Having last passed significant tort reform more than 10 years ago, it was about time for the legislature to have another go at it.\(^2\) The 2011 Alabama Legislature, the first with a Republican majority since Reconstruction,\(^3\) passed five bills constituting the first tort reform package in more than a decade. On June 9, 2011, Governor Bentley signed the new acts into law. The new laws decrease the period of repose for claims against architects, engineers, and builders; reduce the interest rate on money judgments; affect the venue of wrongful death actions; protect non-manufacturer sellers from product liability actions; and, change the standard for the admission of expert testimony in certain civil and criminal proceedings.

While three of the reforms passed this year are straightforward and of relatively easy application, two—the law creating additional litigation protections for wholesalers and retailers and the revision of Alabama law concerning admissibility of expert evidence, the so-called “Daubert” bill—will no doubt stir skirmishes concerning their interpretation and application. After briefly summarizing the 2011 tort reform package, this article will discuss some of the issues likely to be raised concerning these latter two laws, with a particular focus on the new Alabama expert standard, and will offer a few practical considerations.

**Seven Year Rule of Repose for Actions against Architects, Engineers, and Builders**

Act Number 2011-519\(^4\) amends certain provisions of the Alabama Code providing limitation and repose periods for civil actions alleging design and construction related
defects against architects, engineers, and builders. Specifically, the new law shortens the statute of repose from thirteen years from the date of substantial completion of the real property improvement in question to seven years from that date.

**Post-Judgment Interest Reduced to 7.5%**

Act Number 2011-521⁵ amends Ala. Code § 8-8-10 (1975), which allows for interest on money judgments. The amendment reduces the annual interest rate on non-contract judgments from 12% to 7.5%. While the act’s preamble states that it was also intended to require interest to be compounded annually, there is no language in the actual body of the new statute so providing. Thus, case law construing the pre-amendment version of the statute as not authorizing the compounding of interest likely still applies.⁶

**Wrongful Death Venue**

Act Number 2011-522⁷ amends Alabama’s Wrongful Death Act to provide for proper venue in cases brought pursuant to the act. The amendment makes clear that all such cases must be filed in counties where the deceased, pursuant to Alabama’s general venue statutes, could have commenced an action for the alleged wrongful act, omission, or negligence causing the decedent’s death. Previously, many wrongful death actions against corporations have been filed in the county of residence of the decedent’s personal representative based on Ala. Code § 6-3-7 (1975), which makes the county of residence of “the plaintiff” the proper venue for an action against a corporation (assuming it does business in that county).⁸
Additional Protections for Non-Manufacturing Defendants

Act Number 2011-627 amends Ala. Code §§ 6-5-501 and 6-5-521 (1975), which define “products liability action” for purposes of code provisions setting forth limitation periods and modifying the collateral source rule with respect to such actions.

In Atkins v. American Motors Corp., one of the first cases recognizing the Alabama Extended Manufacturer’s Liability Doctrine (AEMLD), the Supreme Court of Alabama acknowledged that a defendant in an AEMLD case is entitled to raise as an affirmative defense the fact that the product was already in a defective condition when the defendant received it, that the defendant did not contribute to the defect, and that the defendant had no superior knowledge of the defect or opportunity to inspect the product. This so-called “lack of causal relation” defense was not available to a non-manufacturer who distributed a product under its own trade name.

Generally speaking, the amendments to §§ 6-5-501 and 6-5-521 provide that no product liability action, which is defined broadly to include several theories of liability, may be asserted against the seller of a product or someone using that product in the production or delivery of its own products or services unless such person or entity:

1. is also the manufacturer or assembler of the product and the manufacture or assembly is causally related to the product’s defective condition,

2. exercised substantial control over the design, testing, manufacture, packaging, or labeling of the product and such act is causally related to the product’s defective condition, or

3. altered or modified the product and such alteration or modification was a substantial factor in causing the harm for which recovery is sought.

The new statute thus appears to codify the “lack of causal relation” defense (arguably even for wholesalers or retailers selling products under their own trade names).
The new law contains an exception allowing the commencement of a products liability action against a non-manufacturer if the plaintiff, after exercising due diligence, cannot identify the manufacturer. The plaintiff or his or her attorney must file an affidavit certifying that he or she has been unable to identify the manufacturer. The burden then shifts to the non-manufacturer defendant, typically a wholesaler or retailer, to identify the manufacturer, at which time the plaintiff is obliged to “exercise due diligence to file an action and obtain jurisdiction over the manufacturer.” Under the statute, “once the claimant has commenced an action against the manufacturer, and the manufacturer has or is required to have answered or otherwise pleaded, the claimant shall voluntarily dismiss all claims against the” non-manufacturer defendant. The new law thus provides a procedural mechanism for certain non-manufacturing defendants (those who can identify the manufacturer of the product at issue) to obtain dismissal from suits against them, provided they meet the other requirements of the new law.

The statute is not clear as to what happens if, after being sued, a non-manufacturer identifies the manufacturer, but it is determined that the manufacturer is not subject to personal jurisdiction in Alabama. This will be an issue the Alabama courts will likely be called upon to resolve. Even if the exception allowing a plaintiff to sue a non-manufacturer applies and the non-manufacturer is unable to identify the manufacturer, the lack of causal relation defense should still be available to the non-manufacturer at the summary judgment or trial stage. Nothing in the new law appears to curtail the availability of the lack of causal relation defense if the manufacturer can not be identified or sued.
It is worth noting that, in *Sparks v. Total Body Essential Nutrition, Inc.*, the Alabama Supreme Court held that the “sealed container doctrine” was *not* a valid defense to a breach-of-implied-warranty claim brought against a retailer under Alabama’s version of the Uniform Commercial Code. Notwithstanding the encompassing nature of the definition of “products liability action” contained in the amendments to §§ 6-5-501 and 6-5-521 (which specifically includes breach of implied warranty claims), those amendments specifically state that, while they are meant to protect mere conduits of products, they are not meant to protect a non-manufacturer’s “independent acts unrelated to the product design or manufacture, such as independent acts of negligence, wantonness, warranty violations, or fraud.” It remains to be seen whether the new law will have any effect on the holding in *Sparks*.

**New Era for Admissibility of Alabama Expert Testimony?**

Act Number 2011-629, quoted in full below, amends § 12-21-160, Ala. Code 1975. The pre-amendment version of that code section provided simply that “[t]he opinions of experts on any question of science, skill, trade or like questions are always admissible, and such opinions may be given on the facts as proved by other witnesses.” Before discussing the new law, it is worth taking a brief trip through the historical landscape concerning rules applicable to Alabama expert witnesses.

**The Existing Law on Experts**

The routinely-ignored former § 12-21-160 had been in the books for years, predating the January 1, 1996 effective date of the Alabama Rules of Evidence. The adoption of Ala. R. Evid. 702, which copied verbatim the corresponding federal rule then in effect, further diminished the import of old § 12-21-160. Alabama Rule 702 became
effective in 1996, during the period when the United States Supreme Court had released *Daubert*\(^{19}\) (1993) but not yet *Joiner*\(^{20}\) (1997) or *Kumho*\(^{21}\) (1999). The Alabama Supreme Court had previously followed the “general acceptance” test of *Frye v. United States*\(^{22}\) as applicable to determine admissibility of “novel, scientific” testimony, and subsequently, broadened use of this test to other non-novel scientific evidence.\(^{23}\) The Alabama Evidence Rules Advisory Committee decided not to take a stance on whether the Alabama Supreme Court’s adoption of Rule 702 manifested an intent to adopt the United States Supreme Court’s interpretation of the then identical Federal Rule 702 in *Daubert*. The Alabama Evidence Rules Advisory Committee’s Note to Rule 702 states: “Further development of Alabama law on this subject is left to the case law.”

In 1993, the Alabama legislature enacted Ala. Code § 36-18-30 to provide that DNA evidence shall be reviewed under “the criteria for admissibility as set forth by the United States Supreme Court in *Daubert*.”\(^{24}\) In actions under the Alabama Medical Liability Act,\(^{25}\) only experts who are “similarly-situated” – that is, who have the same education, certifications and board qualifications as the defendant health care provider – may testify about whether that health care provider deviated from the applicable standard of care.\(^{26}\) The Alabama Supreme Court has further held that a trial court may use the Alabama Rules of Evidence to assess an expert’s ability to assist the trier of fact in an AMLA action, even if the expert satisfies the “similarly situated” requirements.\(^{27}\)

In response to the *Daubert* trilogy, Federal Rule 702 was amended in 2000 to incorporate the clarifications to federal practice begat by these decisions and their progeny. The three subparts to Federal Rule 702 were added by this amendment. However, Alabama Rule 702 was not changed to add the new federal language.
Following enactment of the Alabama Rules of Evidence, the Alabama Supreme Court did not have or take an opportunity to decide the issue of whether an Alabama court might properly apply, under existing Alabama Rule 702, the *Daubert* factors or other criteria and principles described in federal court precedent to assess the reliability and relevance – and thus admissibility – of expert opinions.\(^{28}\) Thus, the “*Frye versus Daubert*” issue under Alabama Rule 702\(^ {29}\) was never satisfactorily resolved before the recent passage of new § 12-21-160.

**The New Law Governing Experts**

It is against this historical backdrop that the 2011 amendment to § 12-21-160 should be considered. The new law provides:

“§ 12-21-160.

“(a) Generally. 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.

“(b) Scientific evidence. In addition to requirements set forth in subsection (a), expert testimony based on a scientific theory, principle, methodology, or procedure is only admissible if:

“(1) The testimony is based on sufficient facts or data,

“(2) The testimony is the product of reliable principles and methods, and

“(3) The witness has applied the principles and methods reliably to the facts of the case.”

Section 3. This act shall apply to all civil state court actions commenced on or after the effective date of this act. In criminal actions, this act shall only apply to non-juvenile felony proceedings in which the defendant that is the subject of the proceeding was arrested on the charge that is the subject of the proceeding on or after January 1, 2012. This act shall not apply to domestic relations, child support, juvenile, or probate cases.

Section 4. The provisions of this act, where inconsistent with any Alabama Rule of Civil Procedure, Alabama Rule of Criminal Procedure, or Alabama Rule of Evidence, including, but not limited to, Ala. R. Evid. 702, shall supersede such rule or parts of rules.

Section 5. This act shall become effective on January 1, 2012.30

Importantly, subsection (a) of the new version of § 12-21-160 is identical to present Alabama Rule 702, while subsection (b) tracks but is not identical to the current version of Federal Rule 702. In this regard, subsection (b) of § 12-21-160 adopts the three subparts of the current Federal Rule 702. However, subsection (b) differs from the current Federal Rule 702 by being limited to expert testimony “based on a scientific theory, principle, method or procedure.” It is worth recalling again that Federal Rule 702 was amended in 2000 to add the three subparts in response to the Daubert trilogy. According to the Advisory Committee’s Note for the 2000 Amendments to Federal Rule 702, the specific standards listed in Rule 702 “are broad enough to require consideration of any or all of the specific Daubert factors where appropriate.”31

Issues Raised by New § 12-21-160

After the 2011 amendment to Ala. Code § 12-21-160 takes effect on January 1, 2012, it will present several questions that Alabama courts will undoubtedly be called upon to decide as the new law is applied in specific cases.

Perhaps the biggest task facing Alabama courts in applying new § 12-21-160 will be drawing an appropriate distinction between expert testimony falling under subsections
(a) and (b). The starting point will be subsection (b)’s language requiring application of its new three-part test to “expert testimony based on a scientific theory, principle, methodology or procedure.” This broad language is not found in any federal or state rule or statute, to the knowledge of the authors. Moreover, subsection (b)’s “based on” phrase contains two descriptive words—“theory” and “procedure”—that are not found in Federal Rule 702, which refers only to testimony being the product of “reliable principles and methods,” the other two descriptive words in subsection (b)’s “based on” phrase. If the words “theory” or “procedure” are to have any independent operative realm, it would appear that the type of scientific support underlying expert testimony to be considered under subsection (b) is broader than just such testimony based solely on a “principle” or “method.” Moreover, the inclusion of the word “theory” would seem to call for assessment of expert testimony based on “theoretical” science—i.e., propositions not yet proven but thought to be correct—even though it is doubtful that such hypothetical expert opinions could ever meet subsection (b)’s three-part test (or survive Daubert analysis) and gain admissibility.

The “based on” language in subsection (b)’s key phrase also indicates that expert testimony need not be “pure” or the product of “research” science to fall under subsection (b). Rather, the testimony of experts working in the “applied” sciences—experts who may not have an academic pedigree, work in a research facility, or regularly publish, but whose testimony is founded upon a “scientific theory, principle, method or procedure”—should also be appropriately considered under subsection (b)’s three-part analysis. Such “based on” or applied scientific testimony would certainly seem to include most, if not all, opinions expressed by engineering, accident reconstruction, economic, statistical, and
medical experts. These and many other types of experts commonly apply scientific theories, principles, methods, and procedures in their work to reach opinions. In other words, regardless of whether an expert is labeled as “medical,” “technical,” “forensic,” “other specialized” or with some other description, if the expert’s testimony is “based on a scientific theory, principle, method or procedure,” the expert’s testimony should be assessed for admissibility under § 12-21-160(b). Under the new law, it is the basis for the expert’s testimony, rather than the expert’s degree, title or field of expertise, that is controlling. Alabama courts will be called upon to make the important distinctions noted above in applying new § 12-21-160 in the years ahead.

Other issues likely to be raised concern whether and to what extent federal decisional law following the Daubert trilogy will constitute persuasive authority to admissibility determinations under new § 12-21-160. Generally, when an Alabama rule is identical to a corresponding federal rule, federal decisions are persuasive though not controlling authority. When Rule 702 of the Federal Rules of Evidence was amended in 2000 to add the three-part test now also embodied in § 12-21-160(b), the Federal Rules Advisory Committee noted that the three subparts were derived from Daubert and its progeny. Accordingly, it would seem appropriate to assess scientific evidence falling under subsection (b) using the full persuasive authority of federal decisions applying current Federal Rule 702 as well as Daubert and its progeny.

However, may an Alabama court also look to Daubert regarding expert evidence falling under § 12-21-160(a)? Of course, subsection (a) is not new; it is identical to existing Alabama Rule 702. But existing Alabama Rule 702 is identical to the federal rule in effect during the period from 1993 to 1999 when the United States Supreme Court
rendered its opinions in the *Daubert* trilogy. Therefore, it seems reasonable that cases construing the old Federal Rule 702, including federal cases employing a *Daubert* analysis of proffered expert testimony, should be persuasive authority regarding interpretation of current Alabama Rule 702. Because Alabama Rule 702 was copied verbatim into § 12-21-160(a), it also seems logical that decisions applying *Daubert* are persuasive authority with respect to expert testimony falling under subsection (a).

In addition, the enactment of the new law raises questions concerning displacement of existing statutory provisions. For example, is Alabama Code § 36-18-30, which requires a *Daubert*-based review of evidence relating to use of genetic marker or DNA evidence, superseded by the new law? Expert testimony relating to DNA would certainly appear to be “based on a scientific theory, principle, methodology or procedure” and therefore only admissible under new § 12-21-160 if the three-part test stated in subsection (b) is satisfied. While the comments to current Federal Rule 702, which originated the three subparts, establish that they were derived from *Daubert* and its progeny --which also form the basis for the admissibility analysis called for in § 36-18-30-- it is also true that the three subparts are not explicitly set out in those cases. On balance, it would seem that any conflict is ephemeral and that § 36-18-30 will survive.

Another issue concerns how the new provision affects actions under the Alabama Medical Liability Act. Given the Alabama Supreme Court’s decision in *Holcomb*, it seems likely that expert witnesses testifying in an AMLA action must meet the requirements of both the AMLA and new § 12-21-160.
Procedural Questions and Practical Considerations

What will happen to Alabama Rule 702? Presumably, the Alabama Evidence Rules Advisory Committee will consider whether to substitute the text of § 12-21-160 for the current language of Alabama Rule 702, which is now superseded by the new provision to the extent of any conflict. The preceding discussion indicates that the new law presents several substantial differences to Rule 702, and thus that the new provision will supersede the existing rule in many applications. If and when the Advisory Committee makes this substitution, does the Committee have the authority to adopt new Advisory Committee Notes for the new law that it did not propose? If these notes attempt to interpret the terms of the new standard or to comment on their application in specific contexts, do or should these comments have any effect?

One of the consequences of the enactment of new § 12-21-160 could be increased requests for pre-trial hearings pursuant to Ala. R. Evid. 104. Often called “Daubert hearings” in the federal system, these hearings allow a trial court to pre-screen expert testimony before trial. At a Rule 104 hearing, the court is “not bound by the rules of evidence except those with respect to privileges.” Outside of the presence of the jury, the court may assess live or recorded testimony and other pertinent evidence and consider legal argument to determine preliminary questions about the qualifications of a witness or the admissibility of the witness’s testimony. In cases requiring testimony of an expert to prove a prima facia element of a claim, such as most products liability, professional liability, and similar actions, a Rule 104 hearing can offer an efficient way of determining if a case should be tried. If the expert is unqualified or the expert’s testimony is
inadmissible for some other reason, then the unnecessary costs associated with the trial might be avoided when the expert’s testimony is excluded.

Because of the broad language used in subsection (b), prudent counsel should select and prepare their testifying experts with an eye to meeting the three sub-parts of subsection (b). Federal practitioners already have such experience, and the new rule should bring more conformity in the treatment of experts in Alabama state and federal courts.

Lastly, it is suggested that some of the “line drawing” issues concerning application of subsections (a) and (b) of § 12-21-160 might be avoided by opposing counsel, who should attempt to meet and confer on whether a specific expert’s testimony is properly considered under subsection (a) or (b). In the majority of situations, counsel ought to be able to agree on whether an expert’s testimony is “based on a scientific theory, principal, method, or procedure” and thus falls under subsection (b). In cases where an agreement can not be reached, the issue will need to be submitted to and decided by the court.

**Conclusion**

Whether the enactment of § 12-21-160 marks the beginning of a new era in Alabama expert testimony remains to be seen. While undoubtedly the new provision will change Alabama courts’ assessment of certain types of expert testimony – most notably expert testimony “based on a scientific theory, principle, methodology or procedure” – it is unknown if the application will alter admissibility rulings in specific contexts. That is, will certain types of expert opinions routinely admitted under current standards be excluded under the new § 12-21-160? For experts whose testimony falls under
subsection (b), it would certainly seem that current practice will be altered substantially. However, the answer to that question will depend on the zealousness of counsel in making an appropriate record of sufficient facts and data for their expert’s testimony and in carefully vetting their expert’s work to confirm that the expert has used reliable principles and methods that were reliably applied to the facts and data to reach an objectively supportable opinion. For other types of testimony, it is less clear whether current practices and admissibility decisions will be altered. One thing is certain: the new provisions should provide ample opportunity for Alabama judges and lawyers to grapple with application of the new law.

Biography

Joseph P. H. Babington, a member of Helmsing, Leach, Herlong, Newman & Rouse, P.C., Mobile, is admitted to practice before all Federal and State courts in Alabama and Louisiana, as well as before the United States Supreme Court, before which he successfully argued the Kumho case. Mr. Babington handles general civil litigation, with a focus on product liability defense, mass tort and multi-district cases, and commercial and insurance litigation.

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The authors gratefully acknowledge the research assistance of Samuel Charles Rosten, a 2011 summer associate with Helmsing, Leach, Herlong, Newman & Rouse, P.C., who is anticipating graduation from the University of Alabama School of Law in 2012.

1 At the outset, Mr. Babington makes the following disclosure: “I participated in the discussions and drafting of the revisions to the so-called “Daubert” bill, the amendment to Ala. Code § 12-21-160, after the bill’s introduction in the Alabama House and Senate and the bill’s first reading. My participation occurred at the invitation of Matthew McDonald, general counsel of the Alabama Civil Justice Reform Committee, and was motivated both by my long-standing interest in expert evidence standards and by my work as a products liability defense and commercial litigation lawyer. I was not compensated by any client or other entity or person for my work. I personally advocated
amending the Alabama standards governing expert opinions to mirror Fed. R. Evid. 702. When it became clear that goal was not reachable, but that a “Daubert” bill in some form would pass, I worked with the bill sponsors and other interested parties and lawyers to try to get the best, most clear bill possible. In my opinion, the new standard represents an opportunity to advance the administration of justice in the Alabama state courts, but whether progress is actually achieved will be left to those courts’ interpretation and implementation of the new provision in specific cases.”

2 In 1999, the Alabama Legislature incorporated a new § 6-11-21 into the Code of Alabama 1975, thereby re-establishing caps on punitive damages in most civil cases after the legislature’s first effort at imposing such caps in the late 1980’s had been declared unconstitutional. See Henderson v. Alabama Power Co., 627 So. 2d 787 (Ala. 1993); see also, Morris v. Laster, 821 So. 2d 923 (Ala. 2001).


4 Act No. 2011-519 provides as follows: “Section1. Sections 6-5-221, 6-5-222, 6-5-225, and 6-5-227, Code of Alabama 1975, are amended to read as follows: “§ 6-5-221. “(a) All civil actions in tort, contract, or otherwise against any architect or engineer performing or furnishing the design, planning, specifications, testing, supervisions, administration or observation of the construction of any such improvement, or any defect or deficiency in the construction of any such improvements; or “(i) Any defect or deficiency in the design, planning, specifications, testing, supervision, administration or observation of the construction of any such improvement, or any defect or deficiency in the construction of any such improvements; or “(ii) Damage to real or personal property caused by any such defect or deficiency; or “(iii) Injury to or wrongful death of a person caused by any such defect or deficiency; shall be commenced within two years next after a cause of action accrues or arises, and not thereafter. Notwithstanding the foregoing, no relief can be granted on any cause of action which accrues or would have accrued more than seven years after the substantial completion of construction of the improvement on or to the real property, and any right of action which accrues or would have accrued more than seven years thereafter is barred, except where prior to the expiration of such seven-year period, the architect, engineer, or builder had actual knowledge that such defect or deficiency exists and failed to disclose such defect or deficiency to the person with whom the architect, engineer, or builder contracted to perform such service.” 2011 Ala. Acts 519 (codified as amended at Ala. Code §§ 6-5-221, 6-5-222, 6-5-225, 6-5-227).

5 Act No. 2011-521 provides as follows: “To Amend Section 8-8-10, Code of Alabama 1975, relating to the interest on money judgments, to provide that judgments, other than judgments based on a contract action, would bear interest from the date of entry of the judgment at a rate equal to 7.5 percent; and to provide that post-judgment interest would be computed daily to the date of payment, and compounded annually. BE IT ENACTED BY THE LEGISLATURE OF ALABAMA: Section 1. Section 8-8-10, Code of Alabama 1975, is amended to read as follows: “§ 8-8-10. “(a) Judgments for the payment of money, other than costs, if based upon a contract action, bear interest from the day of the
cause of action, at the same rate of interest as stated in the contract; all other judgments shall bear interest at the rate of 7.5 percent per annum, the provisions of section 8-8-1 to the contrary notwithstanding; provided, that fees allowed a trustee, executor, administrator, or attorney and taxed as a part of the cost of the proceeding shall bear interest at a like rate from the day of entry. “(b) This section shall apply to all judgments entered on and after the effective date of the act adding this subsection.” Section 2. This act shall become effective on the first day of the third month following its passage and approval by the Governor, or it’s otherwise becoming law.” 2011 Ala. Acts 521(codified as amended at Ala. Code § 8-8-10)(effective date to be Aug. 1, 2011).


7 Act No. 2011-522 provides as follows: “To amend Section 6-5-410 of the Code of Alabama 1975, the Alabama Wrongful Death Act, to further provide for venue of an action by the personal representative of the deceased. BE IT ENACTED BY THE LEGISLATURE OF ALABAMA: Section 1. Section 6-5-410 of the Code of Alabama 1975, is amended to read as follows: “§ 6-5-410 “(a) A personal representative may commence an action and recover such damages as the jury may assess in a court of competent jurisdiction within the State of Alabama where provided for in subsection (e), and not elsewhere, for the wrongful act, omission, or negligence of any person, persons, or corporation, his or her or their servants or agents, whereby the death of the testator or intestate was caused, provided the testator or intestate could have commenced an action for the wrongful act, omission, or negligence if it had not caused death. “(b) The action shall not abate by the death of the defendant, but may be revived against his or her personal representative and may be maintained though there has not been prosecution, conviction, or acquittal of the defendant for the wrongful act, omission, or negligence. “(c) The damages recovered are not subject to the payment of the debts or liabilities of the testator or intestate, but must be distributed according to the statute of distributions. “(d) The action must be commenced within two years from and after the death of the testator or intestate. “(e) For any cause of action brought pursuant to this section, the action may only be filed in a county where the deceased could have commenced an action for the alleged wrongful act, omission, or negligence pursuant to Section 6-3-7 or 6-3-2, if the alleged wrongful act, omission, or negligence had not caused death. Nothing in this subsection is intended to override Rule 82 of the Alabama Rules of Civil Procedure.” Section 2. This act shall only apply to actions filed after the effective date of this act. Section 3. This act shall become effective immediately following its passage and approval by the Governor, or it’s otherwise becoming law.” 2011 Ala. Acts 522 (codified as amended at Ala. Code § 6-5-410).

8 See Ex parte W.S. Newell, Inc., 569 So. 2d 725, 728 (Ala. 1990) (holding that cases brought against corporations pursuant to the Wrongful Death Act may be commenced in the county of residence of the personal representative).

9 335 So. 2d 134, 143 (Ala. 1976).
Townsend v. General Motors Corp., 642 So. 2d 411, 424 (Ala. 1994).


See id. at 627 (codified as amended at Ala. Code § 6-5-501(2)(b)).

Id., at 627 (Codified as amended at 6-5-501(2)(c)).

Id.

Arguably, placing some non-manufacturing defendants on unequal footing than others based on the availability of the identity of a manufacturer could motivate non-manufacturers to purchase from reliable sources and to maintain adequate records of those sources.

27 So. 3d 489 (Ala. 2009).

2011 Ala. Acts 627, 627 (to be codified at § 6-5-521(b)(4)).


Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

See Ex parte Perry, 586 So. 2d 242, 247 (Ala. 1991) (Frye determines admissibility of novel scientific evidence); Swanstrom v. Teledyne Continental Motors, Inc., 43 So.3d 564 (Ala. 2009) (Frye applicable to scientific testimony).


See, e.g., McGlothern v. Eastern Shore Family Practice, 742 So.2d 173, 175 (Ala. 1999) (holding that an expert board certified in internal medicine was not qualified to opine about the standard of care applicable to a family practitioner).

Holcomb v. Carraway, 945 So.2d 1009, 1020 (Ala. 2006).

See e.g., Courtaulds Fibers, Inc. v. Long, 779 So.2d 198, 202 (Ala. 2000) (“[N]either the Frye test nor the Daubert standard applies to the expert’s testimony. Instead, the
issue is controlled by Rule 702.”); Chestang v. IPSCO Steel, Inc. 50 So.2d 418, 438 (Ala. 2010), (declining to give an advisory opinion regarding adopting Daubert).


31 The Daubert factors include: (1) whether the expert’s technique or theory can be or has been tested; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community. Subsequent cases, including Joiner and Kumho, have added additional considerations, such as whether the expert’s conclusions were supported by more than the expert’s “ipse dixit”, and whether the expert’s litigation-related work incorporated the “same level of intellectual rigor” as his work outside the courtroom.

32 Since the Alabama Legislature typically does not include its legislative intent in an act, and since there is no “public record” of such intent created during the legislative process, the courts primarily look to the language of the statute to construe its meaning. See, e.g., Ex parte Waddail, 827 So. 2d 789, 794 (Ala. 2001) (“‘Words used in a statute must be given their natural, plain, ordinary, and commonly understood meaning, and where plain language is used a court is bound to interpret that language to mean exactly what it says. If the language of the statute is unambiguous, then there is no room for judicial construction and the clearly expressed intent of the legislature must be given effect’”) (quoting Blue Cross & Blue Shield v. Nielsen, 714 So.2d 293, 296 (Ala.1998)); see also, Ex parte Berryhill, 801 So. 2d 7, 10 (Ala. 2001) (stating that when a statute is ambiguous and the court must choose between different meanings, it “will not only consider the results that flow from assigning one meaning over another, but will also presume that the legislature intended a rational result, one that advances the legislative purpose in adopting the legislation, that is ‘workable and fair,’ and that is consistent with related statutory provisions’”) (quoting John Deere Co. v. Gamble, 523 So.2d 95, 100 (Ala.1988)).

33 The closest statute is from Indiana, although it differs from the new Alabama rule in significant ways. The Indiana statute reads as follows: “Expert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable.” Ind. R. Evid. 702(b). The Indiana rule covers testimony in applied sciences such as engineering. See Lytle v. Ford Motor Co., 696 N.E.2d 465, 471 (Ind. Ct. App. 1998) (stating that “the theory of inertial release” in a seatbelt case “is based upon complex scientific principles,” requiring the party to “establish that the scientific principles” of the “testimony were reliable”); Rogers v. Cosco, Inc., 753 N.E.2d 1158, 1167, -69 (Ind. Ct. App. 2000) (remanding case to examine the reliability of testimony on safer child restraints and the “mechanisms of . . . injuries,” where “the focus
must be on the principles and methodology behind the science rather than the conclusions generated”).

34 Of note, the terminology employed in the three subparts of subsection (b) do not include the words “theory” or “procedure” but use the identical language of the Federal Rule.

35 Note that Indiana steers its subsection (b), which has the closest language to Alabama’s new law, towards this view. See supra note 28.

36 Courts may at times struggle with deciding what expert testimony does and does not fit within this broadly-described category. Indeed, as the Court recognized in *Kumho*, “it would prove difficult, if not impossible, for judges to administer evidentiary rules under which a gatekeeping obligation depended upon a distinction between ‘scientific’ knowledge and ‘technical’ or ‘other specialized’ knowledge. There is no clear line that divides the one from the others.” 526 U.S. at 148. The broad “based on” phrase of new § 12-21-160(b) should result in application of this provision to experts in the “technical” or “other specialized” categories, to the extent their testimony is “based on” a scientific theory, principle, method or procedure.


38 Fed. R. Evid. 702, Advisory Committee’s Note.

39 945 So.2d at 1020.

40 Ala. R. Evid. 104(a).