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When Daubert Gets Erie: Medical Certainty and Medical Expert Testimony in Federal Court

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SUMMARY

When the United States Supreme Court decided Daubert v. Merrell Dow Pharmaceuticals, Inc. in 1993, it changed the process and standards for admitting expert testimony in federal court. Since that decision, most federal courts have assumed that the Daubert analysis is the only standard governing the admissibility of expert testimony in federal court—even in diversity medical malpractice and medical products liability cases. However, Daubert did not modify, or even significantly discuss, the Erie doctrine, leaving questions unanswered regarding the admissibility of expert medical testimony when federal courts sit in diversity. In particular, states often impose medical certainty requirements on expert medical testimony that can affect that testimony’s admissibility, the expert’s competence to testify, or the plaintiff’s burden of proof. This article argues that because these state medical certainty standards generally are substantive enough under Erie to apply in diversity cases and do not directly conflict with the Federal Rules of Evidence or the Daubert analysis, federal courts sitting in diversity should apply the relevant state standard as well as the Daubert analysis in diversity cases that involve medical experts.

I. INTRODUCTION

Medical malpractice cases and certain kinds of medicine-related products liability cases—those involving pharmaceutical drugs or medical devices, for example—generally require expert medical testimony on the issue of causation: can, and did, the doctor, drug, or device cause the plaintiff’s injuries? In 1993, the U.S. Supreme Court decided Daubert v. Merrell Dow Pharmaceuticals, Inc.¹ and established a new analysis pursuant to Federal Rule of Evidence 702 for the admissibility of expert medical testimony on causation in federal court.² Under the Daubert rul-
ing, a federal trial judge "must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." The focus of a Daubert analysis is on an expert's methodology, not on his or her conclusions—that is, Daubert asks whether the proffered testimony is grounded in scientific knowledge, not whether it is sufficient to prove plaintiff's case.

Federal court medical malpractice and products liability cases, however, are almost always diversity cases asserting state law claims, and state law often imposes special standards of certainty for the reliability of expert medical testimony. In some states, medical experts must testify "to a reasonable degree of medical certainty," while in others they must testify "to a reasonable degree of medical probability," that the doctor, drug, or device caused the plaintiff's injury or condition. Throughout this

expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." FED. R. EVID. 702.

4. See Daubert, 509 U.S. at 595.
5. See id. at 589–595.

7. See, e.g., Richmond Police Dep’t v. Bass, 493 S.E.2d 661, 667 (Va. Ct. App. 1997) (holding that plaintiff failed to show that job stress caused his heart disease when no doctor "opined to a reasonable degree of medical certainty that job stress was a causative factor in the disease claimant suffered").

8. See, e.g., Payton v. Kearse, 495 S.E.2d 205, 211 (S.C. 1998) (holding that a doctor was not qualified to testify as to causation when he could not say that any medication most probably caused the plaintiff’s tinnitus).
article these standards are referred to collectively as “state medical certainty standards.” State courts will generally exclude expert medical testimony that does not meet the applicable medical certainty standard. As a result, the *Erie* doctrine presents a potential wrinkle for the *Daubert* analysis regarding medical expert testimony in federal court. Under *Erie*, federal courts hearing state-law claims must apply state substantive law. Should a federal court sitting in diversity admit expert medical testimony that satisfies *Daubert* if that testimony does not meet the state-law medical certainty standard?

Most federal courts to date have answered that question in the negative, deeming Federal Rule of Evidence 702 and *Daubert* the exclusive measures of whether a medical expert’s testimony is admissible, even in diversity cases. This article explores the various kinds of certainty standards that states impose on medical expert testimony, the *Erie* ramifications of those standards, the *Daubert* analysis in federal court, and the intersection of *Daubert* gatekeeping and state-law medical certainty. It will illustrate that the most difficult issues arise when a state medical certainty standard governs the admissibility of expert medical testimony, but it argues that because state standards rarely conflict absolutely with Federal Rule of Evidence 702 or the *Daubert* screening requirements, federal courts can, and should, apply those standards in conjunction with their *Daubert* analysis, in keeping with the Supreme Court’s most recent *Erie* jurisprudence.

II. STATE MEDICAL CERTAINTY STANDARDS

Medical malpractice and products liability are two common state-law causes of action that plaintiffs use when they have been injured in the course of medical treatment. Both require the plaintiff to prove that the alleged problem—the doctor’s technique, a medical device’s design, a drug’s side effect—is medically capable of causing the plaintiff’s injury. Thus, in both medical malpractice and products liability cases, causation—the link between the doctor, drug, or device at issue and the harm or injury complained of—is critical for a plaintiff trying to prove his or her case, particularly if the link between the alleged cause and the injury is not obvious or generally accepted. As one court has noted, “[n]o matter how negligent a party may have been, if his negligent act bears no relation to the injury, it is not actionable.”

9. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (establishing that federal courts sitting in diversity must apply state substantive law, both statutes and common law). *See also* Hanna *v. Plumer*, 380 U.S. 460, 467–68 (1965) (holding that whether the choice between state and federal law is outcome determinative should be viewed with respect to whether the choice leads forum shopping and the inequitable application of laws); Guaranty Trust Co. *v. York*, 326 U.S. 99, 110 (1945) (holding that state law applies in diversity cases if the choice of law is outcome determinative).


Unlike many kinds of tort cases, medical malpractice and products liability cases can involve two levels of causation issues: general causation and specific causation. To prove specific causation, the plaintiff must show that the defendant doctor’s negligence or the defendant manufacturer’s defective drug or device caused the plaintiff’s injury. General causation, on the other hand, presents the issue of whether the alleged cause is capable of ever causing the alleged injury to anyone. If a drug is incapable of causing cancer, for example, neither doctors nor manufacturers can be liable for a plaintiff’s cancer regardless of their conduct in relation to that drug. When applicable, therefore, lack of general causation can be a basic defense in medical malpractice and products liability suits.

Most states require that plaintiffs prove medical causation through expert testimony unless it is obvious to a layperson that a problem

14. See, e.g., Curtis v. M&S Petroleum, Inc., 174 F.3d 661, 669 (5th Cir. 1999) (affirming the lower court’s finding of general causation by outlining the presented evidence of the hazards of benzene to establish a sufficient causal connection between benzene and the claimed injuries); Snyder v. Upjohn Co., 172 F.3d 58 (9th Cir. 1999) (stating that evidence of general causation cannot be used to establish cause and effect); Barnes v. American Tobacco Co., 161 F.3d 127, 135 (3d Cir. 1998) (noting that proof of general causation does not prove individual causation for tobacco class action members); Raynor v. Merrell Pharm., Inc., 104 F.3d 1371, 1376 (D.C. Cir. 1997) (holding that testimony on specific causation has legitimacy only after admissible evidence shows that the drug in question is generally capable of causing birth defects); In re Joint E. & S. Dist. Asbestos Litig., 52 F.3d at 1131 (stating that the first element of causation that must be established in a toxic tort action is general causation, or the causal link between the implicated product and the claimed injury); Smith v. Ford Motor Co., 626 F.2d 784, 797–800 (10th Cir. 1980) (finding that defendant’s failure to disclose that an expert witness would be testifying to both general and specific causation resulted in prejudice requiring a reversal and remand); Heller, 167 F.3d at 155 (stating that “a medical expert [need not] always cite published studies on general causation in order to reliably conclude that a particular object caused a particular illness.”).
would have occurred.\textsuperscript{16} State standards governing expert medical testimony and medical causation, however, vary. In some jurisdictions, such as Pennsylvania, the expert must be able to testify “to a reasonable degree of medical certainty” that the doctor’s or manufacturer’s actions caused the plaintiff’s injuries.\textsuperscript{17} Other jurisdictions, like Virginia, similarly use a “reasonable degree of medical certainty” standard, but apply it more broadly to the plaintiff’s overall burden of proof.\textsuperscript{18}

More commonly, the standard is some form of medical probability that can again apply either to the expert’s testimony or to the plaintiff’s overall burden of proof.\textsuperscript{19} In Ohio medical malpractice cases, for example, “the plaintiff must prove causation through medical expert testimony in terms of probability to establish that the injury was, more likely than not, caused by the defendant’s negligence.”\textsuperscript{20} In Connecticut, experts must testify to a standard of “reasonable degree of medical probability;”\textsuperscript{21} in South Carolina, the medical expert must testify that the purported cause “most probably” caused the plaintiff’s injury;\textsuperscript{22} and in Massachu-
sets the expert must testify "that the purported cause, more probably than not, caused the injury."\(^{23}\) Texas does not require that individual medical experts testify to the reasonable medical probability standard, but "the substance of the evidence must show a reasonable probability" to support an ultimate finding of causation.\(^{24}\)

Jurisdictions requiring individual medical experts to meet either the reasonable medical certainty or medical probability standard do not usually require experts to use those "magic words" in their testimony.\(^{25}\) However, these courts will usually exclude the expert's testimony if the expert will only testify as to possibilities.\(^{26}\)

Finally, some jurisdictions use a "substantial factor" standard, which takes two forms: (1) the "substantial factor" requirement modifies "reasonable medical certainty" or "reasonable medical probability"; or, (2) the entire standard is the "substantial factor" test. These tests can be phrased many ways. For example, the California Supreme Court held that a plaintiff may prove causation by showing that the alleged cause

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Baughman v. American Tel. & Tel. Co., 410 S.E.2d 537 (S.C. 1991). The standard changes slightly when a plaintiff "relies solely upon the opinion of medical experts to establish a causal connection between the alleged negligence and the injury." In that case, the experts must, "with reasonable certainty, state that in their professional opinion, the injuries complained of most probably resulted from the defendant's negligence." Ellis v. Oliver, 473 S.E.2d 793, 795 (S.C. 1996) (emphasis added).


\(^{24}\) Purina Mills, Inc. v. Odell, 948 S.W.2d 927, 938 (Tex. App. 1997). \textit{But see} Hernandez v. Calle, 963 S.W.2d 918, 920 (Tex. App. 1998) (stating that in summary judgment, expert testimony as to causation must be based on reasonable medical probability).

\(^{25}\) \textit{E.g.}, Kunnanz v. Edge, 515 N.W.2d 167, 173 (N.D. 1994) ("Hypertechnical words are not necessary for the admission of an expert medical opinion; the test for admissibility is whether the expert's testimony demonstrates the expert is expressing a medical opinion that is more probable, or more likely than not."); Welsh v. Bulger, 698 A.2d 581, 585–86 (Pa. 1997) ("We do not, however, require experts to use 'magic words' when expressing their opinions. . . . Instead, we look at the substance of their testimony."); Weber v. McCoy, 950 P.2d 548, 551 (Wyo. 1998) ("Wyoming does not require that an expert use the magic words 'reasonable medical probability' for his opinion to be considered a competent medical opinion.").

\(^{26}\) \textit{See, e.g.}, Abdul-Majeed v. Emory Univ. Hosp., 484 S.E.2d 257, 258 (Ga. Ct. App. 1997) (holding that "a possibility that the alleged negligence caused the death is not sufficient to establish proximate cause. . . . Certainty is not required, but the plaintiff must show a probability rather than merely a possibility that that alleged negligence caused the injury or death."); Koontz v. Ferber, 870 S.W.2d 885, 890 (Mo. Ct. App. 1993) (holding that a "physician's opinion that the lab reading 'may' reflect acidosis is not the same as an opinion, to a reasonable degree of medical certainty, that the lab reading does reflect acidosis" and therefore that exclusion of the testimony was not an abuse of discretion); \textit{Kunnanz}, 515 N.W.2d at 172 (noting that expert medical opinions must "be expressed in terms of reasonable medical certainty or probability, not mere possibility."); Vitrano v. Schiffman, 702 A.2d 1347, 1351 (N.J. Super. Ct. App. Div. 1997) ("[M]edical opinion testimony must be couched in terms of reasonable medical certainty or probability; opinions as to possibility are inadmissible."); State Farm Mut. Auto. Ins. v. Kendrick, 491 S.E.2d 286, 287 (Va. 1997) (holding that a medical opinion based on "possibility" is inadmissible).
was, to a reasonable medical probability, a substantial factor in contributing to the plaintiff’s injury.27 Other jurisdictions, such as New Jersey, use the substantial factor test for all causation issues.28 In the First Circuit’s formulation of this test, “the plaintiff can carry her burden by showing a ‘substantial possibility’ that the harm would have been averted had the defendant acted in a non-negligent manner.”29 So phrased, the substantial factor test imposes a far less taxing burden on plaintiffs than either medical certainty or medical probability.30

Beyond their sheer variety, state medical certainty standards create several potential interpretive pitfalls when plaintiffs file their medical malpractice or products liability actions in federal court. First, states differ regarding the exact evidentiary consequence of meeting—or not meeting—their medical certainty standards. In some states, the standard determines whether an individual medical expert’s testimony is admissible.31 In other states, the standard governs the expert’s competency to testify.32 Finally, as previously noted, in some states the medical certainty standard defines the overall burden of proof for a medical malpractice or

27. See Rutherford v. Owens-Illinois, Inc., 941 P.2d 1203, 1219 (Cal. 1997): Plaintiffs may prove causation in asbestos-related cancer cases by demonstrating that the plaintiff’s exposure to defendant’s asbestos-containing product in reasonable medical probability was a substantial factor in contributing to the aggregate dose of asbestos the plaintiff inhaled or ingested, and hence to the risk of developing asbestos-related cancer, without the need to demonstrate that fibers from the defendant’s particular product were the ones, or among the ones, that actually produced the malignant growth. Id. See also Lineaweaver v. Plant Insulation Co., 31 Cal. Rptr. 902, 906 (Cal. Ct. App. 1995) (“In evaluating whether exposure was a substantial factor in causing asbestos disease, the standard should be the same as used in other cases: is there a reasonable medical probability based upon competent expert testimony that the defendant’s conduct contributed to plaintiff’s injury.”).


29. Blinzler, 81 F.3d at 1152 (citing Hake v. Manchester, 486 A.2d 836, 839 (N.J. 1985)).

30. See Rutherford, 941 P.2d at 1219 (“The substantial factor standard is a relatively broad one, requiring only that the contribution of an individual cause be more than negligible or theoretical.”).


32. See, e.g., Eisenbach v. Downey, 694 A.2d 1376, 1383–84 (Conn. Ct. App. 1997); See also Joyce v. Boulevard Physical Therapy & Rehabilitation Ctr., 694 A.2d 648, 655 (Pa. Super. Ct. 1997) (stating that in Pennsylvania, “if a witness has an reasonable pretension to specialized knowledge on a subject under investigation he may testify, and the weight given to his testimony is for the jury.”).
medical products liability case, while individual experts can testify to a lesser degree of certainty.\textsuperscript{33}

Next, a court cannot assume that "reasonable medical certainty" imposes a higher standard than "reasonable medical probability," although that is the usual assumption.\textsuperscript{34} The District of Columbia Court of Appeals' definition of "reasonable medical certainty" illustrates the problem: "reasonable medical certainty[] reflects an objectively well-founded conviction that the likelihood of one cause is greater than the other; it does not mean the expert is 'personally certain' of the cause or that the cause is discernible to a certainty."\textsuperscript{35} The Fifth Circuit has equated "reasonable medical certainty" and "reasonable medical probability" by holding simultaneously that plaintiff must prove causation to a reasonable medical certainty "but need only establish by a fair preponderance of the evidence the reasonable medical probability" of causation.\textsuperscript{36} Similarly, the Tenth Circuit has interpreted Colorado law to equate the two standards.\textsuperscript{37}

Finally, not all jurisdictions that purport to use the same standard—"reasonable medical certainty," for example—actually agree on what that standard means or impose the same evidentiary burden. For example, the Sixth Circuit distinguished Tennessee from other jurisdictions that rely on "reasonable medical certainty":

Whereas numerous jurisdictions have rejected medical experts' conclusions based upon a "probability," a "likelihood," and an opinion that something is "more likely than not" as insufficient medical proof, the Tennessee courts have adopted a far less stringent standard of proof and have required only that the plaintiffs prove a causal connection between their injuries and the defendant's tortious conduct by a preponderance of the evidence. While, in accordance with Tennessee common law, plaintiff's proof by reasonable medical certainty requires them only to establish that their particular injuries more likely


\textsuperscript{34} E.g., Forrestal v. Magendanz, 848 F.2d 303, 307 (1st Cir. 1988); Hovermale v. Berkeley Springs Moose Lodge No. 1483, 271 S.E.2d 335, 340 (W. Va. 1980).


\textsuperscript{36} Rewis v. United States, 503 F.2d 1202, 1218 (5th Cir. 1974).

\textsuperscript{37} See Zerr v. Trenkle, 454 F.2d 1103, 1106 (10th Cir. 1972). Accord Schrantz, 527 A.2d at 969 (accepting either reasonable medical certainty or reasonable medical probability); Dellenbach v. Robinson, 642 N.E.2d 638, 648 (Ohio Ct. App. 1993) (noting that reasonable medical certainty and reasonable medical probability are "essentially the same standard"); McKellips, 741 F.2d at 471 (accepting either "reasonable medical certainty" or "reasonable medical probability" but stating that "[a]bsolute certainty is not required, however, mere possibility or speculation is insufficient.").
than not were caused by [the alleged cause], their proofs may be nei-
ther speculative nor conjectural.\textsuperscript{38}

Given these variations among the states, the determination of ex-
actly what kind of expert witness testimony the forum state requires can
be critical to a plaintiff’s success in his or her medical malpractice or
products liability action. However tempted federal courts sitting in diver-
sity might be to avoid this state-law quagmire and to simply apply \textit{Daubert}
without regard to any state medical certainty standards, the \textit{Erie}
doctrine generally requires them to apply the relevant state standard as
will be discussed.\textsuperscript{39} This places a burden on the courts to first identify an
\textit{Erie} conflict, then to apply both \textit{Daubert} and the appropriate state stan-
dard in determining the admissibility of expert medical testimony.

III. THE \textbf{ERIE} DOCTRINE AND THE FEDERAL RULES OF EVIDENCE

A. \textit{The Erie} Doctrine in General

Because medical malpractice and products liability are generally
state-law claims, federal courts usually hear them through diversity jurис-
diction.\textsuperscript{40} As such, these claims are subject to the \textit{Erie} doctrine, named
for the U.S. Supreme Court’s 1938 decision in \textit{Erie Railroad Co. v. Tompkins}.\textsuperscript{39} The \textit{Erie} Court held that, “[e]xcept in matters governed by
the Federal Constitution or by acts of Congress, the law to be applied in
any case is the law of the state,” and that the law of the state included
both statutes and state common law.\textsuperscript{41} This holding has been interpreted
to mean that, in federal diversity cases, state law governs substantive
issues and federal law governs procedural issues.

Later Supreme Court decisions have refined this basic \textit{Erie} rule,
particularly in terms of resolving the distinction between substantive
issues and procedural issues. In 1945, for example, the Court announced
an “outcome determinative” test for deciding whether state law is sub-
stantive enough to apply in diversity actions.\textsuperscript{42} In \textit{Guaranty Trust Co. v.}

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38. Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1201 (6th Cir. 1988). \textit{See also} Estate of
‘reasonable medical probability’ has no greater meaning than a preponderance of the evidence, and 
the standard of proof is preponderance of the evidence as to medical causation.”).

39. \textit{See supra} note 6 and accompanying text.

40. \textit{See, e.g.}, Goldman v. Bosco, 120 F.3d 53, 54 (5th Cir. 1997); Hall v. Dow Corning Corp.,
114 F.3d 73, 78 (5th Cir. 1997); Cortes-Irizarry v. Corporacion Insular de Seguros, 111 F.3d 184,
189 (1st Cir. 1997).

41. 304 U.S. 64 (1938). Federal courts have applied the \textit{Erie} doctrine to diversity medical
malpractice or products liability cases. \textit{See, e.g.}, \textit{Cortes-Irizarry}, 111 F.3d at 189; Free v. Carnesale,
110 F.3d 1227, 1230 (6th Cir. 1997); Boburka v. Adecock, 979 F.2d 424, 427 (6th Cir. 1993).

42. \textit{Erie R.R. Co. v. Tompkins}, 304 U.S. 64, 78 (1938). In so holding, the Court overruled the
prior rule of \textit{Swift v. Tyson}, 41 U.S. 1 (1842), which had held that state statutes but federal common
law governed in diversity cases. \textit{Swift}, 41 U.S. at 18–19.

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York, the Court faced the question of whether a federal court sitting in diversity could, in effect, ignore a state statute of limitations. The Court announced that:

since a federal court adjudicating a state-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State. Thus, the question for a federal court to ask is whether such a statute concerns merely the manner and the means by which a right to recover, as recognized by the State, is enforced, or whether such statutory limitation is a matter of substance in the aspect that alone is relevant to our problem, namely, does it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court? In other words, the Erie doctrine ensures that "the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." Thus, because the New York statute of limitations at issue in Guaranty Trust would completely bar recovery, the federal court sitting in diversity was bound to apply it in order to avoid a different outcome under the federal law.

Thirteen years later, the Court modified the outcome determination test to take account of important federal interests. In Byrd v. Blue Ridge Rural Electric Cooperative, the Court considered whether a diversity plaintiff was entitled to a jury trial in federal district court to determine his status as a statutory employee under South Carolina's worker's compensation laws. The South Carolina courts had held that this issue of immunity was a matter of law and as such was for the judge to decide. The Supreme Court, in addressing this question, considered whether, under Erie, this rule was part of state created "rights and obligations," which would thus

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44. Id.
45. Id. at 108.
46. Id. at 109.
47. Id.
48. See id. at 110.
51. Id. at 528.
52. See id.
53. See id. at 534 (citing Adams v. Davison-Paxon Co., 96 S.E.2d 566 (S.C. 1957)).
require its application in federal court. The Court determined that the judge-decision rule was “not an integral part” of the rights and obligations created by the South Carolina Worker’s Compensation Act. Further, that the rule appeared “to be merely a form and mode of enforcing the immunity.”

While acknowledging that cases following Erie had held that federal courts should apply state rules of form and mode where such rules might have a substantial impact on the outcome of the litigation, the Byrd Court added to the Erie analysis the consideration of the federal interest at stake and thus backed away from the outcome determination test. The Byrd Court cited to “a strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts.” Stating that “[a]n essential characteristic of [the federal system] is the manner in which . . . it distributes trial functions between judge and jury and, under the influence—if not the command—of the Seventh Amendment, assigns the decisions of disputed questions of facts to the jury,” the Court decided that the state rule must yield to a federal jury trial.

The Supreme Court further modified the outcome determination test in 1965 when it decided Hanna v. Plumer. Hanna involved a Massachusetts statute that required delivery in hand or service upon the executor or administrator of an estate within one year of a decedent’s death. Federal Rule of Civil Procedure 4, in contrast, allowed service by leaving a copy of the complaint at the defendant’s dwelling house. When plaintiff filed her complaint in federal court, she followed Federal Rule of Civil Procedure 4 in effecting service and left copies of the complaint with the deceased defendant’s wife, who was not the executor or administrator of the estate, at the decedent’s residence. The defendant moved

54. Id. at 535 (referring to Erie’s holding that “the federal courts must respect the definition of state created rights and obligations by the state courts.” Id. See also Erie R.R. Co. v. Thompkins, 304 U.S. 64, 79–80 (1938)).
55. Id. at 536 (distinguishing the case at bar from Dice v. Akron, 342 U.S. 359 (1952), “where this court held that the right to trial by jury is so substantial a part of the cause of action created by the Federal Employers’ Liability Act, 45 U.S.C. § 51 et seq., that the Ohio courts could not apply, in an action under that statute, the Ohio rule that the question of fraudulent release was for the determination by a judge rather than by a jury.” Id.).
56. Id.
57. See id. at 536–37.
58. Id. at 538.
59. Id. at 537. The Court additionally found that the likelihood of a different outcome was not “so strong as to require the federal practice of jury determination of disputed factual issues to yield to the state rule in the interest of uniformity of outcome.” Id. at 540.
60. 380 U.S. 460 (1965) (footnote omitted).
61. See Hanna, 380 U.S. at 462 (referring to MASS. GEN. LAWS Ch. 197, § 9 (1958)).
62. See id. at 46. “Service shall be made as follows: . . . upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing within.” Id. (quoting FED. R. CIV. P. 4(d)(1)).
for summary judgment on the grounds that the Massachusetts statute was controlling.\textsuperscript{64} Despite the fact that the choice of rules was obviously outcome determinative, the Supreme Court held that Federal Rule of Civil Procedure 4 controlled.\textsuperscript{65}

First, the Court held that Federal Rule of Civil Procedure 4 clearly related to the "practice and procedure of the district courts" and thus did not exceed the congressional mandate of the Rules Enabling Act.\textsuperscript{66} All rules promulgated pursuant to that Act, the Court held, are valid if they "regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either."\textsuperscript{67} Second, the Court refined what the outcome determination test meant by holding that the test "cannot be read without reference to the twin aims of the \textit{Erie} rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws."\textsuperscript{68} In this context, the Court found the conflict between Federal Rule of Civil Procedure 4 and the Massachusetts statute not truly outcome determinative because the differing means of service did not present the kind of choice that would encourage forum shopping at the time a plaintiff filed suit.\textsuperscript{69} Finally, the Court held that \textit{Erie} was not intended as a means of invalidating the Federal Rules of Civil Procedure and determined that when there is a direct conflict between a valid Federal Rule and a state law, the Federal Rule must control.\textsuperscript{70}

\textbf{B. The \textit{Erie} Doctrine and the Federal Rules of Evidence}

Although the Supreme Court has applied the logic of \textit{Hanna v. Plumer} to the Federal Rules of Appellate Procedure,\textsuperscript{71} it has never explicitly

\textsuperscript{64} See id. at 461–62.
\textsuperscript{65} See id. at 463–64.

\textsuperscript{67} \textit{Hanna}, 380 U.S. at 472.
\textsuperscript{68} Id. at 468.
\textsuperscript{69} See id. at 468–69.
\textsuperscript{70} See id. at 469–74. For further refinements of the \textit{Hanna} analysis and the Federal Rules, see discussion infra Part IV.B.2.a.

\textsuperscript{71} See \textit{Burlington N. R.R. Co. v. Woods}, 480 U.S. 1, 7–8 (1987). In \textit{Hanna v. Plumer}, . . . we set forth the appropriate test for resolving conflicts between state law and the Federal Rules. The initial step is to determine whether, when fairly
decided how the *Erie* doctrine and the Federal Rules of Evidence, which Congress enacted in 1975, interact. Surprisingly, lower federal courts demonstrate considerable differences of opinion on this issue. Because the Federal Rules of Evidence, like the Federal Rules of Civil Procedure, derived originally from the Rules Enabling Act, federal courts quite simply could have extended the *Hanna v. Plumer* analysis and held that the evidentiary rules are “rationally capable of classification” as procedural. Thus, the Federal Rule of Evidence would trump if there is a conflict between a state and federal rule. While some federal circuit courts construed the scope of Federal Rule [of Appellate Procedure] 38 is “sufficiently broad” to cause a “direct collision” with the state law or, implicitly, to “control the issue” before the court, thereby leaving no room for the operation of that law. The [Federal] Rule must then be applied if it represents a valid exercise of Congress’ rulemaking authority, which originates in the Constitution, and has been bestowed on this Court by the Rules Enabling Act, 28 U.S.C. § 2072.

The [Federal] Rule 401 provides that evidence is relevant if it is “of consequence” to the suit, and that, thus, relevancy in a diversity action is determined by “the underlying substantive state law.”

First, Congress enacted the evidentiary rules as statutes, unlike the Federal Rules of Civil Procedure, implying that the Supremacy Clause plays a role in the analysis as well as the *Erie* doctrine. See Dudley, supra note 66, at 1798 (stating that “[b]ecause the Rules Enabling Act, with its prohibition on modification of substantive rights, was the only available vehicle for federal evidence reform, scholars debated intensely the question of whether evidence law as a whole could be classified as ‘procedural,’ despite the various purposes served by the evidentiary rules,” and arguing that congressional enactment of the Federal Rules of Evidence independent of the Rules Enabling Act ended this argument that the rules were, by definition, procedural); Kenneth J. Lorge, Note, Hottle v. Beech Aircraft: Confusion Surrounding the Choice of Law in Federal Diversity Actions Persists as the Fourth Circuit Applies State Evidentiary Law in the Face of a Conflicting Rule of Federal Evidence, 26 Sw. U. L. REV. 135, 147–49 (1996) (arguing that the Federal Rules of Evidence apply in diversity cases through the Supremacy Clause as long as the law is arguably procedural). Second, however, in adopting the Federal Rules of Evidence, Congress made it clear that it intended to give effect to at least some aspects of the *Erie* doctrine. See Kelleher, supra note 66, at 82–83 (“Notably, [in the enacted Federal Rules of Evidence], the proposed Rules on privileges were completely revised to require the application of state law whenever state law provides the substantive rule of decision.”).

In addition, three points argue against a simple extension of *Hanna v. Plumer* to the Federal Rules of Evidence. First, as will be argued infra in Part IV.B.2.a, later *Erie* jurisprudence
have indeed followed this logic, most that have addressed the *Erie* /Federal Rule of Evidence issue are in a least basic agreement that some state evidentiary rules are so substantive that federal courts sitting in diversity must take account of them.

The Federal Rules of Evidence "apply generally to civil actions and proceedings." Most federal courts apply the Federal Rules of Evidence rather than state rules to all evidentiary questions in diversity cases. The Rules themselves eliminate many potential conflicts between state and federal evidentiary rules—and hence eliminate many *Erie* issues—by expressly providing that when state law provides the rule of decision, state law also applies in determining presumptions, privileges, and the competency of witnesses.

State law also can affect the admissibility of evidence in diversity cases in two other ways. First, when state law supplies the rule of decision, it sets out the boundaries of what evidence is relevant. The Federal

emphasizes harmonizing state and federal provisions rather than choosing between them. Second, the argument can be made—indeed, has troubled numerous federal courts—that evidentiary rules are far more likely than the Federal Rules of Civil Procedure to affect substantive rights, thus distinguishing the *Hanna v. Plumer* analysis for the Federal Rules of Evidence. Many scholars note that *Hanna* 's "rationally capable of classification as procedural rule" is subject to excessively broad interpretations that go too far in allowing Federal Rules to displace state law. Professor Dudley points out: "The interference with the independent administration of the federal system — that is, the impact on the accuracy of fact-finding — occasioned by the application of a [state-law evidentiary] rule in a diversity case arguably is not sufficient to justify disregarding a substantive state policy in applying state law." Dudley, *supra* note 66, at 1797–1803; Carrington, *supra* note 66, at 297–99. See also *Kelleher, supra* note 66, at 78–79 (arguing that the federal interest in determining what evidence should be available is less compelling in diversity actions). Third, at least half of the federal circuits addressing *Erie*/Federal Rules of Evidence problems have determined that the *Erie* doctrine applies in their analysis of whether they should take account of state evidentiary rules.


77. See *Conway v. Chemical-Leaman Tank Lines, Inc.*, 540 F.2d 837, 839 (5th Cir. 1976); Stonehocker v. General Motors Corp., 587 F.2d 151, 156 (4th Cir. 1978); see also *Carter*, 716 F.2d 344, 347 (using Texas products liability law to determine relevance of evidence); *Adams*, 820 F.2d 271, 273 (using Missouri products liability law to determine relevance of evidence).

78. FED. R. EVID. 1101(b).

79. See *e.g.*, *Allstate Ins. Co. v. Sunbeam Corp.*, 53 F.3d 804, 806 (7th Cir. 1995); *Hottle v. Beech Aircraft Corp.*, 47 F.3d 106, 109 (4th Cir. 1995); *Espeaignnette v. Gene Tierney Co.*, 43 F.3d 1, 9 (1st Cir. 1994); *Washington v. Department of Transp.*, 8 F.3d 296, 300 (5th Cir. 1993); *Grossheim v. Freightliner Corp.*, 974 F.2d 745, 754 (6th Cir. 1992); *Potts v. Benjamin*, 882 F.2d 1320, 1324 (8th Cir. 1989); *Romine v. Parman*, 831 F.2d 944, 944–45 (10th Cir. 1987).

80. See FED. R. EVID. 302.

81. See FED. R. EVID. 501.

82. See FED. R. EVID. 601.
Rules create a general premise that "[a]ll relevant evidence is admissible" and that "[e]vidence which is not relevant is not admissible." Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Because in diversity cases the underlying state-law claim or defense establishes which facts are "of consequence to the determination of the action," state law necessarily influences the court's application of the Federal Rules.

Second, when a state evidentiary rule embodies, reflects, or gives effect to a state substantive policy, many federal courts will apply that state rule pursuant to Erie. For example, in a case decided not long after Congress enacted the Federal Rules of Evidence, the Fourth Circuit discussed the potential Erie problems of dual-natured—evidentiary and substantive—state rules that conflict with the Federal Rules of Evidence. In that 1978 diversity case, an injured automobile driver sought to admit evidence that the manufacturer of his car had violated a federal safety standard. The Fourth Circuit performed an Erie analysis to determine whether the state or Federal Rules governed the admissibility of the evidence. In the end, it applied the Federal Rules, but only because South Carolina substantive law was silent on the issue:

[1]In the absence of any indication of any policy in South Carolina, we should be guided by the literal terms of the [Federal R]ules and admit relevant evidence unless there is some reason not to do it. We do not

83. FED. R. EVID. 402.
84. FED. R. EVID. 401.
85. Id.
86. Thus, the Fifth Circuit, after determining that the Federal Rules of Evidence apply in diversity actions, nevertheless concluded that “[t]o determine relevancy in a diversity case we must look to the underlying state substantive law.” Carter v. Massey-Ferguson, Inc., 716 F.2d 344, 347 (5th Cir. 1983). It looked to Texas law to determine whether evidence of industry custom was relevant—and hence admissible—in a strict products liability case. Id. at 347-48. Similarly, the Eighth Circuit, after determining that the Federal Rules of Evidence “provide the standards of relevancy of evidence,” nevertheless turned to Missouri products liability law to determine whether state-of-the-art feasibility evidence should be admissible. Adams v. Fuqua Indus., Inc., 820 F.2d 271, 273 (8th Cir. 1987). But see Espeaignnette v. Gene Tierney Co., 43 F.3d 1, 9-10 (1st Cir. 1994) (determining the relevance of prior accidents in a strict products liability action with reference only to federal decisions, holding that “it is axiomatic that in determining whether evidence is relevant, and therefore admissible in a diversity action, the Federal Rules of Evidence supply the appropriate rules of decision”); Romaine v. Parman, 831 F.2d 944, 945-46 (10th Cir. 1987) (holding that “the Federal Rules of Evidence should be applied in a diversity case in federal court to determine whether evidence is relevant or prejudicial” and declining to follow state-law decisions that made pleas of guilty to traffic offenses inadmissible).
88. Stonehocker, 587 F.2d at 153 (citing Mickle v. Blackmon, 166 S.E.2d 173 (S.C. 1969)).
89. See id. at 154-55 (noting that South Carolina law governed the existence of the manufacturer's duty "and the Supreme Court of that State ha[d] imposed a duty on automobile manufacturers to use due care in car design.").
imply that South Carolina can make no different rule; that is simply a question not before us for she has not done so.90

The Fourth and Fifth Circuits both hold "that there are State evidentiary rules so bound up with the substantive law of the State that a federal court sitting in that State should accord it the same treatment as the State courts in order to give effect to the State's substantive policy."91 In 1995, the Fourth Circuit applied Virginia state law in a diversity products liability action where Virginia law provided that a party's private rules were not admissible to prove negligence or to set a standard for that party's duty of care.92 Similarly, the Fifth Circuit determined that a federal district court had to follow Texas law in a wrongful death diversity action when Texas state law made evidence of a widow's remarriage admissible and the non-admission of such evidence reversible error.93

The Ninth Circuit has also held that under Erie some state evidentiary rules should apply in diversity cases.94 In Wray v. Gregory, the court stated that "even though the passage of the Federal Rules of Evidence in 1975 rendered the Erie analysis inapplicable to most evidentiary questions in diversity cases, it did not have the effect of supplanting all state

90. Id. at 155–56.
91. Stonehocker, 587 F.2d at 155 (citing Conway v. Chemical-Leaman Tank Lines, Inc., 540 F.2d 837 (5th Cir. 1976)). But cf., Michael H. Gottesman, Should Federal Evidence Rules Trump State Tort Policy? The Federalism Values Daubert Ignored, 15 CARDOZO L. REV. 1837, 1838 (1994) (arguing that evidence that would be admitted in many state courts will not be admitted in federal court under Daubert: "So long as diversity of citizenship exists, the defendant will remove the [products liability] case to federal court, if not originally filed there by plaintiff, in order to achieve the radically different outcome resulting from the federal courts' more stringent evidence rules.").
92. See Hottle v. Beech Aircraft Corp., 47 F.3d 106, 109–10 (4th Cir. 1995). Noting that Virginia had made the policy of keeping private rules separate from the legal standard of reasonable care as far back as 1915 and that "there is no countervailing federal interest compelling application of the federal rules in this case," the Fourth Circuit concluded that "the Virginia rule is sufficiently bound up with state policy so as to require its application in federal court." Id. at 110.
93. See Conway, 540 F.2d at 838–39. The court reasoned:
[W]e recognize in article 4675a [the Texas wrongful death statute at issue] one of those rare evidentiary rules which is so bound up with state substantive law that federal courts sitting in Texas should accord it the same treatment as state courts in order to give full effect to Texas' substantive policy. Actions for wrongful death did not exist at common law, and in Texas, as elsewhere, they are entirely the creation of statute. [The statutory provisions] remained constant for almost fifty years, until 1973, when the Texas Legislature, doubtless to forestall further use of the tactics employed here to create a misleading impression of continuing widowhood, enacted article 4675a and no other amendment to the act at that session. Such a course of action evidences clearly that the legislators considered the amendment a matter of significance and one necessary to substantive policy in an area peculiarly within their control. As such, article 4675a represents more than a mere rule of evidence; it is a declaration of policy by the creators of the Texas wrongful death action that the sort of palming off heretofore practiced would no longer be tolerated.

In such and similar circumstances, federal courts have long recognized an exception to the inapplicability of Erie to evidentiary questions . . . .

Id. (citations omitted).
law evidentiary provisions with federal ones." The court supported this assertion by stating that "some state rules of evidence in fact serve substantive state policies and are more properly rules of substantive law within the meaning of Erie."  

The First, Third, Seventh, and Eight Circuits similarly recognize the substantive nature of some state evidentiary rules and have attempted to define a substance/procedure distinction. In 1992, Judge Posner, writing for the Seventh Circuit, formulated a test for determining when state evidentiary rules are in fact substantive. In a diversity action against a car manufacturer for personal injuries in an automobile accident, plaintiff sought to exclude evidence that she had not been wearing a seatbelt. North Carolina law provided that evidence of not wearing a seatbelt was generally inadmissible. The Seventh Circuit reasoned:

Even in diversity cases the rules of evidence applied in federal courts are the federal rules of evidence rather than state rules, save with respect to matters of presumptions, privilege, and competency of witnesses, Fed. R. Evid. 302, 501, 601, none of which is involved here. If North Carolina’s rule against the admission of testimony about a failure to wear one’s seatbelt is a rule of evidence, it is inapplicable to this case; and there is no counterpart rule in the federal law of evidence.

Well, but is it a rule of evidence for purposes of the Erie doctrine, or is it a substantive rule and therefore binding in a diversity case (or any other case in which state law supplies the rule of decision)? The difference is this. A pure rule of evidence, like a pure rule of procedure, is concerned solely with accuracy and economy in litigation and should therefore be tailored to the capacities and circumstances of the particular judicial system, here the federal one; while a substantive rule is concerned with the channeling of behavior outside the courtroom, and where as in this case the behavior in question is regulated by state law rather than by federal law, state law should govern even if the case happens to be in federal court.

The Seventh Circuit concluded that the North Carolina rule was "founded on the desire of the North Carolina courts not to penalize the failure to fasten one’s seatbelt, because nonuse is so rampant in the state that the average person could not be thought careless for failing to fasten his seatbelt." The state rule thus regulated behavior outside the court.

95. Wray, 61 F.3d at 1417.
96. Id. at 1417 (quoting 19 C. Wright, A. Miller & E. Cooper, FEDERAL PRACTICE AND PROCEDURE § 4512, at 194–95 (1984)).
98. See Barron, 965 F.2d at 196–97, 198.
99. See id. at 198–99.
100. Id. (citations omitted).
101. Id. at 200. See also Milam v. State Farm Mut. Auto. Ins. Co., 972 F.2d 166, 170 (7th Cir. 1992) (holding that the Federal Rules of Evidence apply in diversity cases, "[b]ut where a state in
and did not serve "solely [the] accuracy and economy" of the proceeding. As a result, the rule was substantive law and, under Erie and Hanna, was applicable in the determination of whether the evidence was admissible.102

Both the Third and Fifth Circuits followed similar reasoning in finding that the admissibility of evidence of seatbelt and child safety seat use were substantive issues. The Third Circuit reasoned that the admissibility of evidence of seatbelt use is a substantive question because the evidence is, in itself, a defense having legal consequence and not merely proof of some other fact.103 The Fifth Circuit similarly held that the admissibility of evidence of non-use of a child safety seat was a substantive issue.104 Determining that the Arkansas Child Passenger Protection Act regulated behavior by placing a legal duty on certain persons to use a child safety seat, the court found the issue of admissibility to be "a classic example of the type of substantive rule of law binding upon a federal court in a diversity case."106

The First Circuit has adopted a slightly different analysis. In 1985, the First Circuit in McInnis v. A.M.F. acknowledged that while Congress was free to enact rules that, under Hanna, could rationally be characterized as procedural, "federal courts and Congress are constitutionally precluded from displacing state substantive law with federal substantive rules in diversity actions."107 Thus, the court stated in dicta that "Congress did not intend the [Federal R]ules to preempt so-called 'substantive' state rules of evidence such as the parole evidence rule, the collateral source rule, or the Statue of Frauds."108

In 1999, however, the First Circuit "disavow[ed] the McInnis dictum"109 in a case considering whether, in diversity actions, state evidence rules "regarding compensation from collateral sources should displace the Federal Rules of Evidence."110 The court first held that state law collateral source rules must apply in diversity actions because such rules are

furtherance of its substantive policy makes it more difficult to prove a particular type of state-law claim, the rule by which it does this, even if denominated a rule of evidence or cast in evidentiary terms, will be given effect in a diversity suit as an expression of state substantive policy."). But see Allstate Ins. Co. v. Sunbeam Corp., 53 F.3d 804, 806 (7th Cir. 1995) ("[T]he federal rules of procedure and evidence always apply in federal litigation, whether or not they determine the outcome.").

102. Barron, 965 F.2d at 200.
103. See Dillinger v. Caterpillar, Inc., 952 F.2d 430, 434–45 (3d Cir. 1992) (considering whether evidence of seat belt non-use was correctly admitted at trial in a strict products liability action).
104. See Potts v. Benjamin, 882 F.2d 1320, 1324 (8th Cir. 1994).
106. Potts, 882 F.2d at 1324.
108. McInnis, 765 F.2d at 245.
110. Id. at 73–74.
substantive. The court then stated that the Federal Rules of Evidence apply whenever a "rule is sufficiently broad to control a particular issue." Thus, the court determined that "here, the Federal Rules of Evidence (and in particular Rules 401, 402, and 403) are malleable enough to deal with the principal evidentiary issues contemplated by the collateral source rule: relevancy and unfairly prejudicial effect." The effect of this holding was that the Massachusetts collateral source rule barring use of third party compensation was applicable in the determination of damages, but the Federal Rules of Evidence allowed any other use of collateral source evidence, provided the evidence satisfied the relevancy requirements of the Rules.

Thus, under the *Erie* and *Hanna* analyses, most circuits have held that state evidentiary rules that have a substantive impact on the decision will trump the Federal Rules of Evidence. The tests or reasoning applied varies from circuit to circuit, but the general concept holds that when a rule of evidence is significantly tied to a state substantive policy, that policy will override the Federal Rules and determine the evidentiary issue before the court.

C. *Erie* and State Medical Certainty Standards: Three Analyses

Because states use medical certainty standards for three different evidentiary purposes, these standards require three different analyses regarding the interactions of state law, the Federal Rules of Evidence, and the *Erie* doctrine.

1. Medical Certainty as a Burden of Proof

The Supreme Court has determined that burdens of proof are matters of state substantive law that must apply in diversity cases under the *Erie* doctrine. Therefore, in medical malpractice or medical strict prod-
ucts liability cases in federal court where a state uses a medical certainty standard to define the plaintiff's burden of proof, those state standards govern what the plaintiff must prove. For example, the Sixth Circuit applied Tennessee's medical probability standard in a diversity medical malpractice case, finding the defendant had not met the medical probability requirement in trying to assert a comparative fault defense against a nonparty to the suit. Similarly, in a diversity products liability case, the Eleventh Circuit imposed Florida's requirement that "plaintiffs [must] prove by a preponderance of the evidence, with 'reasonable medical probability,'" that a manufacturer's alleged negligence caused the patient's injury.

While a plaintiff's overall burden of proof is governed by state law, the circuits disagree as to whether other issues regarding the sufficiency of evidence are also under the purview of state regulation. For example, the Fourth Circuit has held that the federal, not the state, medical certainty standard determines whether evidence offered to prove causation in a medical products liability case is sufficient to create a jury question. In contrast, the D.C. Circuit has held that state law governs


118. See, e.g., DeLuca v. Merrell Dow Pharm., Inc., 911 F.2d 941, 958 n.22 (3d Cir. 1990) (holding that New Jersey's standard "that a plaintiff show to a reasonable degree of medical probability that defendant's conduct caused her injuries" was a burden of proof that governed in federal diversity cases).

119. See Free v. Carnesale, 110 F.3d 1227, 1231 (6th Cir. 1997) (quoting Kilpatrick v. Bryant, 868 S.W.2d 594, 602 (Tenn. 1993)).

120. Christoph v. Cutter Lab., 53 F.3d 1184, 1191 (11th Cir. 1995).

121. For additional discussion of this conflict and an argument that state law should govern, see Gottesman, supra note 95, at 1863-69.

122. See Owens v. Bourns, Inc., 766 F.2d 145, 149-50 (4th Cir. 1985) ("Even under diversity jurisdiction the sufficiency of the evidence to create a jury question is a matter governed by federal law."). Accord, Morrison Knudsen Corp. v. Fireman's Fund Ins. Co., 175 F.3d 1221, 1259 n.47 (10th Cir. 1999) ("While state law governs a party's substantive entitlement to damages in a diversity case like this, it is well-established that federal law governs the grant or denial of a new-trial motion in diversity cases, and, at least in this Circuit, governs the determination whether evidence is sufficient to support a verdict."); Johnson Enters. of Jacksonville, Inc. v. FPL Group, Inc., 162 F.3d 1290, 1308 n.44 (11th Cir. 1998) ("The sufficiency of the evidence to create a case for the jury is a procedural issue to which we apply federal law.") (citing Excel Handbag Co. v. Edison Bros. Stores, Inc., 630 F.2d 379, 383-84 (5th Cir. 1980)); Taylor v. Cooper Tire & Rubber Co., 130 F.3d 1395, 1399 (10th Cir. 1997) (in diversity cases, federal law controls the issue of whether the evidence in a products liability action is sufficient to go to the jury); Mayer v. Gary Partners & Co., 29 F.3d 330, 334 (7th Cir. 1994) (in diversity cases, federal law controls the issue of whether the evidence is sufficient to survive summary judgment); Pegasus Helicopters, Inc. v. United Tech. Corp., 35 F.3d 507, 510 (10th Cir. 1994) (in diversity cases, federal law controls the sufficiency of evidence for judgment as a matter of law); Thrash v. State Farm Fire & Cas. Co., 992 F.2d 1354, 1356 (5th Cir. 1993) (federal law governs the sufficiency of evidence in upholding a jury verdict in diversity cases); ABC-Paramount Records, Inc. v. Topps Record Distrib. Co., 374 F.2d 455, 460 (5th Cir. 1967) ("[T]he sufficiency of the evidence to raise a question of fact for the jury is controlled by
the sufficiency of evidence to survive a motion for judgment notwithstanding the verdict because it is a substantive rule under *Erie.*" Therefore, even if the state medical certainty standard defines a burden of proof, the question of whether that standard governs a sufficiency issue depends on the exact procedural posture of the case and the circuit in which the case is being heard.

2. Medical Certainty as a Matter of Witness Competency

When state law characterizes the applicable medical certainty standard as determining a medical expert's competence to testify, the Federal Rules of Evidence themselves provide that state law controls, eliminating the need for a complex *Erie* analysis. Under Federal Rule of Evidence 601, "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law." Thus, in state-law medical malpractice actions, federal courts must apply state evidentiary rules to determine a medical expert's competency to testify.

3. Medical Certainty and Admissibility

The most complex *Erie* problem involving state medical certainty standards arises when the state medical certainty standard governs the admissibility of an expert's testimony. Here, the Federal Rules of Evidence and state law seem to conflict. State laws generally hold that the expert's testimony is admissible if the expert testifies to the relevant state standard, while Federal Rule of Evidence 702 provides that: "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."

Two aspects of the state medical certainty standards support the argument that state standards should be applied in diversity cases. First,
even when couched in terms of "admissibility," the requirement that a medical expert be able to testify to a certainty standard is essentially a competency requirement, as the Tenth Circuit has implicitly recognized.\(^{127}\) Under Colorado law, medical testimony "is admissible if founded on reasonable medical probability."\(^{128}\) The Tenth Circuit applied state standard because, under 601, it was necessary to apply Colorado law to determine "the competency of [the doctor's] testimony."\(^{129}\) Indeed, any line drawn between competency and admissibility in this situation would necessarily be arbitrary: Is the medical expert an incompetent witness because his or her testimony is inadmissible for failure to meet the requisite standard, or is that testimony inadmissible because the expert is not competent under that standard to give an opinion? Therefore, in many cases, the state standard will apply through Federal Rule of Evidence 601 even if couched as an "admissibility" requirement.

Second, state medical certainty standards governing admissibility often are substantive evidentiary rules, requiring their application in appropriate diversity cases under \textit{Erie}.\(^{130}\) As noted, for \textit{Erie} purposes, federal courts generally determine whether a state rule is substantive by applying the "outcome determinative" test.\(^{131}\) In the Supreme Court's most recent formulation of this test, the question is: "Would application of the [state] standard . . . have so important an effect upon the fortunes of one or both of the litigants that failure to apply it would unfairly discriminate against citizens of the forum State, or be likely to cause a plaintiff to choose the federal court?"\(^{132}\) For many states imposing a medical certainty standard on the admissibility of expert medical testimony, the answer to this question is "yes," indicating that federal courts should apply the state standard.\(^{133}\)

In many states, a medical certainty admissibility requirement serves to ensure that an expert has a requisite degree of confidence in his or her conclusion, particularly regarding medical causation. It leads state courts to exclude expert medical testimony that identifies only medical "possibilities" or that avoids identification of a particular cause.\(^{134}\) Thus, state

\(^{127}\) \textit{LeMaire}, 826 F.2d at 954.
\(^{128}\) \textit{Id.} (emphasis added; citations omitted).
\(^{129}\) \textit{Id.} (emphasis added).
\(^{130}\) \textit{See} \textit{Erie R.R. Co. v. Tompkins}, 304 U.S. 64, 78 (1938); \textit{see also} \textit{Rules of Decision Act}, 28 U.S.C. § 1652 (1999) ("The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decisions in civil actions in the United States, in cases where they apply.").
\(^{131}\) \textit{See supra} notes 40–65 and accompanying text.
\(^{133}\) \textit{See Gottesman, supra} note 91, at 1851–55 (discussing how state standards for expert testimony differ substantively from that in \textit{Daubert}).
\(^{134}\) For example, in Texas, "[a] possible cause only becomes 'probable' [for purposes of the reasonable medical probability standard] when, in the absence of other reasonable causal explanations, it becomes more likely than not that the injury was a result of its action." \textit{Williams v.}
medical certainty standards impose substantive obligations on expert medical testimony.

Failure to meet the state standard can have an immediate substantive effect on a particular case because exclusion of the expert’s testimony often leads to the failure of the plaintiff’s prima facie case. For example, the Nebraska Supreme Court upheld a lower court’s grant of defendant’s motion for summary judgment when the plaintiff’s sole medical expert witness failed to testify to a reasonable degree of medical certainty that the plaintiff’s fallopian tube could have been saved had her HMO allowed a transfer to another hospital.135 “The only permissible inference from the [expert’s testimony] is that [plaintiff’s] fallopian tube possibly could have been saved had she remained at Bergan [Hospital] for surgery. Medical testimony couched in terms of ‘possibility’ is insufficient to support a causal relationship.”136

Under more traditional distinctions between “substance” and “procedure,” law is substantive if it creates, defines, or regulates legal rights or duties.137 As noted, state medical certainty standards often implicitly impose content requirements on expert medical testimony. In addition, most states require a medical malpractice or medical products liability plaintiff to produce expert testimony on the issue of causation, and require those experts to testify to the requisite state standard.138 In other words, states partially regulate the availability of these torts through their medical certainty standards. In Pennsylvania, for example, to establish a prima facie case of malpractice, a plaintiff must present an expert witness who will testify, to a reasonable degree of medical certainty, that the acts of the physician deviated from good and acceptable medical standards, and that such deviation was the proximate cause of the harm suffered.139 Pennsylvania medical malpractice plaintiffs cannot avoid the state law medical certainty standard by submitting other kinds of evidence. Thus, in Pennsylvania, for medical malpractice plaintiffs, the submission of expert testimony that meets the requisite standard is a part of their burden of proof—and burdens of proof, as discussed above, are substantive law.

NGF, Inc., 994 S.W. 2d 255, 256–57 (Tex. App. 1999). Similarly, in Vermont, a psychiatric expert’s testimony met the “reasonable degree of medical certainty” standard when the expert positively identified psychological rather than physical causes as the source of the plaintiff’s pain after a fall. Everett v. Town of Bristol, 674 A.2d 1275, 1277 (Vt. 1996).

136. Steineke, 518 N.W. 2d at 907–08.
137. See generally Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938); Bankers Trust Co., v. Lee Keeling & Assocs., 20 F.3d 1092, 1099 (10th Cir. 1994).
139. Id.
State medical certainty standards thus effectively embody a policy choice by certain states to limit the kind of medical testimony that a medical tort plaintiff can use to prove his or her case. As discussed, many states have determined that medical experts who are not willing to testify to the requisite degree of medical certainty will not be allowed to confuse the issue of causation by testifying to something less than the threshold state standard. In these states, therefore, medical tort plaintiffs cannot rely on sophisticated speculation to prove causation by a preponderance of the evidence. Medical certainty standards thus serve as a screening device for expert medical testimony. Notably, medical malpractice screening requirements have universally been held to be substantive rules of law by the federal circuits that have addressed them.140

By analogy, state medical certainty standards, as screening devices, are also substantive rules that federal courts should apply in diversity cases.

D. The Problem: Uncertain Application of State Medical Certainty Standards

The substantive character of most states' medical certainty admissibility standards and the federal circuits' general willingness to apply state substantive evidentiary rules in diversity actions strongly suggest that state medical certainty standards should apply in diversity medical tort cases. However, only the Third Circuit has held that state medical certainty standards govern the admissibility of medical experts in diversity actions.141

In In re Paoli, a 1994 products liability case, the Third Circuit first noted that Pennsylvania law requires medical experts to testify to causation to a reasonable degree of medical certainty.142 It then decided that this requirement, if viewed purely as a rule of admissibility, would be “in conflict with [Federal Rules of Evidence] 702 and 703 which require a

140. In an effort to weed out non-meritorious medical malpractice claims, keep medical costs down for insurance purposes, and encourage alternative dispute resolution, several state have enacted medical malpractice screening requirements. These statutes generally require potential medical malpractice plaintiffs to take their grievance before a panel or committee, and that panel or committee’s evaluation of the potential case is usually admissible into evidence. The six federal circuits that have faced the question of whether federal courts sitting in diversity must follow these state-law screening statutes have all answered in the affirmative, concluding that the screening and admissibility requirements are sufficiently substantive to require application under Erie. See Wray v. Gregory, 61 F.3d 1414, 1417-18 (9th Cir. 1995); Daigle v. Maine Med. Ctr., 14 F.3d 684, 687-90 (1st Cir. 1994); DiAntonio v. Northampton-Accomack Mem’l Hosp., 628 F.2d 287, 292 (4th Cir. 1980); Edelson v. Soricelli, 610 F.2d 131, 135, 141 (3d Cir. 1979); Hines v. Elkhart Gen. Hosp., 603 F.2d 646, 649 (7th Cir. 1979); Woods v. Holy Cross Hosp., 591 F.2d 1164, 1168-69 (5th Cir. 1979). But see Braddock v. Orlando Reg’l Health Care Sys., Inc., 881 F. Supp. 580, 582-84 (M.D. Fla. 1995) (refusing, pursuant to the Erie doctrine, to apply Florida’s statutory pre-suit requirements for medical malpractice suits in a federal diversity action because state law directly conflicted with Federal Rules of Civil Procedure 3, 4 and 8).


142. See In re Paoli, 35 F.3d at 750.
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reliable methodology . . . but nowhere require a reasonable degree of medical certainty." As such, if the state rule was merely a "standard of admissibility in conflict with Federal Rules of Evidence Pennsylvania's rule would be 'rationally capable of classification as procedural' and the Federal Rules of Evidence would govern." Pennsylvania's medical certainty standard, however, was found not just a standard of admissibility, but also part of plaintiff's burden of proof, because the Pennsylvania courts had "strongly implied that, even if admissible, testimony with less than a reasonable degree of medical certainty was insufficient to prove causation." Therefore, "Pennsylvania's rule is a substantive one, not in conflict with Federal Rules of Evidence, and thus governs in federal court."  

Most other federal circuits have been unwilling to consider whether state laws have a substantive effect on the admissibility of expert testimony. The First, Fourth, Fifth, and Eighth Circuits have each held that Federal Rule of Evidence 702, and not state law, governs the admissibility of expert medical testimony. In addition, outside of the context of medical experts, the Sixth, Seventh, and Tenth Circuits have

144. Id. (quoting Salas v. Wang, 846 F.2d 897, 904–06 (3d Cir. 1988)).
146. Id. at 752. The Third Circuit has recently reaffirmed its approach, noting that in addition to the Daubert analysis, "state rules on the degree of certainty required of an expert's opinion apply" in diversity cases. Heller v. Shaw Indus., Inc., 167 F.3d 146, 153 n.4 (3d Cir. 1999).
147. See Forrestal v. Magendantz, 848 F.2d 303, 305 (1st Cir. 1988) ("The exclusion or admission of testimony is governed by the Federal Rules of Evidence in diversity cases as well as in all others.").
148. See Scott v. Sears, Roebuck & Co., 789 F.2d 1052, 1054 (4th Cir. 1986)("Unlike evidentiary rules concerning burdens of proof or presumptions, the admissibility of expert testimony in a federal court sitting in the diversity jurisdiction is controlled by federal law. State law, whatever it may be, is irrelevant.").
149. See Dawsey v. Olin Corp., 782 F.2d 1254, 1262 (5th Cir. 1986).
150. See Clark v. Heidrick, 150 F.3d 912, 914 (8th Cir. 1998). In a diversity medical malpractice case regarding the explicit issue of whether a medical expert's testimony could be admissible even though it did not meet the "reasonable medical certainty standard," the Eighth Circuit held that "'[t]he question of whether expert testimony should be admitted or excluded is a matter governed by federal, rather than state, law.'" Id. (quoting Fox v. Dannenberg, 906 F.2d 1253, 1255 (8th Cir. 1990)).
151. See id.
152. See Brooks v. American Broad. Co., 999 F.2d 167, 173 (6th Cir. 1993) ("The admissibility of expert testimony is a matter of federal, rather than state, procedure.").
153. See Stutzman v. CRST, Inc., 997 F.2d 291, 294–95 (7th Cir. 1993) (considering whether expert testimony is substantive or procedural and finding that "the Federal Rules governing expert testimony reflect a procedural judgment that juries are aided by hearing expert testimony and that assistance enhances the accuracy of the entire process—even where an expert is not absolutely certain about his conclusion."). See also United States v. Cyphers, 553 F.2d 1064, 1072–73 (7th Cir. 1977) (upholding Rule 702 as the sole measure of an expert's admissibility and refusing to impose a medical certainty standard, and citing United States v. Wilson, 441 F.2d 655, 656 (2d Cir. 1971), for "the rule that an expert's lack of absolute certainty goes to the weight of his testimony, not to its admissibility."); Rogers v. Ford Motor Co., 952 F. Supp. 606, 611 n.3 (N.D. Ind. 1997) (citing
stated categorically that Federal Rule of Evidence 702 governs the admissibility of experts in diversity actions because the issue is a procedural one. Thus, all but one of the circuits that have addressed the issue have indicated that state medical certainty standards do not apply in a diversity case to determine the admissibility of an expert’s testimony.

IV. THE DAUBERT COMPLICATION: FEDERAL RULE OF EVIDENCE 702 AND STATE MEDICAL CERTAINTY STANDARDS

A. Admissibility of Scientific Experts in Federal Court: The Daubert Analysis

As has been discussed, medical malpractice and medical product liability cases almost always involve the testimony of expert witnesses to prove causation.\(^\text{155}\) In federal courts, for almost 70 years, the guideline for the admissibility of scientific and medical expert testimony was the *Frye* test, which takes its name from the 1923 appellate court case of *Frye v. United States*.\(^\text{156}\) The question facing the *Frye* court was whether an expert witness’s testimony as to the results of a systolic blood pressure deception test, a type of lie detector test, was admissible against a criminal defendant.\(^\text{157}\) The court held that such testimony was inadmissible, creating a test of general acceptance for admissibility:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be

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\(^{155}\) See *Gust v. Jones*, 162 F.3d 587, 594 (10th Cir. 1998) (“The admission of expert testimony in a federal trial is governed by Federal Rule of Evidence 702 . . . .”).

\(^{156}\) See *supra* notes 15 & 16 and accompanying text; see also Cortes-Irizarry v. Corporacion Insular de Seguros, 111 F.3d 184, 191 (1st Cir. 1997); *Rohrbough v. Wyeth Lab., Inc.*, 916 F.2d 970, 972 (4th Cir. 1990) (holding that proof of causation in a products liability case involving a vaccine “must be by expert testimony”).

\(^{157}\) 293 F. 1013 (D.C. Cir. 1923).
sufficiently established to have gained general acceptance in the particular field in which it belongs.\textsuperscript{158}

In 1993, however, the U.S. Supreme Court rejected the Frye general acceptance test in Daubert v. Merrell Dow Pharmaceuticals, Inc.,\textsuperscript{159} a products liability case in which the child plaintiffs alleged that their mothers' ingestion of Bendectin during pregnancy caused their birth defects.\textsuperscript{160} The Court held that the Federal Rules of Evidence supersede the Frye test.\textsuperscript{161} Specifically Federal Rule of Evidence 702,\textsuperscript{162} which governs the admissibility of "scientific, technical, or other specialized knowledge," does not establish "'general acceptance' as an absolute prerequisite to admissibility," nor was there "any clear indication that [Federal Rule of Evidence] 702 or the Rules as a whole were intended to incorporate a 'general acceptance' standard."\textsuperscript{163} Noting that "Frye made 'general acceptance' the exclusive test for admitting expert scientific testimony," the Court concluded that "[t]hat austere standard, absent from, and incompatible with, the Federal Rules of Evidence, should not be applied in federal trials."\textsuperscript{164}

While rejecting the Frye test, the Court nevertheless acknowledged that the Federal Rules place "limits on the admissibility of purportedly scientific evidence."\textsuperscript{165} "[T]he trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable."\textsuperscript{166} According to the Court, this duty requires examination of two issues: (1) Is the proffered evidence "scientific knowledge;" and (2) Will the proffered evidence assist the trier of fact in understanding or determining a fact in issue?\textsuperscript{167}

Scientific knowledge has "a grounding in the methods and procedures of science" and is "more than subjective belief or unsupported speculation."\textsuperscript{168} While the subject of scientific testimony need not be "known to a certainty," "an inference or assertion must be derived by the scientific method."\textsuperscript{169} The scientific knowledge requirement, therefore,

\textsuperscript{158.} Id. at 1014 (emphasis added).
\textsuperscript{159.} 509 U.S. 579 (1993).
\textsuperscript{160.} See id. at 582.
\textsuperscript{161.} See id. at 586--87.
\textsuperscript{162.} FED. R. EVID. 702. "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." Id.
\textsuperscript{163.} Daubert, 509 U.S. at 588.
\textsuperscript{164.} Id. at 589.
\textsuperscript{165.} Id.
\textsuperscript{166.} Id.
\textsuperscript{167.} Id. at 592.
\textsuperscript{168.} Id. at 589--90.
\textsuperscript{169.} Id. at 590.
“establishes a standard of evidentiary reliability.” Assisting the trier of fact, by contrast, “goes primarily to relevance”—a question of “fit.” “‘Fit’ is not always obvious, and scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes.”

The Court delineated four factors for federal courts to consider when screening scientific and technical evidence for admissibility: (1) whether the theory or technique “can be (and has been) tested”; (2) whether the theory or technique has been subjected to peer review and publication;” (3) “the known or potential rate of error” “and the existence and maintenance of standards controlling the technique’s operations;” and (4) “general acceptance.” However, the Court also emphasized that the inquiry into scientific evidence’s admissibility is “a flexible one” and that the focus “must be solely on principles and methodology, not on the conclusions that they generate.” Moreover, other Federal Rules of Evidence—such as Rule 403, which allows a federal judge to exclude otherwise admissible evidence “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury,” also play a role in the final decision of whether to admit scientific evidence.

Federal district and appellate courts have varied in their applications of the Daubert standards, particularly regarding evidence of causation and the role of experts’ conclusions in the evaluation process. For example, on remand of the Daubert case, the Ninth Circuit excluded expert witness testimony on both scientific knowledge and fitness grounds. Some of the expert testimony on the issue of whether Bendectin can cause birth defects was inadmissible because the plaintiffs failed to sufficiently establish the reliability of that testimony:

[P]laintiffs rely entirely on the experts’ unadorned assertions that the methodology they employed comports with standard scientific procedures. In support of these assertions, plaintiffs offer only the trial and deposition testimony of these experts in other cases. While these materials indicate that plaintiffs’ experts have relied on animal studies, chemical structure analyses and epidemiological data, they neither explain the methodology the experts followed to reach their conclusions nor point to any external source to validate that methodology. We’ve been presented only with the experts’ qualifications, their con-

170. Id.
171. Id. at 591.
172. Id.
173. Id.
174. See id. at 593–94.
175. Id. at 594–95.
176. Id. at 595 (quoting FED. R. EVID. 403).
177. See Daubert v. Merrell Dow Pharm., Inc. (Daubert II), 43 F.3d 1311, 1319 (9th Cir. 1995).
clensions and their assurances of reliability. Under *Daubert*, that's not enough.\textsuperscript{178}

The court found other expert testimony inadmissible because it amounted merely to opinion. The only expert willing to testify that Bendectin caused the children's limb defects "asserted\[d] only that Bendectin is a teratogen and that he [had] examined the plaintiffs' medical records, which apparently reveal the timing of their mothers' ingestion of the drug."\textsuperscript{179} The expert offered "no tested or testable theory to explain, how, from this limited information, he was able to eliminate all other potential causes of birth defects, nor does he explain how he alone can state as a fact that Bendectin caused plaintiffs' injuries."\textsuperscript{180} In the court's opinion, these assertions amounted to personal opinion, not science, and thus were inadmissible under *Daubert*.\textsuperscript{181}

In addition, the Ninth Circuit found plaintiffs' proffered expert testimony on causation to be insufficient in terms of "fit."\textsuperscript{182} Noting that California tort law supplied the governing substantive tort standard,\textsuperscript{183} the court defined "fit" under the circumstances:

California tort law requires plaintiffs to show not merely that Bendectin increased the likelihood of injury, but that it more likely than not caused their injuries. In terms of statistical proof, this means that plaintiffs must establish not just that their mothers' ingestion of Bendectin increased somewhat the likelihood of birth defects, but that it more than doubled it--only then can it be said that Bendectin is more likely than not the source of their injury.\textsuperscript{184}

Because "[n]one of plaintiffs' epidemiological experts claims that ingestion of Bendectin during pregnancy more than doubles the risk of birth defects," their testimony was inadmissible.\textsuperscript{185} The Ninth Circuit thus took a relatively aggressive stand regarding the court's gatekeeping role and incorporated the state-law burden of proof into its *Daubert* analysis.

In contrast, addressing the issue of whether Depo-Provera can cause birth defects, the D.C. Circuit more conservatively emphasized that "the *Daubert* analysis does not establish a heightened threshold for the admission of expert evidence, but rather focuses on the court's 'gatekeeper' role as a check on 'subjective belief' and 'unsupported speculation.'"\textsuperscript{186} Indeed, according to the D.C. Circuit, "the threshold for admissibility has

\begin{footnotesize}
\begin{enumerate}
\item 178. *Daubert II*, 43 F.3d at 1319.
\item 179. *Id.*
\item 180. *Id.*
\item 181. See *id.*
\item 182. See *id.*
\item 183. See *id.* at 1320.
\item 184. *Id.* at 1320–21 (citations omitted).
\item 185. *Id.*
\end{enumerate}
\end{footnotesize}
been lowered, both because of the liberal theory of admissibility adopted by the Federal Rules of Evidence and because Frye's 'general acceptance' test is no longer dispositive of admissibility."

The D.C. Circuit expressly rejected the Ninth Circuit's fitness evaluation for epidemiological evidence, holding that "[t]he dispositive question is whether the testimony will 'assist the trier of fact to understand the evidence or to determine a fact in issue,' . . . not whether the testimony satisfies the plaintiff's burden on the ultimate issue at trial." It admitted expert testimony that Depo-Provera "is capable of causing the types of defects" that the infant plaintiff suffered even though that testimony failed "to establish the causal link to a specified degree of probability," because the testimony nevertheless "could aid the jury's resolution of the [plaintiffs'] claims." As such, the D.C. Circuit eliminated consideration of state-law burdens of proof from the Daubert analysis.

Thus, for the moment, how the Daubert analysis and state law interact for diversity medical malpractice cases is subject to circuit variations. Moreover, the Supreme Court's recent opinions clarifying Daubert have done little to resolve the issue. In General Electric Co. v. Joiner, an electrician of the City of Thomasville, Georgia, sued three chemical manufacturers under a strict products liability theory, alleging that polychlorinated biphenyls (PCBs) in electrical transformers and voltage regulators caused his lung cancer. Before the Supreme Court, the issue was a narrow one: "what standard an appellate court should apply in reviewing a trial court's decision to admit or exclude expert testimony under Daubert v. Merrell Dow Pharmaceuticals, Inc." The Court determined that "abuse of discretion is the appropriate standard."

The Court emphasized that a court of appeals reviewing a district court's decision "may not categorically distinguish between rulings allowing expert testimony and rulings which disallow it." Further, district courts performing Daubert evaluations may not draw bright lines between methodology and conclusions. Noting that "conclusions and methodology are not entirely distinct from one another," the court held that it is within a District Court's discretion to conclude that an expert's

187. Ambrosini, 101 F.3d at 134.
188. Id. at 135 (quoting Daubert, 509 U.S. at 591 (quoting FED. R. EVID. 702)).
189. Id. at 135-36.
190. See id. at 135 n.8 (rejecting the Ninth Circuit's approach and noting that "[i]n light of our disposition, we have no occasion to consider whether the substantive tort law of California and the District of Columbia are similar . . . ").
194. Id.
195. Id. at 142.
196. See id.
methodology is insufficient to support his or her proferred opinion. Thus, although the *Joiner* opinion gives lower courts no guidance on the issue of what to do with state-law sufficiency standards in general or with medical certainty requirements in particular, the Court indirectly validated more broadly-focused *Daubert* inquiries such as that the Ninth Circuit undertook in *Daubert II*. After *Joiner*, therefore, defendants remain free to argue that when an expert's conclusion regarding causation is inadmissible or insufficient under the applicable state-law standard, it may simply not "fit" the case at hand under *Daubert*'s analytical framework.

More recently, in *Kumho Tire Co. v. Carmichael*, the Supreme Court expanded *Daubert*'s applicability to not only "scientific" but also "technical" expert testimony. The Court again emphasized that the *Daubert* screening is "flexible" and specifically held that the *Daubert* factors "do not constitute a 'definitive checklist or test.'" Instead, the *Daubert* inquiry ensures "that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." The *Kumho* Court, however, made no mention of the *Erie* doctrine or of state substantive law.

**B. When Daubert Gets Erie: Federal Rule of Evidence 702 and State-Law Medical Certainty**

1. *Daubert* and State-Law Medical Certainty Standards

Because, in federal court, expert medical testimony must be based on "scientific knowledge," medical experts and their opinions on medical causation are subject to screening under *Daubert*. Like the *Erie* doctrine, *Daubert* provides a framework for determining the admissibility of expert opinions in federal court. However, when the *Daubert* analysis is applied to state-law medical certainty standards, the result is often a "fit" that allows the expert's testimony to be heard in court.

197. See id. at 146.
200. Id. at 1175 (emphasis added) (quoting *Daubert*, 509 U.S. at 593).
201. Id. at 1176.
202. See generally id. at 1167–80.
203. FED. R. EVID. 702; *Daubert* v. Merrell Dow Pharm., Inc. 509 U.S. 579, 588 (19993).
204. The Supreme Court’s recent decision in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) (discussed supra, Part IV.A), eliminated many of the potentially hairsplitting decisions that federal courts had been making regarding when the *Daubert* analysis applies. See, e.g., Desrosiers v. Flight Int'l, Inc., 156 F.3d 952, 960–61 (9th Cir. 1998) (stating that the *Daubert* analysis may not apply to testimony of accident reconstruction experts that did not involve scientific knowledge); Talkington v. Atra ReclameLucifers Fabrieken BV (Cricket BV), 152 F.3d 254, 265 (4th Cir. 1998) (holding that *Daubert* does not apply to an electrical engineer's expert testimony based on his experience and training in the absence of a challenge to his methodology or technique); Michigan Millers Mut. Ins. Corp. v. Benfield, 140 F.3d 915, 920 (11th Cir. 1998) (noting that *Daubert* applies to expert testimony based on science, not experience, but holding that expert testimony regarding the origin of a fire was subject to *Daubert* because it relied on scientific method); Carmichael v. Samyang Tire, Inc., 131 F.3d 1433, 1435 (11th Cir. 1997) (holding that *Daubert* applies only to expert witnesses who claim scientific expertise and thus did not apply to the testimony of an expert regarding tire failure); United States v. Call, 129 F.3d 1402, 1404 (10th Cir. 1997) (holding that
doctrine, however, the *Daubert* analysis interacts with state medical certainty standards in potentially three ways, depending on how a particular state uses its standard.

a. Medical Certainty as the Burden of Proof: The Effect on When *Daubert* Determinations Are Made

As discussed above, when state medical certainty standards define the burden of proof, there is no question that they will apply in appropriate diversity actions. The issue regarding *Daubert*, therefore, is when they apply: should the court consider burdens of proof as part of *Daubert*’s fitness prong, or are those burdens more appropriately considered after the *Daubert* rulings are made?

As the Ninth and the D.C. Circuits have demonstrated, the relationship between *Daubert* admissibility and the state-law burdens of proof in diversity medical malpractice and products liability cases is not clear. In *Daubert II*, the Ninth Circuit’s application of a state-law burden of proof in the “fitness” prong of the *Daubert* analysis became critical to the plaintiffs’ Bendectin case, resulting in the exclusion of plaintiffs’ ex-

*Daubert* applies to polygraph evidence because it is scientific); Moore v. Ashland Chem., Inc., 126 F.3d 679, 687 (5th Cir. 1997) (citing Watkins v. Telsmith, Inc., 121 F.3d 984, 989–91 (5th Cir. 1997) for the principle that *Daubert* is not limited to “scientific knowledge” or “novel” scientific evidence and holding that it applied to expert clinical medical testimony); Watkins, 121 F.3d at 989–91 (holding that expert testimony in a products liability case regarding defective design was subject to *Daubert*); McKendall v. Crown Control Corp., 122 F.3d 803, 806 (9th Cir. 1997) (holding that *Daubert* applies only to “scientific knowledge” and thus did not apply to a products liability product design expert’s testimony because that testimony was based on “technical or other specialized knowledge”); Freeman v. Case Corp., 118 F.3d 1011, 1016 (4th Cir. 1997) (holding that *Daubert* does not apply when an expert relies on experience and training rather than a particular methodology); Masayesva v. Hale, 118 F.3d 1371, 1379 (9th Cir. 1997) (holding that *Daubert* does not apply to an expert’s relatively straightforward application of range economics); United States v. Webb, 115 F.3d 711, 716 (9th Cir. 1997) (holding that *Daubert* was not applicable to a police expert’s testimony regarding the reasons people hide guns because the testimony was not based on scientific knowledge); People Who Care v. Rockford Bd. of Educ., Sch. Dist. No. 205, 111 F.3d 528, 534 (7th Cir. 1997) (holding that *Daubert* applies to the testimony of “social scientists as well as to that of natural scientists”); Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1143 (9th Cir. 1997) (holding that *Daubert* applies to all expert testimony but that survey evidence should generally be found admissible); United States v. Cordoba, 104 F.3d 225, 230 (9th Cir. 1997) (holding that *Daubert* applies only to the admission of scientific testimony); Compton v. Subaru of Am., Inc., 82 F.3d 1513, 1518 (10th Cir. 1996) (holding that *Daubert* applies only when an expert relies on a principle or methodology); Iacobelli Constr., Inc. v. County of Monroe, 32 F.3d 19, 25 (2d Cir. 1994) (holding that *Daubert* applies only to scientific testimony).

Even before *Kumho Tire*, however, only two federal courts declined to apply *Daubert* to expert medical testimony. Sementilli v. Trinidad Corp., 155 F.3d 1130, 1134 (9th Cir. 1998) (holding that the *Daubert* analysis does not apply to a doctor’s testimony regarding a seaman’s fitness for duty because it “does not constitute ‘scientific’ testimony but rather testimony based on the doctor’s training and experience”); Waitek v. Dalkon Shield Claimants Trust, 934 F. Supp. 1068, 1087 n.10 (N.D. Iowa 1996) (holding that the *Daubert* factors do not apply to clinical medical testimony based solely on experience or training). It appears that after *Kumho Tire*, *Daubert* should always apply to expert medical testimony.
erts. In contrast, the D.C. Circuit reversed a district court’s decision to exclude causation experts because the district court impermissibly failed “to distinguish between the threshold question of admissibility and the persuasive weight to be assigned the expert evidence.” State-law burdens of proof were simply not relevant.

The Ninth and D.C. Circuits’ differences in approach reflect a philosophical division among the circuits regarding the desirability of early and active judicial management of cases involving complex causation issues, particularly class action products liability suits. As discussed, Daubert sets forth a threshold standard of admissibility, based on methodology and reliability. Given the Federal Rules’ emphases on conferencing and early case management, Daubert screenings often take place before—sometimes long before—trial itself begins. For example, when a patient, on behalf of her minor son, brought a medical malpractice action against her obstetrician alleging that the obstetrician had negligently post-dated her pregnancy and thus caused her son’s brain damage, the First Circuit held that plaintiff’s expert could be held to the Daubert standard of admissibility even at the summary judgment stage.

Moreover, when Daubert rulings either recognize or create—a gap in a plaintiff’s prima facie case, they can, as a practical matter, end the litigation and take a case away from a jury. In fact, since the Supreme Court decided Daubert in 1993, the circuits have demonstrated that its application clearly affects when and how federal cases involving experts are resolved. Affirmation or reversal of summary judgment in Daubert cases now often depends on whether the appellate court agrees or disagrees with the trial court’s screening of a particular expert. Affirmances and reversals of judgment

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205. See supra notes 177-81 and accompanying text.
207. See id. at 135 n.8.
208. See FED. R. EVID. 104(a) (“Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court . . .”); FED. R. CIV. P. 16(a), (c)(4) (authorizing the court to hold pretrial conferences in order, among other things, to discuss “the avoidance of unnecessary proof and of cumulative evidence, and limitations or restrictions on the use of testimony under Rule 702 of the Federal Rules of Evidence”).
211. See, e.g., Raynor v. Merrell Pharm., Inc., 104 F.3d 1371, 1375–77 (D.C. Cir. 1997) (granting defendants’ motion for judgment notwithstanding the verdict because the testimony of the plaintiffs’ experts was inadmissible under Daubert).
212. See Jaurequi v. Carter Mfg. Co., 173 F.3d 1076, 1083–84 (8th Cir. 1999) (affirming summary judgment because the district court properly excluded an expert witness); Mitchell v. Gencorp, Inc., 165 F.3d 778, 780–84 (10th Cir. 1999) (affirming summary judgment because the district court properly excluded as expert witness); Kirstein v. Parks Corp., 159 F.3d 1065, 1067 (7th Cir. 1998) (affirming summary judgment because the district court properly excluded an expert witness); Ancho v. Pentek Corp., 157 F.3d 512, 515–18 (7th Cir. 1998) (affirming summary
as a matter of law/judgment notwithstanding the verdict show a similar pattern. Frye and the "general acceptance" test had nowhere near this effect of non-trial resolution of cases through the exclusion of experts: a Westlaw search revealed only one federal circuit court decision between 1957 and 1993 (the year the Supreme Court decided Daubert) that rested

judgment because the district court properly excluded an expert witness); Target Mkt. Publ'g, Inc. v. ADVO, Inc., 136 F.3d 1139, 1141-45 (7th Cir. 1998) (affirming summary judgment for defendant because the district court properly excluded a business appraiser's report under Daubert); Cabrer v. Cordis Corp., 134 F.3d 1418, 1420-23 (9th Cir. 1998) (affirming summary judgment for defendant when experts were properly excluded under Daubert for unreliability); Binakonsky v. Ford Motor Co., 133 F.3d 281, 291 (4th Cir. 1998) (reversing summary judgment for the defendant in part because, contrary to the district court's decision, Daubert screening was inapplicable to a medical examiner's non-expert testimony); Carmichael v. Samyang Tire, Inc., 131 F.3d 1433 (11th Cir. 1997) (reversing summary judgment for defendant because, contrary to the district court's decision excluding the expert, Daubert screening was inapplicable to the testimony of an expert on tire failure); Dancy v. Hyster Co. 127 F.3d 649 (8th Cir. 1997) (affirming summary judgment for defendant when the district court properly excluded pursuant to Daubert plaintiff's sole expert witness); McKendall v. Crown Control Corp., 122 F.3d 803 (9th Cir. 1997) (reversing summary judgment for defendant because, contrary to the district court's exclusion of the expert, Daubert was not applicable to a product design expert's testimony); Navarro v. Fuji Heavy Indus., Ltd., 117 F.3d 1027 (7th Cir. 1997) (reversing summary judgment because the district court properly excluded an expert's affidavit under Daubert); Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134 (9th Cir. 1997) (reversing summary judgment for defendant in part when, contrary to district court's decision to exclude expert, expert's testimony was admissible under Daubert); Ambrosini v. Labarreque, 101 F.3d 129 (D.C. Cir. 1996) (reversing summary judgment for defendant in part when, contrary to district court's decision to exclude expert, expert's testimony was admissible under Daubert); Peitzmeier v. Hennessy Indus., Inc., 97 F.3d 293 (8th Cir. 1996) (affirming summary judgment because the expert's testimony was not admissible under Daubert); Barrett v. Atlantic Richfield Co., 95 F.3d 375 (5th Cir. 1996) (affirming summary judgment for defendant when expert's testimony was inadmissible under Daubert); Lust v. Merrell Dow Pharm., Inc., 89 F.3d 594 (9th Cir. 1996) (affirming summary judgment because the district court properly excluded a causation expert under Daubert); Rosen v. Ciba-Geigy Corp., 78 F.3d 316 (7th Cir. 1996) (affirming summary judgment for defendant because a physician causation expert's testimony was inadmissible under Daubert); Buckner v. Sam's Club, Inc., 75 F.3d 155 (5th Cir. 1996) (affirming summary judgment when the district court properly excluded an expert pursuant to Daubert).

213. See Blue Dane Simmental Corp. v. American Simmental Ass'n, 178 F.3d 1035, 1039–41 (8th Cir. 1999) (affirming judgment as a matter of law in part because the circuit court agreed with the district court's exclusion of an expert pursuant to Daubert); Curtis v. M&S Petroleum, Inc., 174 F.3d 661, 668–72 (5th Cir. 1999) (partially reversing judgment as a matter of law because the district court had improperly excluded expert testimony under Daubert); Ruiz-Troche v. Pepsi Cola of Puerto Rico Bottling Co., 161 F.3d 77, 88 (1st Cir. 1998) (reversing judgment on a jury verdict on the basis of improper exclusion of evidence under Daubert); Robertson v. Norton Co., 148 F.3d 905, 907–08 (8th Cir. 1998) (reversing judgment on a jury verdict because a ceramic expert's opinion was not sufficiently reliable under Daubert); Watkins v. Telsmith, Inc., 121 F.3d 984 (5th Cir. 1997) (affirming the district court's granting of judgment notwithstanding the verdict because the lower court had properly excluded expert under Daubert); Raynor, 104 F.3d 1371 (affirming the district court's granting of judgment notwithstanding the verdict because it properly held experts' testimony inadmissible under Daubert); Allen v. Pennsylvania Eng'g Corp., 102 F.3d 194 (5th Cir. 1996) (affirming the district court's granting of judgment as a matter of law because it had properly held expert testimony inadmissible under Daubert); Benedi v. McNeil-P.P.C., Inc., 66 F.3d 1378 (4th Cir. 1995) (affirming the district court's denial of judgment as a matter of law because it properly admitted expert testimony under Daubert).

its summary judgment decision on whether the district court had properly excluded an expert under Frye's general acceptance test.215

Considering burdens of proof in the Daubert analysis only increases the likelihood that the Daubert ruling will result in early judgment as a matter of law rather than a jury trial. Unlike decisions regarding competency or admissibility, which lead to particularized rulings affecting one piece of evidence at a time, burdens of proof necessarily raise issues of overall sufficiency. Incorporating burdens of proof into a Daubert screening thus forces the presiding judge to decide, often relatively early in the case, whether a plaintiff has enough evidence to get to a jury—a decision federal judges are generally reluctant to make even during or after trial.216

Nevertheless, in the context of class action products liability cases some judges have embraced Daubert screening as a means of exercising judicial control over speculative science and the “improper” persuasion of lay juries in order to avoid random jury verdicts. For example, in a post-Daubert products liability action against the drug Bendectin’s manufacturer, the Sixth Circuit upheld the district court’s grant of summary judgment in favor of the defendant following a Daubert screening because the opinions of plaintiffs’ experts, based on animal studies and reanalyses of human epidemiological studies, were admissible but “‘simply inadequate . . . [to] permit a jury to conclude that Bendectin more probably than not causes limb defects.’”217

Other judges resist what they see as judicial interference, favoring jury resolution of such cases. The Fourth Circuit, for instance, has emphasized both that “Daubert governs whether evidence is admitted, not how persuasive it must be to the factfinder,”218 and that “the Supreme Court itself viewed Daubert as a liberalization, not a tightening, of the rules controlling admission of expert testimony.”219 As a practical matter,

216. Trial courts can grant motions for judgment as a matter of law during or after trial, for example, only when “there is no legally sufficient evidentiary basis for a reasonable jury to find for that party.” Fed. R. Civ. P. 50(a)(1). The persistence of the “scintilla rule,” which allows jury resolution if the non-moving party produced any evidence at all to support its position, testifies to courts’ reluctance to take decision making authority away from juries. See, e.g., Kentucky State Police Prof’l Ass’n v. Gorman, 870 F. Supp. 166, 168 (E.D. Ky. 1994) (applying the “scintilla rule” in summary judgment decisions); Adcox v. Teledyne, Inc., 810 F. Supp. 909, 913 (N.D. Ohio 1992) (applying the “scintilla rule” to directed verdict decisions).
217. Elkins v. Richardson-Merrell, Inc., 8 F.3d 1068, 1071 (6th Cir. 1993) (quoting Turpin v. Merrell-Dow Inc., 959 F.2d 1349 (6th Cir. 1992), cert. denied, 506 U.S. 826 (1992)). The court declined to address plaintiff’s argument, raised only on appeal, that Tennessee law rather than Daubert applied under the Erie doctrine to determine whether plaintiff’s expert scientific testimony was admissible to create an issue of fact on the issue of whether Bendectin could cause birth defects. Id. at 1072. According to plaintiffs, Tennessee law did not allow courts to take the “hard look” at scientific evidence that Daubert requires federal courts to take. Id.
219. Cavallo, 100 F.3d at 1158.
therefore, more *Daubert* cases get to a jury in the Fourth Circuit than can in the Sixth Circuit.

The conflict between the Ninth Circuit and the D.C. Circuit over the role of state-law burdens of proof in the *Daubert* analysis thus reflects a long-standing debate over judicial activism. While this controversy is important and in need of further clarification from the Supreme Court, it is purely a *Daubert*—not an *Erie*—problem.

b. Medical Certainty and Expert Competency

Timing is far less of an issue when state-law medical certainty standards govern an expert's competency or admissibility. Like *Daubert*, state-law competency and admissibility standards deal with the issue of whether a particular expert's testimony should be allowed into the case at all. If a federal court applies these standards, therefore, it makes perfect sense, from both a logical and a judicial efficiency perspective, for the court to consider competency and state-law admissibility standards at the same time that it undertakes its *Daubert* analysis.

Under Federal Rule of Evidence 601, state-law competency standards do not seem to present a *Daubert/Erie* problem: not only does Federal Rule of Evidence 601 eliminate the need for an *Erie* analysis, it takes the state-law competency issue out of the realm of Federal Rule of Evidence 702 and the *Daubert* inquiry. Nevertheless, at least according to

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221. FED. R. EVID. 601.

Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.

Id.

222. FED. R. EVID. 702.
some parties, Rule 601 potentially conflicts with Rule 702 when the competency of medical experts is at issue. The Sixth Circuit, for instance, faced a situation where the plaintiffs in a medical malpractice action argued that Federal Rule of Evidence 601 governed the admissibility of a defense expert on the standard of care and that Tennessee's locality rule would render that witness incompetent, while "[d]efendant argue[d] that 702 alone governs expert testimony and that state law is inapplicable." However, the court did not decide this question because the plaintiffs failed to demonstrate that the ruling allowing the expert's testimony was anything other than harmless error.

No other circuits have faced this issue. District court discussion of the purported conflict has also been limited, but most of the courts that have addressed the issue have decided that Federal Rule of Evidence 601, not Federal Rule of Evidence 702, controls the issue of medical expert competency when state law supplies the rule of decision.

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.

Id. at 184 (quoting TENN. CODE. ANN. § 29-26-115(b) (1975)).

223. See, e.g., Ward v. United States, 838 F.2d 182, 188 (6th Cir. 1988) (outlining plaintiff's and defendant's conflicting views on whether Federal Rule of Evidence 601 or 702 governed the competency of expert medical witnesses, and declining to decide that issue "because plaintiff's failed to show that this evidentiary ruling affected a substantial right as required by Federal Rule of Evidence 103(a)(1)).

224. Ward, 838 F.2d at 188 (citations omitted). The Tennessee malpractice statute provided that:

No person in a health care profession requiring licensure under the laws of this state shall be competent to testify in any court of law to establish the facts required to be established [in a malpractice action] unless he was licensed to practice in the state or a contiguous bordering state a profession or specialty which would make his expert testimony relevant to the issues in the case and had practiced this profession or specialty in one of these states during the year preceding the date that the alleged injury or wrongful act occurred.

Id. at 184 (quoting TENN. CODE. ANN. § 29-26-115(b) (1975)).

225. Id. at 188. The Sixth Circuit has continued to refuse to decide whether Federal Rule of Evidence 601 or Federal Rule of Evidence 702 controls the competency of a medical expert. See Ralph v. Nagy, 950 F.2d 326, 329 (6th Cir. 1991) ("These issues are moot because the jury expressly found that the defendant did not breach his duty to the plaintiff under the appropriate standard of care."); Hanson v. Parkside Surgery Ctr., 872 F.2d 745, 750 n.5 (6th Cir. 1989) ("Because neither party has raised the issue of Dr. O'Day's competency as an expert, we again decline to consider" the relationship between Federal Rules of Evidence 601 and 702.)

governs an expert’s competency, most federal courts will probably apply that standard pursuant to Federal Rule of Evidence 601. 227

c. Medical Certainty and Admissibility

As noted, most federal circuits have held that Federal Rule of Evidence 702 is the exclusive measure of an expert’s testimony’s admissibility in a diversity case. Moreover, of the two circuits that have held that state medical certainty standards do apply in diversity cases, only one, the Third Circuit, has dealt with those standards in the context of a Daubert analysis. 228 In a products liability action involving plaintiffs’ exposure to polychlorinated biphenyls (PCBs) and their subsequent claims of illnesses and injuries as a result, the Third Circuit first determined that Pennsylvania’s threshold admissibility requirement that experts testify to a reasonable degree of medical certainty “is an element of plaintiff’s burden of proof”—a substantive requirement—and hence applied in the diversity products liability case before it. 229 However, it resisted the temptation to see the Daubert analysis and the state medical certainty standard as mutually exclusive. Instead, the court applied Federal Rule of Evidence 702 and Daubert, Federal Rule of Evidence 703, and the state medical certainty requirements sequentially to the expert testimony in controversy in reviewing the district court’s grant of summary judgment in favor of the defendants. 230

One of the experts, Dr. Sherman, whose testimony defendants challenged both generally and with regard to particular plaintiffs, can serve as an example of how the Third Circuit combined the Daubert and medical certainty analyses. First, the court determined that Dr. Sherman was generally qualified by training and experience to testify as an expert under Federal Rule of Evidence 702. 231 Second, the court looked at whether some of the tests that Dr. Sherman relied on were “the type of data reasonably relied upon by experts in the field under Rule 703,” 232 determin-


228. See In re Paoli R.R. Yard PCB Litig., 35 F.3d 717 (3rd Cir. 1994). In an unpublished opinion, the Ninth Circuit refused to decide whether Arizona’s standard for admitting expert testimony, rather than Daubert, should apply in a diversity case on the ground that a Daubert analysis was unnecessary. See Arrendondo v. Uniroyal Goodrich Tire Co., 114 F.3d 1193, *1 (9th Cir. 1997). However, the court upheld the district judge in excluding the expert’s testimony on the basis that it was unreliable—a criterion that enters Rule 702 only by way of Daubert. See id. Ironically, the Ninth Circuit itself cited Daubert for the proposition that Rule 702 “demands that the evidence be reliable.” Id. (citing Daubert, 509 U.S. at 591).


230. See id. at 751.

231. See id. at 753. Although the court recognized that several factors undermined Dr. Sherman’s testimony, including mistakes while testifying and substantial employment as a plaintiff’s witness, it concluded that “a trained internist who has spent significant time reviewing the literature on PCBs [can] testify as to whether PCBs caused illness in plaintiffs.” Id. at 753–54.

232. Id. at 754. Rule 703 states that:
ing that those tests did not satisfy that level of reliability and thus could not be the basis of any of Dr. Sherman’s medical conclusions as to causation if she were allowed to testify. 233

The Third Circuit next addressed whether Dr. Sherman’s reliance on differential diagnosis was methodologically sound under Federal Rule of Evidence 702 and Daubert, concluding “that sometimes differential diagnosis can be reliable with less than full information” so long as the doctor engages in standard diagnostic techniques and can explain why other causes do not explain the illness or injury. 234 The court finished its analysis by evaluating Dr. Sherman’s testimony with regard to each of the relevant plaintiffs, excluding testimony when it was methodologically unsound under Daubert or insufficiently certain under Pennsylvania’s reasonable medical certainty requirement, or both. 235

The Third Circuit thus incorporated both Daubert and the state reasonable medical certainty standard into a summary judgment screening without making the state standard part of the Daubert analysis. The federal and state standards, in its view, were neither redundant nor mutually exclusive; instead, the state-law standard was an alternative means of screening expert testimony, requiring the court to evaluate certainty or sufficiency in addition to Daubert’s methodological reliability. 236 The Third Circuit’s analysis thus demonstrates that federal courts can apply both Daubert and state-law standards without doing violence to either.

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The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

FED. R. EVID. 703.

233. See In re Paoli, 35 F.3d at 754.
234. Id. at 759.
235. See id. at 760.
236. See id. at 766 (excluding testimony that PCBs caused sinusitis because it relied heavily on unreliable immunological data and was thus unreliable itself).
237. See id. at 767 (excluding testimony that PCBs were a significant factor in causing reduced ankle reflexes because Dr. Sherman would not testify to causation to a reasonable degree of medical certainty).
238. See id. at 766 (excluding testimony that PCBs caused pregnancy losses because Dr. Sherman had not explained away alternative causes and because “Dr. Sherman’s statement that PCB’s were a possible cause did not have sufficient scientific certainty to survive summary judgment.”).
239. See id. at 749 n.19.
2. So, Back to *Erie* Step One: Is There An Absolute Conflict Regarding Admission of Expert Medical Testimony?

   a. Recent Supreme Court *Erie* Decisions Emphasize that State Law Should Apply in Diversity Cases Unless There Is an Absolute Conflict with Federal Procedural Rules

Until now, this article, like most federal courts, has skipped the initial question in any *Erie* analysis: Is there a conflict between state and federal law that requires the federal court sitting in diversity to choose between the two? As the Supreme Court has repeatedly and recently emphasized, this is a critical threshold question for federal courts to ask when faced with a decision of whether to apply state law in a diversity action, particularly when Federal Rules are involved.\(^\text{240}\)

Since 1980, the Supreme Court has emphasized that the Federal Rules of Civil Procedure do not displace state law, as *Hanna v. Plumer* required, unless there is a direct and absolute conflict between the two.\(^\text{241}\) In *Walker v. Armco Steel Corp.*,\(^\text{242}\) for example, the Court held that both an Oklahoma statute and Federal Rule of Civil Procedure 3 could co-govern despite their apparent mutual exclusivity:\(^\text{243}\) the state statute did not deem an action "commenced" for statute of limitations purposes until service of the summons was made upon the defendant,\(^\text{244}\) while under Federal Rule of Civil Procedure 3, "[a] civil action is commenced by filing a complaint with the court."\(^\text{245}\)

The Supreme Court nevertheless found no absolute conflict. Noting that "[t]he first question must . . . be whether the scope of the Federal Rule in fact is sufficiently broad to control the issue before the Court,"\(^\text{246}\) it quoted as a general rule that "where 'the scope of the Federal Rule [is] not as broad as the losing party urge[s], and therefore, there being no Federal Rule which cover[s] the point in dispute, *Erie* command[s] the

\(^{240}\) See, e.g., Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 426 (1996) ("The dispositive question, therefore, is whether federal courts can give effect to the substantive thrust of [New York Civil Practic Law and Rules] § 5501(c) without untoward alteration of the federal scheme for the trial and decision of civil cases."); Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 4-5 (1987) ("The initial step is to determine whether, when fairly construed, the scope of Federal Rule [of Appellate Procedure] 38 is 'sufficiently broad' to cause a 'direct collision' with state law, or, implicitly, to 'control the issue' between the court, thereby leaving no room for the operation of that law."); Walker v. Armco Steel Corp., 446 U.S. 740, 749–50 (1980) ("Application of the *Hanna* analysis is premised on a 'direct collision' between the Federal Rule and the state law.").

\(^{241}\) See *Walker*, 446 U.S. at 749–50.

\(^{242}\) *Id.* at 752–53.

\(^{243}\) See *id.* at 740.

\(^{244}\) *Id.* at 742–43 (citing *Okla. Stat.* tit. 12, § 97 (1971)).


\(^{246}\) *Walker*, 446 U.S. at 749–50. See also Burlington N. R.R. Co., 480 U.S. at 4–5 (citing *Walker* for the same rule).
enforcement of state law.'"247 The Court concluded that Federal Rule of Civil Procedure 3 was not sufficiently broad to exclude the state law:

There is no indication that the Rule was intended to toll a state statute of limitations, much less that it purported to displace state tolling rules for purposes of state statutes of limitations. In our view, in diversity actions [Federal Rule of Civil Procedure] 3 governs the date from which various timing requirements of the Federal Rules begin to run, but does not affect state statutes of limitations.248

It supported this conclusion by emphasizing the substantive component of the Oklahoma statute:

In contrast to [Federal Rule of Civil Procedure] 3, the Oklahoma statute is a statement of a substantive decision by that State that actual service on, and accordingly actual notice by, the defendant is an integral part of the several policies served by the statute of limitations... It is these policy aspects which make the service requirement an 'integral' part of the statute of limitations... As such, the service rule must be considered part and parcel of the statute of limitations. [Federal Rule of Civil Procedure] 3 does not replace such policy determinations found in state law. [Federal Rule of Civil Procedure] 3 and Okla. Stat., Tit. 12, § 97 (1971), can exist side by side, therefore, each controlling its own intended sphere of coverage without conflict.249

In contrast, seven years after Walker, the Supreme Court in Burlington Northern Railroad Company v. Woods250 found an absolute and irreconcilable conflict between an Alabama statute and Federal Rule of Appellate Procedure 38.251 The Alabama statute imposed a mandatory ten percent penalty when state appellate courts left money judgments substantially unmodified after enforcement of those judgments had been stayed pending appeal.252 In contrast, Federal Rule of Appellate Procedure 38 allowed, but did not require, federal appellate courts to award damages and costs if an appeal is frivolous.253 According to the Court:

the Rule's discretionary mode of operation unmistakably conflicts with the mandatory provision of Alabama's affirmance penalty statute. Moreover, the purposes underlying the Rule are sufficiently coextensive with the asserted purposes of the Alabama statute to indi-

247. Walker, 446 U.S. at 750 (quoting Hanna v. Plumer, 380 U.S. 460, 470 (1965)).
248. Id. at 750–51 (citations omitted).
249. Id. at 751–52 (citations omitted).
251. See id. at 7–8 ("Federal Rule 38 adopts a case-by-case approach to identifying and deterring frivolous appeals, the Alabama statute precludes any exercise of discretion within its scope of operation.").
252. See id. at 4.
cate that the Rule occupies the statute's field of operation so as to preclude its application in federal diversity actions.\(^\text{254}\)

Nevertheless, in 1996, in *Gasperini v. Center for Humanities, Inc.*,\(^\text{255}\) the Supreme Court again demonstrated the extent to which it was willing to go to avoid finding an absolute conflict between state and federal law in a diversity case and to apply both state and federal law if the state rule at issue has a substantive character. *Gasperini* involved a New York law that empowered appellate courts "to review the size of jury verdicts and to order new trials when the jury's award 'deviates materially from what would be reasonable compensation,'"\(^\text{256}\) a provision that conflicted both with the Seventh Amendment and with the federal standard for reviewing jury awards.\(^\text{256}\) First, under the Seventh Amendment, "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."\(^\text{257}\) At common law, trial judges—not appellate courts—make the initial determination of whether a verdict is excessive.\(^\text{258}\) Second, federal courts will not disturb jury awards claimed to be excessive "unless the amount was so exorbitant that it 'shock[s] the conscience of the court.'"\(^\text{259}\)

Under *Erie*, the Court decided, the New York standard was both substantive and procedural: "'substantive' in that § 5501(c)'s 'deviates materially' standard controls how much a plaintiff can be awarded; 'procedural' in that § 5501(c) assigns decisionmaking authority to New York's Appellate Division."\(^\text{260}\) "The dispositive question, therefore, is whether federal courts can give effect to the substantive thrust of § 5501(c) without untoward alteration of the federal scheme for the trial and decision of civil cases."\(^\text{261}\)

The Court first addressed the conflict between New York's "materially deviates" standard and the federal "shock the conscience" standard, observing that "New York state-court opinions confirm that § 5501(c)'s 'deviates materially' standard calls for closer surveillance than 'shock the conscience' oversight."\(^\text{262}\) Noting that a state rule's substantive character is judged by the "outcome determinative" test, "guided by 'the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws,'"\(^\text{263}\) the Court determined that

\(^{254}\) *Id.* at 7.

\(^{255}\) *Id.* at 415 (1996).

\(^{256}\) *Id.* at 418 (quoting N.Y. CIV. PRAC. LAW & RULES § 5501(c) (McKinney 1995)).

\(^{257}\) U.S. CONST., amend. VII.

\(^{258}\) See *Gasperini*, 518 U.S. at 422 (citations omitted).

\(^{259}\) *Id.* (citing Consorti v. Armstrong World Indus., Inc., 72 F.3d 1003, 1012–13 (2d Cir. 1995)).

\(^{260}\) *Id.* at 426.

\(^{261}\) *Id.*


\(^{263}\) *Gasperini*, 518 U.S. at 427–28 (quoting Hanna v. Plumer, 380 U.S. 460, 468 (1965)).
the New York standard was substantive because non-application of the state statute could result in "substantial" variations between state and federal money judgments. As a result, "New York's check on excessive damages implicates" Erie's twin aims, and suggesting that federal courts sitting in diversity should apply the New York law.

The Court then analyzed whether the Seventh Amendment's re-examination clause and the division of labor between trial and appellate courts were "an essential characteristic of the federal-court system" that would prevent application of the New York statute. Noting that under the Seventh Amendment federal district courts could clearly overturn verdicts for excessiveness while the ability of federal appellate courts to do so was a "relatively late, and less secure, development," the court concluded that both New York's interest in the "materially deviates" standard and the federal court's interest in preserving its normal division of labor could be satisfied by having the federal district court apply the state standard. District court decisions using New York's rule would then be reviewable under an abuse of discretion standard at the court of appeals.

The Gasperini Court thus avoided the "easy out" under Erie and refused to hold that because federal procedure and the Seventh Amendment required a different division of labor than the New York statute, that statute could not apply in federal diversity cases. Instead, it retained as much of the state statute as it could, allowing the "materially deviates" standard to govern in federal district court. Resolution of the procedural end of the conflict in favor of the federal system, in other words, did not have to entirely eliminate state substantive law from the analysis.

Consideration of Walker, Burlington Northern, and Gasperini provides federal courts with a powerful but under-utilized framework for analyzing evidentiary Erie problems. Walker and Burlington Northern instruct federal courts to look for but avoid finding absolute conflicts between state law and the Federal Rules. This requires, at minimum, that the federal court know what both the state and the federal rules require in order to identify a conflict: if the state and federal rules agree that evidence is or is not admissible, the Erie "problem" disappears. If the two rules disagree, the temptation for many courts would be to claim a Burlington Northern-type absolute conflict and to revert to the Hanna rule that the Federal Rules govern if rationally capable of classification as procedural. Two salient factors should be considered before such a determination is made, however. First, under Walker, a court must deter-

264. Id. at 430 (paraphrasing Hanna, 380 U.S. at 467–68).
265. See id. at 430–31.
266. Id. at 431 (quoting Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 537 (1958)).
267. Id. at 434.
268. Id. at 437–38.
269. Id. at 438.
mine whether the federal rule at issue is broad enough to control the issue of whether evidence is admissible in a particular case. Second, the court must determine whether the rule relates to the state's substantive policy. The answers to these analyses will provide courts guidance in whether to apply the federal rule, the state standard, or both.

b. There Is No Absolute Conflict Between Federal Rule of Evidence 702, as Interpreted by Daubert, and State-Law Medical Certainty Standards Governing Admissibility of Medical Experts

At least three federal courts have recognized that the Daubert screening standard could conflict with certain state-law standards for expert medical testimony. Nevertheless, Walker and Gasperini indicate that state medical certainty standards often should apply in federal diversity cases, even when those standards govern the admissibility of an expert's testimony.

First, as has already been discussed, state law standards have a substantive character. Thus, as in Gasperini, they are both substantive and procedural: substantive, because most states require a plaintiff to prove its case with expert testimony that must meet this standard, making the standard part of the burden of proof; and procedural, because the standards also define whether evidence is admissible. Under the Court's reasoning in Gasperini, therefore, federal courts sitting in diversity should work hard to apply these state standards even when important federal interests—such as the Federal Rules of Evidence—require accommodation.

Second, the Third Circuit's conclusion in In re Paoli that a conflict exists between medical certainty standards and the Federal Rules was overly hasty. Traditionally, federal courts have required medical experts to testify to a reasonable degree of medical certainty, just as states


If a federal evidentiary rule results in dismissal where the state evidentiary rule would not, then, under Erie, the evidentiary ruling might be considered substantive rather than procedural. If so considered, then the federal court would have to apply the state evidentiary rule in a diversity case such as this. But Arkansas cases follow Daubert's reliability inquiry. See Moore v. State, 323 Ark. 529, 544-47, 915 S.W.2d 284, 292-94 (1996); Prater v. State, 307 Ark. 180, 820 S.W.2d 429 (1991). Therefore, we are not required to face that problem here.);

Hall v. Baxter Healthcare, Corp., 947 F. Supp. 1387, 1395 n.21 (D. Or. 1996) (noting the potential Erie problem but deciding that the Oregon state analysis was the same as the federal Daubert analysis).

271. See In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 750 (3d Cir. 1994). See also supra notes 127-131 & accompanying text. See generally Gottesman, supra note 85, at 1859-63 (arguing that based on legislative history Congress did not intend Federal Rule of Evidence 702 to supersede state substantive law).
have.\footnote{272} Prior to the \textit{Daubert} decision, federal courts included medical certainty as part of Federal Rule of Evidence 702's "assist the trier of fact" requirement. For example, when a chiropractor testified "that he could not state with a reasonable degree of certainty the extent and the causes of [the plaintiff's] disability" and "could only guess as to the effects" of the purported cause, the Eighth Circuit upheld the district court in excluding the testimony under Federal Rule of Evidence 702 because "the expert's testimony would not have assisted the jury in determining the extent of injury attributable to" the alleged cause.\footnote{273}

Similarly, in several states that have adopted Federal Rule of Evidence 702 as part of their state evidence code, courts analyze admissibility under that rule by applying the relevant medical certainty standard.\footnote{274} Indeed, the Illinois Court of Appeals has expressly held that Illinois's adoption of Federal Rules of Evidence 702, 703, and 705 does not change the requirement that a medical expert testify to a reasonable degree of medical certainty.\footnote{275} Accordingly, nothing in Federal Rule of Evi-

\footnote{272. See \textit{Schulz} v. Celotex Corp., 942 F.2d 204, 207-08 (3d Cir. 1991). \textit{See also} \textit{Mayhew} v. Bell S.S. Co., 917 F.2d 961, 963-64 (6th Cir. 1990) (excluding expert testimony because the doctor would not testify with certainty); \textit{Grant} v. Farnsworth, 869 F.2d 1149, 1152 (8th Cir. 1989) (excluding a chiropractor's testimony as not assisting the jury because he could not state an opinion with a reasonable degree of medical certainty); \textit{DaSilva} v. American Brands, Inc., 845 F.2d 356, 361 (1st Cir. 1988) (admitting expert medical testimony because it "generally reflected a conclusion based on a reasonable degree of medical certainty"). \textit{But see} United States v. Cypthers, 553 F.2d 1064, 1072-73 (7th Cir. 1977) (holding that there is no requirement of reasonable scientific certainty in opinions).

\footnote{273. \textit{Grant}, 869 F.2d at 1152.

\footnote{274. \textit{See, e.g., Thirsk} v. Ethicon, Inc., 687 P.2d 1315, 1318 (Colo. Ct. App. 1983) (holding that under Colorado Rule of Evidence 702, "[a] medical opinion is admissible if founded on reasonable medical probability" (citing \textit{Houser} v. \textit{Eckhardt}, 450 P.2d 664 (Colo. 1969))); \textit{Blockling} v. Albertsson's, Inc., 934 P.2d 17, 19-20 (Idaho 1997) (holding that under Idaho Rules of Evidence 701 and 702, the testimony of a physician expert "that it was 'possible' that the insulin blend could have caused a reaction" was inadmissible because "expert medical opinion testimony must be based upon a 'reasonable degree of medical probability' in order to be admissible."); \textit{Fugett} v. \textit{Harris}, 669 N.E.2d 6, 7-8 (Ohio Ct. App. 1995) (in order to satisfy the purposes of Ohio Evidence Rule 702(A), expert opinions on causation must be stated in terms of probabilities (citations omitted)); \textit{Trapnell} v. \textit{John Hogan Interests, Inc.}, 809 S.W.2d 606, 610 (Tex. App. 1991) (reasoning that, under Texas Rule of Civil Evidence 702, expert medical testimony is admissible when it is clear that the doctor's opinion is based on a reasonable medical probability); \textit{Everett} v. \textit{Town of Bristol}, 674 A.2d 1275, 1277 (Vt. 1996) (holding that under Vermont Rule of Evidence 702, expert testimony that does not meet a standard of reasonable probability or reasonable certainty is speculative, irrelevant, and inadmissible and citing \textit{Jackson} v. \textit{True Temper Corp.}, 563 A.2d 621, 623 (Vt. 1989)); \textit{Reese} v. \textit{Stroh}, 907 P.2d 282, 286 (Wash. 1995) \textit{(en banc)} (holding that, under Washington Evidence Rules 702 and 703, expert medical testimony is admissible if it is based upon a reasonable degree of medical certainty, because such testimony must "rise above speculation, conjecture, or mere possibility.").

Evidence 702 per se creates an absolute conflict with state-law medical certainty standards.\(^{276}\)

Nor does the Supreme Court's decision in \textit{Daubert} create such a conflict, although federal circuits have, since \textit{Daubert}, largely dropped the federal medical certainty requirement for expert testimony.\(^{277}\) Despite some courts' assumption to the contrary,\(^{278}\) \textit{Daubert} did not resolve potential \textit{Erie} issues for Federal Rule of Evidence 702. While \textit{Daubert} was a diversity case, that fact played no part whatsoever in the Supreme Court's opinion.\(^{279}\) Indeed, the Court deemed the only \textit{Erie} argument that it addressed irrelevant: petitioners argued that application of the \textit{Frye} rule would affect their substantive rights in violation of the \textit{Erie} doctrine, but the Court declined to apply \textit{Frye} at all.\(^{280}\) \textit{Daubert} thus provides no direct guidance as to the interaction of Federal Rule of Evidence 702 and the \textit{Erie} doctrine. However, the \textit{Daubert} Court did expressly note that other evidentiary rules might affect a federal court's final decision regarding the admissibility of an expert's testimony,\(^{281}\) indicating that \textit{Daubert}'s interpretation of Federal Rule of Evidence 702 is not the exclusive filter for determining whether such testimony is admissible.

In some states, the medical certainty standard has become the substantive equivalent to the \textit{Daubert} inquiry, eliminating any \textit{Erie} conflict. For example, the Texas Court of Appeals has held, pursuant to Texas Rules of Civil Evidence 702, 703, and 705, that "[w]hen the phrase 'reasonable medical probability' is used, it will amount to some evidence only when it represents the overall substance of the expert's opinion and is based on more than purely speculative conclusions or personal opinion ungrounded in scientific reality";\(^{282}\) "[R]easonable probability cannot be created by the mere utterance of magic words by someone designated an expert."\(^{283}\) In Texas, therefore, the acceptance of an expert's reasonable medical probability testimony effectively describes a \textit{Daubert}-like con-

\(^{276}\) See, e.g., Schulz, 942 F.2d at 207 (holding that the district court should have admitted a doctor's expert testimony regardless of whether New Jersey or federal evidence rules applied because no conflict existed between those rules).

\(^{277}\) See, e.g., Benedi v. McNeil-P.P.C., Inc., 66 F.3d 1378, 1383 (4th Cir. 1995) (addressing the admissibility and sufficiency of expert medical testimony on causation purely in terms of \textit{Daubert}); Stutzman v. CRST, Inc., 997 F.2d 291, 296 (7th Cir. 1993) (quoting United States v. Cyphers, 553 F.2d 1064, 1072-73 (7th Cir. 1977), for the principle that under Rule 702, "an expert's lack of absolute certainty goes to the weight of his testimony, not to its admissibility").

\(^{278}\) See, e.g., Cavallo v. Star Enter., 100 F.3d 1150, 1158 (4th Cir. 1996) (holding that \textit{Daubert} sets the standard for the admissibility of expert medical testimony in diversity cases, not state law).


\(^{280}\) See id. at 589 n.6. For a more expansive discussion of the \textit{Erie} arguments in the \textit{Daubert} litigation, see Gottesman, \textit{supra} note 85, at 1846-48.

\(^{281}\) See \textit{Daubert}, 509 U.S. at 595. In addition, the Court stated that "[t]he inquiry envisioned by Rule 702 is, we emphasize, a flexible one." \textit{Id.} at 594.


\(^{283}\) \textit{Id.} at 542 (citation omitted).
clusion that the expert’s opinion is grounded in valid scientific knowledge. As a result, medical testimony in a federal case where Texas substantive law applies is likely to be admissible or inadmissible regardless of whether the federal court applies Texas law or the Daubert analysis. Similarly, the Eastern District of Arkansas has decided that Daubert presented no conflict with Arkansas law because “Arkansas cases follow Daubert’s reliability inquiry.”

Even in states where the state medical certainty standard and Daubert present different rules for expert testimony’s admissibility, they rarely require the court to choose between them. For most states, the state medical certainty requirement does not address the same concerns as the Daubert analysis. Federal Rule of Evidence 702, as interpreted by Daubert, seeks to ensure that expert testimony is based on credible and reliable science—that the expert can reach the conclusion stated through proper scientific methodology—and that the opinion “fits” the case at hand, a measure of relevance. In contrast, as has been discussed, states generally impose certainty standards to ensure that the conclusion actually meets a required confidence threshold. In particular, regarding the issue of causation, the standard often ensures that the expert identifies the most probable cause of the plaintiff’s illness or injury given the facts at hand or that the expert testifies that the purported cause is more probably than not the actual cause.

The difference is most obvious when the distinction between general and specific causation comes into play. For example, an expert could testify to a reasonable degree of medical certainty on the basis of differential diagnosis that a particular drug caused a particular plaintiff’s condition, only to have the federal court exclude the testimony under Daubert because the relevant epidemiology did not demonstrate that the drug

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285. See, e.g., Anthony v. Chambless, 500 S.E.2d 402, 404–05 (Ga. Ct. App. 1998) (noting that, in a loss of chance medical malpractice action, testimony to a reasonable degree of medical certainty serves to ensure that the decedent’s prospects for survival were “more than a mere chance or speculation”); Cherry v. Harrell, 353 S.E.2d 433, 437 (N.C. Ct. App. 1987) (noting that “[r]easonable probability” was employed to increase the degree of certainty allowed when experts could not testify as to ultimate issues).
286. See, e.g., Hernandez v. Altenberg, 904 S.W.2d 734, 738–39 (Tex. App. 1995) (noting that reasonable medical probability standard is met and testimony is admissible when an expert identifies a “probable” cause in contrast to other “possible” causes); Weber v. McCoy, 950 P.2d 548, 551 (Wyo. 1997) (quoting Vassos v. Roussalis, 658 P.2d 1284, 1290–91 (Wyo. 1993), for the principle that the requirement of reasonable medical probability ensures that the expert opinion represents that expert’s “professional judgment as to the most likely one among the possible causes of the physical condition involved”).
287. See, e.g., Steinke v. Share Health Plan, Inc., 518 N.W.2d 904, 907–08 (Neb. 1994) (noting that “[m]edical testimony couched in terms of ‘possibility’ is insufficient to support a causal relationship” and citing Fuglsang v. Blue Cross, 456 N.W.2d 281 (Neb. 1990), for the rule that expert medical testimony is still inadmissible speculation when “rendered on a 50-50 basis”).
increased the relative risk of acquiring that condition. Conversely, medical literature might clearly establish a drug's ability to cause a particular condition, but the expert might be unwilling to testify to a reasonable degree of medical certainty that the drug caused the condition in a particular plaintiff because associated risk factors were absent or another cause seemed more medically probable.

*Daubert* and the state-law standards thus often address different issues regarding expert medical testimony and provide two rationales for excluding such testimony in federal diversity cases. Although the issues of certainty and reliability are obviously related—an expert may be unwilling to testify to a reasonable degree of medical certainty because he or she believes that the available medical evidence cannot support the conclusion sought—the two standards nevertheless focus on different aspects of the testimony: *Daubert* and Federal Rule of Evidence 702 are directed to the science and methodology behind the testimony, while the state standards focus on the expert's actual conclusion. As in *Walker*, therefore, the state and federal rules can function together: courts can engage in a *Daubert* analysis under Federal Rule of Evidence 702 and apply the state-law medical certainty standard, just as Federal Rule of Civil Procedure 3 and service requirements for state statutes of limitations can function side-by-side.

**V. CONCLUSION**

Under the *Erie* doctrine as interpreted by the Supreme Court through 1996, state medical certainty standards should generally apply in federal diversity medical malpractice and medical products liability cases, regardless of whether those standards define an overall burden of proof, impose a competency requirement for medical experts, or establish an admissibility threshold for expert medical testimony. However, these standards' relationship to a *Daubert* analysis depends upon the applicable state's view of the standard. If the standard defines the overall burden of proof, a *Daubert* screening will often occur at an inappropriate time to consider that standard. However, if exclusions under *Daubert* have the result of clearly indicating that the plaintiff cannot meet the state-law burden of proof, consideration of that standard may be immediately warranted, particularly in jurisdictions, such as the Ninth Circuit, that willingly consider sufficiency in the *Daubert* analysis.

Competency and admissibility, in contrast, are issues that federal courts should address in conjunction with, although not necessarily as part of, the *Daubert* analysis, because they, like Federal Rule of Evidence 702, determine whether particular expert testimony will be allowed into evidence. When state-law medical certainty standards govern an expert's competency to testify, Federal Rule of Evidence 601 provides that those standards should govern in diversity cases. Moreover, state-law admissibility standards that have a substantive character generally
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will not absolutely conflict with Federal Rule of Evidence 702, and so, under the *Erie* doctrine, they also should apply.

To date, however, federal courts have been largely unwilling to wrestle with the conjunction of *Daubert* and *Erie* regarding the admissibility of expert medical testimony. The courts have announced general rules based on federal law and *Hanna v. Plumer* rather than performing an *Erie* analysis that considers *Walker, Gasperini*, and the individual peculiarities of state evidence jurisprudence regarding expert medical witnesses. At the very least, these poorly supported general rules fail to recognize, contrary to the dictates of the *Erie* doctrine, that states vary—sometimes drastically—from each other, and from the federal courts, in their standards for admitting expert medical testimony. The general rules are also intellectually dishonest, given the federal circuits' willingness in other contexts to allow state evidentiary rules to apply in diversity cases when the state rules are substantive or bound up in substantive policies.

The Third Circuit has provided one model of how to combine the *Daubert* analysis with consideration of the state medical certainty admissibility standard that preserves both state and federal interests without overly complicating the overall admissibility question. Other approaches certainly exist; indeed, once the *Erie* issue has been settled for a state, it may be more efficient for a federal court sitting in diversity to perform the state-law admissibility analysis before performing the *Daubert* analysis.

The consideration of *Erie*'s effect on the admissibility of expert medical testimony regarding causation could (although almost certainly will not) result in fifty different admissibility analyses for federal courts hearing diversity medical tort cases. But that was the point of the *Erie* doctrine: a state-law case in federal court should look as much like the equivalent case in state court as possible to avoid forum shopping, discrimination, and unequal application of the state laws. Neither Federal Rule of Evidence 702 nor the *Daubert* decision alter a federal court's *Erie* responsibilities, a fact more federal courts may be forced to recognize if parties continue to be willing to argue that *Erie* has something to say about the role of medical certainty standards in diversity medical tort cases.