Daubert in the Realm of Financial Damages Experts

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In many litigation engagements, such as those involving (1) lost profits damages, (2) breach of contract, and (3) business valuation, forensic accounting experts are often involved. Whether you are a practicing attorney or forensic accounting expert, it is strongly recommended that you understand the common reasons why a forensic accounting expert’s report/testimony may be excluded at trial. At a minimum, it is imperative that practitioners understand Daubert, Joiner, and Kumho and the nuances arising out of the case law interpreting them. It is typically not the trial court’s role to determine whether an opinion is correct, only that it is reliable and relevant.

INTRODUCTION

Cases that require forensic accounting experts, such as those involving lost profits damages, breach of contract, and business valuation, often have experts on either side who are worlds apart in their conclusions. In fact, it is not uncommon for a plaintiff’s expert and a defendant’s expert in such cases to differ by a factor of five or ten.

Given such broad differences that are presumably based upon the same available data, one might expect that one or both experts will be excluded. Yet, exclusion remains the exception not the rule.

The most likely reason for exclusion being the exception is that the trial court’s role is not to determine whether an opinion is correct, only that it is reliable and relevant.

While exclusion may be the exception, the courts are certainly not timid about excluding an expert under the appropriate circumstances. Indeed, some studies suggest that the success rates for exclusion are increasing. As many federal court practitioners have likely experienced—and a recent PriceWaterhouseCoopers study confirms—challenges to expert witnesses have increased dramatically since the Supreme Court’s decision in Kumho Tire Co. v. Carmichael, the final case in the trilogy of Daubert v. Merrell Dow Pharmaceuticals, Inc., General Electric Co. v. Joiner, and Kumho Tire Co. v. Carmichael.

Given this increase in challenges to experts and the significant harm exclusion can do to a case, it is important that both attorneys and experts understand the rules laid down by Daubert, Joiner, and Kumho, and the nuances arising out of the case law interpreting them.

A recent case from the District of Massachusetts makes clear the importance of Daubert and an attorney’s obligation to fully understand the bases of an expert’s opinion. In United States v. Hebshie, the court vacated a criminal conviction based on ineffective assistance of counsel because trial counsel failed to challenge the prosecution’s experts.

In the “Introduction” section of the order, the court stated that at least one of the prosecution’s experts would have been excluded, and that “[u]nder the ‘prevailing professional norms,’ reasonably competent counsel would have moved for a Daubert/Kumho Tire hearing before trial. . . .”

In addition to finding that contesting the reliability of experts “was plainly within” the standard practice of an attorney, the court held that “[w]hile counsel need not read every article pertaining to the subject at hand, he must ‘keep abreast of current legal literature and developments.’”
Although *Hebshie* is a criminal case and the professional literature at issue involved “increasing scrutiny of arson evidence,” it would not be surprising to find similar case law finding its way into civil litigation. If that were to happen, the frequency of *Daubert* motions could increase exponentially.  

**Daubert Gatekeeping and the Focus on Reliability and Relevance**

After the Supreme Court decided *Daubert*, “reliable” and “relevant” became the concepts upon which experts and their opinions would succeed or fail. These terms, when applied to experts, can cover a broad swath of fact patterns that are not always parallel to the definitions of relevance and reliability of the Federal Rules of Evidence.  

Adding complexity to the determination of whether an opinion is reliable or relevant are the unique jargon and methodologies of certain areas of expertise. In the realm of financial experts, the methodology can get lost in a haze of spreadsheets, projections, discount rates, and econo-talk. If one does not understand the expert’s jargon, it is sometimes difficult to discern whether the expert’s opinion is relevant or reliable.  

Still, this haze should not obscure the basic reliability and relevance tenets of *Daubert*, *Joiner*, and *Kumho*.  

These tenets were enunciated in *Daubert*, which held that a trial judge’s responsibility regarding expert opinions is to “ensure that any and all scientific testimony or evidence admitted [at trial] is not only relevant, but reliable.”  

*Joiner* provided a bit more direction to the trial courts by holding that:  

...conclusions and methodology are not entirely distinct from one another. Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.  

Finally, *Kumho* extended a trial judge’s gatekeeping obligation to “‘technical’ and ‘other specialized knowledge.” This clearly brought *Daubert* into the realm of financial damages experts.  

Under *Daubert* and its progeny, “[t]he task for the district court in deciding whether an expert’s opinion is reliable is not to determine whether it is correct, but rather to determine whether it rests upon a reliable foundation, as opposed to, say, unsupported speculation.”  

In the following sections, a number of cases involving expert exclusions are discussed. These cases provide guidance for areas where attorneys should examine both the analysis and report of their own expert and the opposing expert.  

**Reliability**

**Choose the Right Expert—Your Case May Depend on It**

Carefully selecting an expert is important. Not only must the expert have the necessary education, background and experience to qualify as an expert under *Daubert* and its progeny, he or she should be able to communicate his or her opinion clearly and concisely.
In selecting a financial expert, non-Daubert considerations should include whether the expert can explain complex financial analyses in terms that a layperson can understand. If not, the expert may avoid exclusion but confuse the jury or cause it to find that the expert lacks credibility. Under those circumstances, exclusion of the expert may have been better for the case.

Still, even the best orator must be qualified. What Daubert and subsequent case law demonstrates is that courts will exclude experts who do not possess the specialized knowledge required under Federal Rule of Evidence 702.

In other words, an individual should be “qualified as an expert by knowledge, skill, experience, training or education,” and should be able to “assist the trier of fact to understand the evidence or to determine a fact in issue” or there is a risk of exclusion.

As a result, when providing the expert’s qualifications, emphasis should be given to the expert’s length of experience, prior cases with similar types of damages or calculations, and any specialized knowledge, education, training, and experience.

Moreover, it is important that the credentials be relevant to the task at hand, as courts have excluded seemingly qualified people who did not understand the damages model. For example, a CEO or other corporate executive can be excluded despite years of experience in an industry and appropriate education. This is because he or she attempts to opine on lost profits based upon a method with which he or she is unfamiliar.

In addition, where testimony requires an analysis beyond an expert’s training, experience, and qualifications, general business or financial aca-

men may not meet the standards of expert witness.

At the same time, the lack of specific experience with the subject matter is not automatically grounds for exclusion. Many courts regard experience as going to weight, not admissibility, by requiring “general rather than specific experience with the subject matter.” An expert’s opinion, however, should still “aid the trier in [the] search for the truth.”

Make Sure Your Expert Has the Facts—His or Her Opinion Depends on It

Unfortunately, with the volume of discovery and the associated costs exponentially rising, it is often difficult to strike an appropriate balance between ensuring the expert has all of the factual data necessary while avoiding excess data that will increase costs. The key is to communicate and understand what the expert needs and why.

When it comes to the expert’s knowledge of the facts, the courts have generally delineated a line between what is inadmissible opinion testimony and what goes to weight—that is, is subject to “vigorous cross-examination.”

On the one hand, when experts misapply or misuse factual data, courts tend to favor allowing the finder of fact to consider the weight of the testimony.

On the other hand, courts tend to exclude speculation, conjecture, or unsupported conclusions. For example, where testimony of lost profits is not based on historical data, and is only based on the expert’s “experience and knowledge” of a particular market, it will be excluded as overly speculative.

This is because Federal Rule of Evidence 702 “implicitly requires that the information be viewed as reliable by some independent, objective standard beyond the opinion of the individual witness.”

Thus, it should come as no surprise that courts expect experts to be knowledgeable about the facts that support, or should support, damages calculations. An expert simply cannot rest upon his or her education and experience to the exclusion of facts and data.

In a case in which the expert apparently tried to do just that, the court held: “He does have an impressive level of education and experience. . . . He plainly has the knowledge and intellect to apply his training in a variety of contexts when and if he does the necessary investigation and research. The problem is that he appears not to have done that in this case.”

In addition, courts will exclude expert testimony where there is inadequate “factual data to support the expert’s conclusions.” Courts have also excluded expert testimony when experts have been ignorant of data that should have been discovered in the course of discovery.

Even where an expert knows the facts, exclusion is appropriate where “an expert’s testimony is not tied to the facts of the case, and assumptions are not based on facts in the record.”
Courts are also wary of experts who rely too heavily on data and information provided by the parties that engaged them as experts or who rely on data favorable to their clients while ignoring unfavorable information.\[32\]

In addition, attorneys should avoid having their experts engage in “too much hypothesizing” and seek exclusion of opposing experts whose reports rely largely on hypotheses as opposed to facts.\[33\]

Conversely, differences in opinion regarding the facts in the record, or their relative importance, are typically left for cross-examination: “despite notable deficiencies,” opinions are best tested through cross-examination “that would inform the weight to be afforded [the] conclusions.”\[34\]

Finally, in some circuits, the courts generally permit testimony based on allegedly erroneous facts if there is some support for those facts in the record.\[35\]

**Find the Method in the Madness**

As with the factual basis of the opinion, an expert’s strong reputation cannot be the sole basis for an expert’s opinion, nor is it an alternative to proper analysis. Indeed, in a case in which the defendant claimed that the court should allow the expert’s testimony based on the expert’s personally developed methodology, because the expert was well respected, the court held that being held in high regard was “not a substitute for analysis.”\[36\]

Similarly, when an expert relied solely on information provided by the attorney, the court excluded the expert because even a “supremely qualified expert cannot waltz into the courtroom and render opinions unless those opinions are based on some recognized scientific method and are reliable and relevant under the test set forth by the Supreme Court in Daubert.”\[37\]

Of course, merely picking a reliable and relevant methodology does not automatically make the opinion itself admissible. Rather, an expert should both select a well-accepted methodology and apply that methodology correctly to the facts of the case.\[38\]

In this regard, “[t]he court’s role—and the offering party’s responsibility—is ‘to make certain that an expert, whether basing testimony on 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.’”\[39\]

Where the expert fails to properly apply the methodology, such as failing to factor in expenses that are normally incurred in generating income when calculating lost profits damages, exclusion is appropriate.\[40\]

In addition, experts have been excluded where he or she used his or her own version of an existing methodology where that version:

1. has not been tested,
2. has not been subjected to peer review,
3. has no controlling standards,
4. has no demonstrable showing of support within the scientific community, and
5. was produced solely for the subject litigation.\[41\]

The courts also seek consistency. In one case in which the expert’s “deposition testimony and expert report [were] at war with each other,” the court was left “guessing as to [the] basis of his calculations or its potential error rate.”\[42\] As a consequence, the court excluded the expert because it had “no idea which of [the] assumptions truly formed the basis of his calculations.”\[43\]

In a different case, the expert was excluded because he had previously testified in another case that the method he applied in the current case was “unreliable, inadvisable, or unsupportable.”\[44\] Certainly different methods may be appropriate in the context of financial damages calculations due to the availability or unavailability of data or because of the specific type of business. However, if an expert has testified in a different case that the method that he or she is currently using is unreliable, inadvisable, or unsupportable, he or she must be ready to explain why it is appropriate in the particular case.

**Is the Expert’s Testimony Relevant?**

Regarding the relevance of expert testimony, courts have held that “expert testimony must be relevant not only in the sense that all evidence must be relevant, but also in the incremental sense that the expert’s proposed testimony, if admitted, likely would help the trier of fact to understand or determine a fact in issue.”\[45\]
The discussion below addresses a few of the circumstances in which courts of various jurisdictions have found that the opinion of a financial damages expert, even if reliable, would not assist the trier of fact and, as such, is irrelevant as defined by Daubert, its progeny and the Federal Rules of Evidence.

Can the Expert Trace the Damages to the Alleged Breach?

One common area in which motions to exclude financial experts are successful involves expert damages calculations that do not explain or account for the claims or defenses. If an expert does not trace the damages to the claim or defense, then a court may well exclude the expert's testimony.

It is well settled that “the damages . . . must be reasonably certain and directly traceable to the breach, not remote or the result of other intervening causes.” Consequently, courts may exclude expert testimony that insufficiently ties damages to a defendant's alleged conduct on the grounds that it has not provided evidence of causation.

For example, in a case in which the expert assumed that the defendant was liable for all counts alleged by the plaintiff and did not take into account other factors that may have contributed to profit losses, the court excluded the expert's testimony.

Similarly, it is important to examine whether an expert has ruled out other possible causes for losses—that is, intervening causes. Failing to consider other industry or economic factors that could have affected a plaintiff's performance during the damage period can lead a court to exclusion of an expert's testimony.

For example, in a 2005 Delaware case, the court decided that the plaintiff's expert's testimony was insufficient because the expert failed to consider whether the plaintiff's loss of sales could have been caused by (1) increased competition, (2) the bankruptcy of a primary supplier, and (3) a major construction project near the entrance to its store.

In a pre-Daubert example, the Seventh Circuit case determined that “expert testimony may be excluded where the expert failed to consider other causes for the lost profits such as market saturation and reduced prices of alternate products.”

Another relevance issue involves something as simple as calculating damages using the wrong date. For example, when an expert calculated reasonable royalties from the date that the lawsuit was filed, he was excluded. This was because applicable law required that the calculation use the date of the first infringement.

It is, therefore, important that an attorney discuss relevant dates, whether they are dates in a contract or statutory dates, with the expert to be sure that the time period for which the expert calculates damages is correct.

In addition, while it should go without saying, it is important that any contract term that implicates how damages are calculated be discussed with the expert—or at least identified—to ensure that such terms are considered by the expert as part of rendering his or her opinion.

Is the Opinion Within Economically Realistic?

In an area that often combines both reliability and relevance, courts are also on guard for opinions about the extent of losses that exceed the bounds of reason. A Florida case that addressed this very issue noted that lost profits damages are not equivalent to “the purchase of a winning lottery ticket . . . any lost profits award must be limited to the actual damages sustained.”

In other words, the expert cannot use “accounting alchemy” to transform a “humble enterprise” into “an engine of commerce.” Of course the reverse is also true and a defendant's expert should not take “an engine of commerce” and turn it into a “humble enterprise.”

In a similar vein to the Florida case, an expert took a very short period of success for a new business and calculated damages based on a forecast that exceeded even the business plan of that new entity. The court found that “while estimates and speculation are sometimes necessary in lost profits cases, extrapolations that are so removed from economic reality are not an appropriate opinion upon which to determine damages.”

Finally, where an expert projected lost profits for a 77-year period based upon a single flood, the court found that the period was “exceedingly long.”
THE BASES FOR THE MOTION TO EXCLUDE SEEM THE SAME AS ANOTHER CASE, BUT THE OUTCOME WAS DIFFERENT—WHY?

Based upon the review of numerous motions to exclude experts and relevant cases, it appears that it is not always a simple matter of the court finding an expert’s testimony inadmissible based on a single factor in the expert’s report. Rather, reading “between the lines,” it appears that exclusion is often based on an amalgamation of issues that combine to render the expert irrelevant or unreliable.

This appears to be borne out by some case law. For example, in the First Circuit case U.S. v. Mooney, the defendant argued that the trial court abused its discretion based upon “another trial court’s decision regarding a different expert.”

The First Circuit disagreed, at least in part, because it had no ability to compare the “particular facts and circumstances” of the case cited by the defendant with the facts and circumstances of the defendant’s case.

The Maine District Court, recently cited Mooney as holding “that the district court did not abuse its discretion in admitting opinion testimony by a handwriting expert, but noted that it was not deciding whether another district court would have abused its discretion by excluding similar testimony.”

In other words, similar cases and seemingly similar fact patterns do not always result in similar decisions on the exclusion of experts. As such, the most likely lesson to be learned from these cases is that it is best to cite as many bases as possible for the court to find an expert unreliable or irrelevant. While some bases will obviously be stronger than others, it may be the sum total of issues upon which the court bases an order excluding the expert.

IS IT REALLY EXPERT OPINION?

Although slightly off the Daubert topic, another consideration regarding experts is whether the opinion is truly an expert opinion. Federal Rule of Evidence 702 permits expert testimony only where “scientific, technical, or other specialized knowledge will assist the trier of the fact to understand the evidence or to determine a fact in issue.”

Where the testimony is not based upon scientific, technical, or other specialized knowledge, but is instead the expert’s “lay opinion of the facts of the case,” the opinion is not admissible if it does not help the jury with a fact that it can decide without expert assistance.

In fact, such an opinion is “inadmissible either as a lay opinion under Rule 701 or as an expert opinion under Rule 702 simply because it [is] not helpful . . . to a determination of a fact in issue” nor will it “assist the trier of fact to understand the evidence.”

In the area of financial experts, while certain mathematical calculations may require technical or other specialized knowledge requiring expert opinion, “[s]imple addition and division does not qualify.” Nor does simple addition or division provide any knowledge that will assist the jury in understanding the evidence or a fact in issue.

Moreover, under Federal Rule of Evidence 701, calculations of this nature are not admissible where they are “not rationally based on [the expert’s] ‘perception,’ but rather upon several assumed facts given to him by” a party or a party’s counsel.

In addition, whether the opinion is truly expert opinion may also affect the evidence upon which
the expert is permitted to rely for his or her testimony. Specifically, the facts or data relied upon by an expert in rendering an expert opinion need not be admissible.65

Where however, the opinion is not “expert” opinion, the Rule of Evidence permitting reliance on inadmissible evidence is inapplicable.66 As a result, if an expert is testifying that a column of numbers provided by the client is correctly added, that opinion may not be admissible. This is because the numbers themselves are hearsay. And, once the expert steps out of the role of expert, his or her testimony can no longer rely on inadmissible evidence.

It is important to keep these matters in mind when analyzing an expert’s opinion to be sure that the opposing party is not attempting to use the imprimatur of an expert to create an inference that certain calculations are beyond reproach or as a method to get otherwise inadmissible evidence before the jury.

**DAUBERT, JOINER, KUMHO AND OTHER BASES FOR EXCLUSION ARE NOT JUST ABOUT OPPOSING PARTY’S EXPERT**

An important, though often overlooked, aspect of expert exclusion is that the application of the Daubert principles begins before receipt of the opposing expert’s designation and opinion. For example, one should consider the tenants of Daubert, Joiner, and Kumho during preparation of discovery requests to ensure that information required by one’s experts is made available by the opposing party.

This analysis continues as the expert gathers information and begins to formulate the opinion. Then, when the expert provides the report, it imperative that the attorney review his or her expert’s report with the same critical eye that is applied to an opposing expert. To ignore the Daubert principles until delivery of the opposing expert’s report is to risk exclusion of one’s own expert.

Careful analysis of cases involving the exclusion of financial experts reveals that some of the exclusions might have been prevented through an attorney’s better understanding of the data upon which the expert relied or failed to rely. Many others could have been avoided had the attorney better understood their own expert’s methods and conclusions.

Indeed, while the road to avoiding expert exclusion may start with choosing the right expert, staying on that road requires communication with that expert to ensure he or she has the necessary data.

**BALANCING COSTS WITH NEEDS**

An August 2008 study of the American College of Trial Lawyers Joint Project with the Institute for the Advancement of the American Legal System on Discovery found that “[t]here is a serious concern that the costs and burdens of discovery are driving litigation away from the court system and forcing settlements based on the costs, as opposed to the merits, of cases.”67
The same report found that “[e]xpert witness fees are a significant cost factor driving litigants to settle, ranking just slightly behind trial costs and attorneys fees.”

The cost conundrum is not likely to get better any time soon. The explosion of discovery since the electronic evidence rules went into effect—at the same time that clients have clamored to keep costs down—makes keeping experts informed of all relevant facts an ever-increasing challenge. Cases that used to generate one banker’s box of documents now generate multiple discs of documents: thousands of e-mails, pages upon pages of spreadsheets, inventories, projections, reports, miscellaneous scanned documents, and so forth.

While it may be cliché, the haystack got bigger and the number of them multiplied, but the single pin stayed the same size and shape. This deluge of information requires a careful balance between ensuring that an expert has sufficient evidence to render a credible, admissible opinion and keeping it affordable for the client.

Again, the key is communication so that (1) the attorney understands what the expert needs and (2) the expert has the data he or she needs to accomplish his or her task without risking exclusion.

Other expenses that factor into the expense dilemma are expert fees related to an attorney’s preparation of motions to exclude and oppositions thereto.

First, in order to lay the groundwork for a motion to exclude, experts often assist attorneys as they prepare to take an opposing expert’s deposition.

Second, where the opposing party files a motion to exclude an expert, that expert’s input is almost universally required in preparation of the opposition to that motion.

Third, in many instances it is helpful for an expert to prepare review reports of opposing expert reports. These review reports may be used either for background to prepare a motion to exclude or during trial preparation to prepare for cross examination.

While it can be difficult to ask a client to incur these additional expenses, an expert’s assistance with these tasks can be invaluable and provide a benefit to the prosecution or defense of the case that outweighs the expense.

To avoid difficulties with both the client and the expert, the role of the expert should be discussed and budgets made as early as possible. In addition, the lines of communication need to remain open so that if the expert’s fees and expenses approach the budgetary limitations, decisions can be made or options explored to keep costs in check without risking exclusion.

**DISCOVERY AND EXPERT COMMUNICATION**

Litigators reading this discussion may now be feeling a bit of *agita* due to the potential for opposing counsel to discover the communications that are suggested in this article.

The elixir for this *agita* can be found in recent changes to Federal Rule of Civil Procedure 26 that were intended to ease communication between experts and attorneys. Specifically, the primary aim of the 2010 amendments to Federal Rule of Civil Procedure 26(a)(2) and 26(b)(4) is to protect draft reports and communications between experts and attorneys from discovery.

As noted by the Advisory Committee, the new rules are “designed to protect counsel’s work product and ensure that lawyers may interact with
IS IT ALWAYS NECESSARY TO MOVE TO EXCLUDE?

Like most strategic decisions in the course of litigation, one must carefully weigh the possible rewards against the possible risks before filing a motion to exclude an expert. While the reward of knocking out the opposing lost profits expert is significant, one should assess the risk that the motion may not be successful.

If the judge denies the motion, its filing may not advance the moving party’s case and, more importantly, will highlight the perceived weaknesses in the expert’s opinion. Under that scenario, opposing counsel and the expert will be able to explore ways to bolster the opinion or address the weaknesses in time for trial.

Still, some weaknesses and errors are incapable of repair, because it is simply too late or the error too egregious to credibly respond. If so, filing a motion may be beneficial even if the court is unlikely to grant it. Highlighting such an error could create a favorable settlement environment. This is because the risk of proceeding to trial with a flawed expert opinion is too great.

Moreover, the motion may also provide an opportunity to educate the trial judge on a contested issue that will likely be the subject of objections at trial, so that he or she will be aware of—and have a better understanding of—the issue when it does arise.

These would, therefore, be factors that may support filing a motion even when it is unlikely that the court will exclude the expert.

Conversely, if the issues raised in the motion are of a type that opposing counsel and the expert would be able to find ways to fix and/or counter, the strategic decision might be to forego filing the motion. By giving counsel and the expert notice of weaknesses in the opinion and time to fix them, the moving party will have foreshadowed its potential trial strategy. This could have serious implications for the conduct of the case.

Educating opposing counsel and his or her expert on deficiencies in the opinion that they can counter in time for trial will also diminish the moving party’s ability to “vigorously cross-examine.”

If the expert is able to credibly respond to the challenges that the motion to exclude raises, then the opportunity to neutralize the expert through cross-examination could be lost. Consequently, unless the motion to exclude is extremely strong, it is sometimes better to skip the motion and focus on “vigorous cross-examination” at trial.

CONCLUSION

Taking the time and making the investment to ensure that your expert’s report can withstand the scrutiny of a Daubert (or other) challenge can result in significant savings for your client. This involves taking preventive measures such as checking to make sure that the damages relate to claims, and that the damages have sufficient evidentiary foundation.

Other issues, particularly those relating to the application of peer-accepted methodology and data use, can be more difficult to detect, but you can avoid them nevertheless with proper planning and review.

Your expert can also assist you in the identification of issues in the opposing expert’s report. Although it requires an investment, it may prove to be some of the best spent time on your case.

Notes:

1. This discussion has been modified from an article that appeared in the Spring 2011 edition of the Maine Bar Journal (Vol. 26, No. 2).
3. Id.
such as an unqualified expert or the application of unreliable methodology); In re Young Broadcasting, Inc., 403 B.R. 99, 125 (S.D.N.Y. 2010).  


9. Daubert Challenges to Financial Experts: An 11-year study of trends and outcomes 2000-2010, at p. 4, http://www.pwc.com/us/en/forensic-services/publications/financial-expert-witness-daubert.jhtmlb (“PWC Study”). The PWC Study states that challenges of all experts increased from 253 in 2000 to 879 in 2010. Based upon the methodology used by PWC, it is likely that this figure substantially understates the number of challenges. Specifically, PWC “sought written court opinions issued between January 1, 2000, and December 31, 2009 (i.e., post-Kumho Tire), using the citation search string “526 U.S. 137” (Kumho Tire v. Carmichael).” PWC Study at p. 27. Thus, any opinion that does not cite Kumho or the U.S. Reporter citation is excluded from the search. A February 23, 2011 Westlaw search limited to the First Circuit for cases that contained the word exclude within a sentence of the word expert, but excluding (“but not” on Westlaw) Kumho for the period of January 1, 2000 through December 31, 2009 resulted in 309 documents. In other words, there were 309 cases in the First Circuit alone that do not mention Kumho. While not all of those cases have been reviewed, it suggests that the PWC Study’s results may not tell the whole story. Still, given that Kumho is the case that made clear that Daubert applied to all specialized knowledge, not just scientific knowledge, the impact of Kumho and, therefore, the PWC study, have relevance to the issue of exclusion of financial experts. 


13. The increase in Daubert motions if Hebshie is applied to civil litigation could be necessary to avoid the prospect of legal malpractice suits. Such malpractice actions would probably be difficult to prove because the plaintiff would likely have the burden of proving that the trial judge would have excluded the expert had a motion been filed. Although statistics suggest that motions to exclude are nearing a 50% success rate (either partial or complete exclusion), the courts still hold that exclusion is “the exception rather than the rule.” See In re Scrap Metal Antitrust Litigation, 527 F.3d 517, 530 (6th Cir.). As a consequence, claims based upon the failure to file a motion to exclude will likely face an uphill battle.  


15. Although staffing cases with multiple attorneys can create costs issues and is typically frowned upon by clients, it can be helpful—and even cost efficient—to have an attorney who is well-versed in the econo-speak of financial experts team with an ace products liability attorney. Given the complexity of much of today’s litigation, an attorney who is an expert in products liability and extremely qualified to defend liability in a tort suit, may not be as effective when exploring and explaining the calculation of lost profits caused by that allegedly defective product. Conversely, an attorney who deftly reads a balance sheet, finds errors or omissions in a profit and loss statement and spots incorrect application of the methodology for calculating extra expenses may not be the attorney who can best question the engineering or science of a mechanical failure or a cause and origin expert. Working together, however, they can be a formidable team that increases the likelihood of success for the client.  


20. See, e.g., In re Scrap Metal Antitrust Litigation, 527 F.3d 517 (6th Cir. 2008).  

21. F.R.Evid. 702; see also U.S. v. Jacques, __ F. Supp. 2d __ (D. Mass. 2011) (finding proffered expert unqualified where he had authored three articles loosely related to the field in which he was purportedly an expert, but had conducted no original studies and lacked training in related fields); Samaan v. St. Joseph Hospital, __ F.R.D. __, D. Me. 2011 (excluding “well-qualified physicians” where their expertise was outside of the narrow question of the causative effect of the defendant’s care of plaintiff).

23. See Lamoureaux v. Anazaohealth Corp., 2009 U.S. Dist. LEXIS 37089 (D. Conn. 2009); see also National Envelope Corp. v. American Pad & Paper Co. of Delaware, Inc., 2009 U.S. Dist. Lexis 121308, *23-24 (S.D.N.Y. 2009); Kozak v. Medtronic, Inc., 512 F. Supp. 2d 913 (S.D. Tex. 2007) (excluding testimony of plaintiff with 23 years of experience as orthopedic surgeon who had invented several medical devices, extensive training in biomedical engineering and had studied the market including growth rates and other economic factors because the designation was vague, without specific years, companies, product or advice and no expertise in calculating future damages or royalties and no specialized knowledge to prepare him to make economic calculations of the nature required); LifeWise Master Funding v. Telebank, 364 F.3d 917 (10th Cir. 2004) (excluding plaintiff's CEO because he did not understand the damages model, the ability to “parrot the results of a model” did not mean he was qualified to opine the results and the analysis he used was subject to misuse).


26. Kemp v. Tyson Seafood Group, Inc., 2000 WL 1062105 (D. Minn. 2000); but see Milward v. Acuity Specialty Products, Inc., 639 F.3d 11, 22-23 (1st Cir. 2011) (noting that exclusion is proper where there is too great an analytical gap between existing data and the expert’s conclusion, but finding that the district court exceeded the bounds of discretion where the opinion was based upon “a reliable methodology and substantial evidence” that the expert carefully explained; the analytical gap was of the district court’s creation).


31. K & V Scientific Co., Inc. v. The Ensign-Bickford Co., 2002 WL 31662326, at *8–9 (Conn. Super. Ct. 2002); see also Eaton v. Hancock County, 2010 U.S. Dist. LEXIS 19208 (D. Me. 2010) (barring expert testimony where expert opined that plaintiff would become a master plumber and facts showed that plaintiff had been a plumber’s apprentice for only a short time).


33. See, e.g., DSU Medical Corp. v. JMS Co. Ltd., 471 F.3d 1293, 1309 (Fed. Cir. 2006) (excluding expert testimony because the expert “relied too heavily on hypothesized contracts in hypothesized markets that lacked any sound economic grounding”); Chicago Title Ins. Corp. v. Magnuson, 2004 LEXIS 30743, at *19 (S.D. Ohio 2004).

34. In re Scrap Metal Antitrust Litigation, 527 F.3d at 529.

35. G.T. Laboratories, Inc. v. The Cooper Companies, Inc., 1998 U.S. Dist. LEXIS 15745, at *23 (N.D. Ill. 1998); see also Loeffel Steel Products, Inc. v. Delta Brands, Inc., 387 F. Supp. 2d 794, 802-03 (N.D. Ill. 2003) (excluding expert whose analysis was based upon a definition of economic loss developed by he and a colleague that had not been peer reviewed or tested).


40. Club Car, Inc. v. Club Car (Quebec) Import, Inc., 362 F.3d 775, 780 (11th Cir. 2004) (abrogation on other grounds recognized by Diamond Crystal Brands, Inc. v. Food Movers International, Inc., 593 F.3d 1249 (11th Cir. 2010); see also Amorgianos v. National RR Passenger Corp., 303 F.3d 256, 267-69 (2d Cir. 2002) (upholding exclusion of expert because of expert’s “failure to apply his stated methodology ‘reliably to the facts of the case…”’).

41. Kentucky Speedway, LLC v. NASCAR, 588 F.3d 908, 916 (6th Cir. 2010).


43. Id.


48. See, e.g., Coleman Motor Corp. v. Chrysler Corp., 525 F. 2d 1338 (3rd Cir. 1975) (granting a new trial where expert did not account for lawful competition by defendant in his sales projection, ignored deteriorating character of the neighborhood and ignored that sales were “severely depressed” during the base period).


53. Sostchin, 847 So.2d at 1125.

54. Olympia Equipment Leasing Co. v. Western Union Telegraph Co., 797 F.2d 370, 382 (7th Cir. 1986).


56. U.S. v. Mooney, 315 F.3d 54, 63 (1st Cir. 2002).

57. Mooney, 315 F.3d at 63 (quoting Kumho, 526 U.S. at 158).


60. Id. (internal quotations omitted).

61. Rule 701 permits opinion evidence that does not fall within the scope of Rule 702 only if it is “(a) rationally based on the perception of the witness [and] (b) helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue.…” F.R.Evid. 701.


63. Id.

64. Id. at 576.

65. See F.R.Evid. 703.

66. See Wright & Miller, 29 Fed. Prac. & Proc. Evid. § 6254 (“by restricting lay opinions to those based on the perception of the witness, the implication of Rule 701 is that lay opinion may not be based on hearsay”).


68. Agita: Heartburn, acid indigestion, an upset stomach or, by extension, a general feeling of upset. The word is Italian-American slang derived from the Italian “agitare” meaning “to agitate.” http://medterms.com/.

69. Rule 26 Advisory Committee Notes to 2010 Amendments.


71. One particular concern is that courts interpreting the prior text of the rule broadly construed the word “considered” to include all documents that were reviewed by the expert. See The Comprehensive Guide to Lost Profits Damages for Experts and Attorneys 97-98 (Nancy J. Fannon ed., 2011). Unless the courts narrow the construction of considered, the new rule may not be as limited as the advisory committee intended.

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