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Warning: Daubert Challenge Ahead Meeting the Daubert Standards for Expert Witness Testimony

By Henry Kaskov, ASA

Beginning with *Daubert v. Merrell Dow Pharmaceuticals* (1), the courts have established the trial judge's role and responsibility to ensure that expert testimony is relevant and reliable (2). Subsequent cases and rulings have further defined the standards by which expert opinions are admitted at trial. The total number of Daubert challenges to financial expert witnesses has increased from 56 in 2000 to 230 in 2015, and of these challenges, 44% have resulted in either a full or partial exclusion of the expert's testimony (3). Among economists, accountants, appraisers and other financial experts, appraisers had the lowest exclusion rate (34%), while accountants had the highest exclusion rate (54%) (4). From 2000 to 2015, cases involving intellectual property, product liability, fraud, securities litigation and bankruptcy experienced the highest exclusion rates, ranging from 47% to 49%, while insurance claim, antitrust and personal injury matters had the lowest rates of exclusion, ranging from 35% to 45% (5).

Given these statistics, legal counsel and financial experts should ensure that the analyses, procedures and methodologies utilized meet the criteria of a Daubert challenge prior to finalizing and submitting a report. Experts should have the necessary qualifications and be able to demonstrate the reliability and relevance of their analysis to the court. Daubert challenges are likely to increase in the future and it is the responsibility of legal counsel and the expert witness to ensure that the reported analysis and conclusions are strong enough to withstand a potential Daubert challenge.

Expert Qualifications

An expert witness should be qualified and have relevant experience in the subject matter for which he or she is testifying. From 2000 through 2015, approximately 18% of financial expert exclusions were related in whole or in part to the expert's qualifications (6). Aside from having the necessary educational background, the expert should hold appropriate certifications and accreditations in his or her respective field. Additionally, some have advised experts to stay within their areas of expertise and not venture far from their core competencies and proficiencies; "stay in your sandbox" has been used by some in the field to emphasize the importance of being fully knowledgeable and competent in a particular area of expertise (7). For example, a healthcare economist that solely studies healthcare damages claims may not be the most qualified expert to testify on software patent infringement damages. This does not mean that experts are precluded from opining on damages for industries in which they may not have extensive experience. In fact, many economic damages principles and valuation approaches, such as determining lost profits or lost value, can be applied across many industries. Furthermore, a witness's lack of experience testifying in court also does not preclude him or her from being qualified. In *Rural Water Dist. No. 5 v. City of Coweta* (8), the court permitted an expert's testimony as it was based on accounting work and principles, an area in which the expert was qualified, stating that "an expert need not have expertise in the exact business at issue." (9) So long as the expert can stay within his or her "sandbox" and demonstrate that he/she has the necessary qualifications, credentials, and skills required for that particular analysis, the qualifications criteria of the Daubert challenge can be met.

Reliability

Not meeting the reliability threshold is the most common reason for exclusion of expert witness testimony. The reliability standard covers both the facts and data utilized by the expert, as well as the methods and principles employed to formulate the opinion. Significant inadequacies in any one of these segments can result in a partial or full exclusion of the expert witness's testimony.

The first area that a Daubert challenge may focus on is the quality and validity of the data utilized by the expert witness. In some circumstances, experts do not receive complete information on which to base their analysis. Although an expert may have to base an opinion upon incomplete information, the amount of (or lack of) examination, scrutiny, analysis or data testing performed by the expert witness can be a factor for Daubert exclusions. For example, information that is relied upon by an expert witness can be checked against available market, industry and financial data. Testing and analyzing data for validity and reliability can support an expert's reliance on the data. In *Auto Industries Supplier Employee Stock Ownership Plan v. Ford Motor Company* (10), the district court stated that the plaintiff's expert witness had little to no familiarity with how the damages presented in his expert report were calculated, as they were provided to him by the plaintiff and the expert did not undertake an analysis or perform due diligence to verify the calculations. (11) Had the expert performed applicable tests or analyzed the data against available market information, his testimony may not have been excluded.

Another popular area of attack of a Daubert challenge is the reliability of the methods and principles employed by the expert witness. As the gatekeeper for the court, it is the judge's

responsibility to ensure that the testimony heard is based on reliable methods. The court will look to see if the methods and principles employed by the expert are testable, have been subject to peer review and publication, and are generally accepted in the profession. The court may also look to quantify and understand the possible rate of error in the expert's analysis and examine if applicable professional standards have been followed.

To prevail over such challenges, experts need to be prepared to support any perceived deviation from common approaches and methods in their respective fields and be ready to demonstrate the reasoning of their methodology. Employing novel and untested methodologies can make it more challenging for the court to accept them as reliable and generally accepted. If, however, the facts of the case require a unique perspective or approach be taken, it may be prudent for an expert witness to relate his or her analysis to more 'traditional' and accepted methodologies to help alleviate any potential concerns that a judge may have. At the end of the day, it is the judge's role as gatekeeper to ensure that the court hears testimony that is reliable based on thorough data analysis, sound principles, and acceptable methodologies.

Relevance

The relevance standard is vaguer than the other two criteria of a Daubert challenge, as its goal is to ensure that the expert's testimony will aid the trier of fact during the trial. An expert's analysis and opinion may be fundamentally sound and accurate, but can still be excluded if it is found to be irrelevant to the case. This was exemplified in *Lafarge North America, Inc. v. Discovery Group LLC* (12) , where "the appraiser's testimony, although based on an acceptable methodology to appraise the market value of leases, was not relevant to the inquiry." (13)

Opposing counsel may argue that an expert's testimony is prejudicial or may be confusing or distracting to the jury. This is why it is important for legal counsel hiring an expert to ensure that the scope of the expert's opinions is clearly applicable to the damages being sought in the case. It is essential for the expert and attorney to communicate early in the engagement to ensure that the opinions being formulated are relevant to the legal issues in dispute. Ultimately, the expert's report and testimony are informational tools that aid the judge or jury in the decision-making processes.

Summary

As the gatekeeper of courtroom, the judge's role is to keep unreliable and irrelevant information from the jury because of its inability to assist in factual determinations, its potential to create confusion, and its lack of probative value (14) . The role of the expert witness is to provide an unbiased opinion on a particular subject matter. Given recent trends, the number of Daubert challenges is expected to continue to increase in future years. As a result, legal counsel and the expert witness should be cognizant of the Daubert standards to ensure that the expert's opinions can be rendered and admitted at trial.

If you have any questions or would like more information on this topic, please contact Henry Kaskov at 630-457-9200 or hkaskov@sphvalue.com.

- [1] Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 589 (1993).
[2] "The Comprehensive Guide to Lost Profits and Other Commercial Damages", Nancy J. Fannon and Jonathan M. Dunitz. Business Valuation Resources, 2014.
[3] "Daubert Challenges to Financial Experts" PWC 2014 and 2016
[4] Ibid.
[5] Ibid.
[6] "Daubert Challenges to Financial Experts" PWC 2016
[7] "How to Be a Successful and Effective Expert Witness" workshop presented by James J. Mangraviti, ASA of SEAK, Inc.
[8] Rural Water Dist. No. 5 v. City of Coweta, 203 WL 5558390
[9] Daubert Challenges to Financial Experts, PWC 2013, page 16.
[10] Auto Industries Supplier Employee Stock Ownership Plan v. Ford Motor Company, 2011 WL 2610584
[11] Daubert Challenges to Financial Experts, PWC 2011, page 19.
[12] Lafarge North America, Inc. v. Discovery Group LLC, 2010 WL 3024120.
[13] Daubert Challenges to Financial Experts, PWC 2011, page 22.
[14] Wellman v. Norfolk & western Ry., 98 F. Supp. 2d 919, 924 (S.D. Oh. 2000)
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