for the largest companies).

²³ See *Lore v. Lone Pine Corp.*, 1986 WL 637507 (N.J. Super Ct., Nov. 18, 1986).

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