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## **Missouri's New Expert Witness Statute**

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## Missouri's New Expert Witness Statute

By Maggie Hummel\*

Governor Eric Greitens vows that Missouri's new expert witness statute<sup>1</sup> sends the message that Missouri is "open for business."<sup>2</sup> By revising Missouri's expert testimony rules, Greitens and his fellow Republican legislators have taken aim at Missouri's—and particularly St. Louis'—reputation for being a plaintiff-friendly court system.<sup>3</sup> Indeed, the American Tort Reform Foundation ranked St. Louis City as the "#1 Judicial Hellhole" of 2016.<sup>4</sup>

Opponents, however, caution that the new § 490.065 requires judges to become experts in complex scientific subjects.<sup>5</sup> Additionally, critics warn that the new requirements will place a financial burden on Missouri courts, and poorer plaintiffs.<sup>6</sup>

Despite the heated rhetoric surrounding the new § 490.065, it remains to be seen how much influence the new legislation will have on the way Missouri judges treat expert testimony.

### I. Missouri's Former Standards: Frye and the old § 490.065

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<sup>1</sup> MO. REV. STAT. § 490.065 (2017). Missouri's new expert witness statute became law on August 28, 2017. *Id.*

<sup>2</sup> Kurt Erickson, *Greitens set to sign expert witness law*, ST. LOUIS POST-DISPATCH (Mar. 27, 2017), [http://www.stltoday.com/news/local/govt-and-politics/greitens-set-to-sign-expert-witness-law/article\\_d6b957a8-a010-5b8a-9c65-dff4809caebb.html](http://www.stltoday.com/news/local/govt-and-politics/greitens-set-to-sign-expert-witness-law/article_d6b957a8-a010-5b8a-9c65-dff4809caebb.html).

<sup>3</sup> Margaret Fisk, *Welcome to St. Louis, the New Hot Spot for Litigation Tourists*, BLOOMBERG BUSINESSWEEK (Sept. 29, 2016), <https://www.bloomberg.com/news/articles/2016-09-29/plaintiffs-lawyers-st-louis>.

<sup>4</sup> American Tort Reform Foundation, *Judicial Hellholes 2016-2017*, <http://www.judicialhellholes.org/wp-content/uploads/2016/12/JudicialHellholes-2016.pdf>.

<sup>5</sup> Michael Carroll, *Missouri legislature advances tort reform measures*, ST. LOUIS REC. (Mar. 9, 2017, 2:18pm), <http://stlrecord.com/stories/511084792-missouri-legislature-advances-tort-reform-measures>.

<sup>6</sup> *Id.*

Prior to adopting the new § 490.065, Missouri courts applied the Frye standard in criminal cases, and the former § 490.065 in civil cases. In criminal actions under Frye, experts could only rely on a scientific test or process that had gained “general acceptance” in the particular field in which it belonged.<sup>7</sup> In civil actions under the former § 490.065, an expert could only use facts and data of “a type reasonably relied on by experts in the field.”<sup>8</sup> Additionally, the court was required to independently assess the reliability of such facts and data.<sup>9</sup>

## II. What Changed?

With a few exceptions, the new § 490.065 now mirrors the Federal Rules of Evidence.<sup>10</sup> The new statute also casts a wider net than its predecessor, as it applies to both civil and criminal actions.<sup>11</sup>

The most heralded change, however, is in § 490.065.2, which mirrors Rule 702. Under the new language, an expert’s testimony must now be both “a product of reliable principles and methods,” and “based on sufficient facts or data.”<sup>12</sup>

Although Missouri legislators have hailed the requirement of “sufficient facts and data,”<sup>13</sup> this new language is not dramatically different from what was already required. As noted above, the former § 490.065.3 required experts to rely on facts and data that were both (1) reasonably relied upon by experts in the field, and (2) otherwise reasonably reliable.<sup>14</sup> Is a requirement of “sufficient” facts and data a markedly higher standard?

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<sup>7</sup> *State v. Hoy*, 219 S.W.3d 796, 808–09 (Mo. Ct. App. S.D. 2007).

<sup>8</sup> *State Bd. of Registration for Healing Arts v. McDonagh*, 123 S.W.3d 146, 156 (Mo. banc 2003).

<sup>9</sup> *Id.*

<sup>10</sup> § 490.065.1 (One notable exception is that the language of the former § 490.065 still applies to a list of exempt proceedings, including marriage and probate cases.).

<sup>11</sup> § 490.065.2.

<sup>12</sup> § 490.065.2(b)-(d) (emphasis added); FED. R. EVID. 702.

<sup>13</sup> John Breslin, *Tort reform legislation filed in Missouri following massive talc verdicts*, ST. LOUIS REC. (Dec. 19, 2016, 12:00pm), <http://stlrecord.com/stories/511078117-tort-reform-legislation-filed-in-missouri-following-massive-talc-verdicts>.

<sup>14</sup> *McDonagh*, 123 S.W.3d at 156.

### III. The Impact of the New § 490.065

While the textual changes in the new § 490.065 are unremarkable, Missouri legislators have indicated that they not only intended to adopt the text of the Federal Rules of Evidence, but also the body of federal case law interpreting the federal rules.<sup>15</sup> Most notably, Missouri lawmakers have quoted Daubert, where the Supreme Court dubbed federal judges as “gatekeepers” against unreliable expert testimony.<sup>16</sup>

Daubert is not binding on Missouri state court judges, but Missouri judges likely will adhere to Daubert’s “gatekeeper” mandate for two reasons. First, the legislature clearly intends for judges to follow Daubert, and courts tend to honor legislative intent.<sup>17</sup> Second, the Missouri Supreme Court already held in McDonagh that, to the extent that § 490.065 mirrors the Federal Rules of Evidence, “Daubert and other cases interpreting those federal rules provide relevant and useful guidance.”<sup>18</sup>

Based on the legislature’s intentions, and the Missouri Supreme Court’s language in McDonagh, Missouri litigants should expect judges to adhere to federal expert witness procedures, including exhaustive pre-trial “Daubert hearings.”<sup>19</sup> Ultimately, if the legislature’s goals are achieved, these costly and rigorous procedures will curtail the amount of expert testimony that judges will admit, thereby creating a more difficult playing field for plaintiffs.

Edited by Luke Jackson

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<sup>15</sup> Breslin, *supra* note 14.

<sup>16</sup> *Id.*; *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. at 597.

<sup>17</sup> See *Howard v. City of Kansas City*, 332 S.W.3d 772, 779 (Mo. 2011) (“The primary rule of statutory construction is to ascertain the intent of the legislature from the language used . . .”).

<sup>18</sup> *McDonagh*, 123 S.W.3d at 155.

<sup>19</sup> Larson, Robert, *NAVIGATING THE FEDERAL TRIAL*, § 11:23 (2017 ed.).

