How to Bulletproof Your Expert: Surviving Daubert Challenges to Accounting Expert Opinions & Damage Calculations

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“Begin with the end in mind”
Three Key Factors Determine Likelihood of Success

1. Jurisdiction in which testimony is challenged
2. Type of financial expert
   - From 2000 to 2009, 52% of all financial expert challenges were directed at: economists, accountants & appraisers
   - These were also the most likely financial experts to survive a challenge
3. Lack of reliability top reason for exclusion of financial experts – 2 out of 3 exclusions in 2009
Financial Experts Becoming Bigger Targets
Challenges to Financial Experts Increasing

- From 2000 - 2009, there were 5,262 Daubert challenges to all types of experts
- During this time, there was an overall increase in the number of challenges (253 in 2000, 869 in 2009)
- An increasing percentage of these are of financial experts (958 of 5,262)
Increase in Challenges of Financial Experts

Figure 5: 
Daubert challenges to financial expert witnesses, 2000–2009

- 2009: 168
- 2008: 155
- 2007: 116
- 2006: 106
- 2005: 93
- 2004: 81
- 2003: 71
- 2002: 68
- 2001: 44
- 2000: 56
Success Rate of Challenges Holding Steady

Figure 8: Success rate of Daubert challenges to financial expert witnesses, 2000–2009
Success Rates Vary Widely by Jurisdiction

Figure 9: Success rate of Daubert challenges to financial expert witnesses, by jurisdiction, 2000-2009

- ME, NH, MA, RI: 33%
- MN, NE, IA, MO, AR: 46%
- CO, UT, KS, OK, NM: 63%
- KY, TN, OH, MI: 40%
- TX, LA, MS: 65%
- NY, CT, VT: 39%
- Total excluded and partially excluded
- Total number of challenges

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Most Challenges to Plaintiff Experts

Figure 11: Daubert challenges to financial expert witnesses, plaintiff-side vs. defendant side, 2000-2009

2009: 71% Plaintiff, 29% Defendant
2008: 68% Plaintiff, 32% Defendant
2007: 71% Plaintiff, 29% Defendant
2006: 72% Plaintiff, 28% Defendant
2005: 67% Plaintiff, 33% Defendant
2004: 67% Plaintiff, 33% Defendant
2003: 70% Plaintiff, 30% Defendant
2002: 74% Plaintiff, 26% Defendant
2001: 66% Plaintiff, 34% Defendant
2000: 75% Plaintiff, 25% Defendant
0000-2009: 70% Plaintiff, 30% Defendant

Plaintiff: Blue
Defendant: Black
Leader Board

Criminologists/Forensics .847
Appraisers .800
Chemists .722
Hydrologists .667
Statisticians .647
Metallurgists .600
Accountants/Economists .598
Admiralty Experts .556
Aviation Experts .500
Fire Experts .478
Physicians .463
Engineers .390
Accident Reconstructionists .387
Psychologists/Psychiatrists .371
Attorneys .333
Marketing Experts .333
Nurses .333
Toxicologists .308
Polygraphers .121

Interesting Items of Note

• 70% of financial expert challenges are against Plaintiff expert; but defendant-side financial experts were excluded more frequently (58% versus 39% exclusion rate in 2009)

• Challenges occur most frequently against financial experts in cases involving breach of contract or fiduciary duty, but lower success rates

• Financial experts experience higher levels of exclusion in matters involving intellectual property & fraud

• Reliability is top reason for exclusion
## Exclusion Reasons

### Figure 17: Exclusions of financial expert testimony, by exclusion reason, 2000–2009

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Exclusion Reasons

• Qualified, but unreliable
  – Lack of industry data provided to support lost profit projection
  – Discounted cash flow analysis prepared in a bankruptcy case, but facts of case not considered
  – Enhancement of a reasonable royalty rate
  – Unreliable, indirect evidence
  – Unreliable method for determining terminal value (projected EBITDA minus cap ex)
  – Failure to use accepted methodologies of business valuation
  – Failure to comply with standards
Challenges Becoming the Norm, Not the Exception

- Many attorneys challenge as a matter of routine strategy
- Three out of BKD’s four top testifying experts have had a substantial challenge in last year
  - Two of these involved three-day hearings
  - Before these, we had never had a challenge
Factors to Our Success Surviving Daubert Challenges

• Only take projects we are truly qualified to perform
• Client acceptance procedures, including pre-engagement consultation
• Strict system of quality controls, including independent math testing & word processing
• Requirement for independent/concurring review
• Good support system to get past “emotional response”
• Involvement of attorney as managing partner of BKD Forensics & Valuation Services
Our Response

- Anticipate a challenge on every report!
- Watch closely for absence of information, limited scope
- Use extreme caution on giving opinions of value which fall under professional standards
- Try to be familiar with burden of proof, who has burden, what reliability hurdle is in subject jurisdiction
- Beware of situations in which we do not have objective facts, figures or data to support opinions
- Seek more guidance & case law info from legal counsel
- What qualifies as “peer review”?
Sources


• Challenges to the Admissibility of Expert Financial Testimony: 2005-2008 by Bruce S. Schaeffer, Susan Ogulnick, Sara Anne Schaeffer of Franchise Valuations, Ltd.

• Daubert Tracker
Questions?

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