

LITIGATION UPDATE

TOP - TEN DAUBERT CHALLENGES TO FINANCIAL EXPERTS

With increasing Daubert challenges seen in the courts, it is ever more important to choose your expert wisely. These Daubert challenges to financial experts offer an instructive look at the risks posed by inadequate experts.



Failure to Perform Due Diligence

The plaintiff's expert in this breach of contract case was excluded for failure to perform due diligence on the business records used in his damage calculations. The plaintiff never identified witnesses to lay a proper foundation for the documents, thus the information in the documents could not be properly vetted. The court found the expert was unable to provide an opinion based on sufficient facts and data. *Auto Industries Supplier Employee Stock Ownership Plan v. Ford Motor Co.*, 09-2126, 2011.

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Testimony Not Considered Relevant

The plaintiff's damages expert provided testimony that was "disconnected from this case's facts." The expert assumed the defendant was liable for all counts alleged by the Plaintiff, ignored other factors that may have contributed to lost profits, and "indiscriminately assessed all losses to the Appellee." The court excluded the expert's testimony because the "evidence was simply 'not sufficiently tied to the facts of the case.'" *PharmaNetics, Inc. v. Aventis Pharmaceuticals, Inc.*, 182 Fed. Appx. 267, 272-73 (4th Cir. 2006).

Blind Application of a Rule of Thumb

The plaintiff's financial expert blindly applied a 25% royalty rate as he believed it was generally accepted. However, the court concluded the 25% rule is not one size fits all, and it requires evidence to prove the relevance of the 25% rate. The court excluded his testimony for failure to support his use of the rate. *Uniloc v. Microsoft*, 2010-1035, 2010-1055, 03-CV-0440, 2011.

Insufficient Input on the Expert Report

The expert report in this patent infringement case was determined to be authored by counsel rather than the expert. It was asserted the expert met with counsel for eight hours to review the report, and made "fairly minor" changes. The court excluded the testimony of the expert, stating "an expert witness who is merely a party's lawyer's avatar contributes nothing useful to the decisional process." *Numatics, Inc v. Balluff, Inc.*, No. 2-13-cv-11049, 2014 WL 7211167.

Venturing Into Legal Territory

The defendant's expert was excluded for incorporating aspects of legal premises in his calculation of damages. He offered opinions on the legal reasoning behind seeking damages, as well as opinions to the nature of the governing contract. These legal assumptions were not only outside his expertise, but also applied incorrectly. *Level 3 Communications, LLC v. Floyd*, 1:09-0082, 2011.

Reliance on Too Little Facts

The defendant's damages expert calculation was based on only two figures: pre-damage value at replacement cost and depreciation. The expert failed to substantiate these numbers with facts. His value was based on merely, a "feeling," which does not fit the reliability factors required for expert admission under Daubert. *James River Ins. Co. v. Rapid Funding, LLC, 07-cv-01146C, 2009*

Failure to Review Discovery

Forensic economists in this wrongful death case were challenged for their dependence on national databases and studies, without consideration of discovery materials available to them. The court found the expert's projections to be "speculative and conjectural, based on unrealistic assumptions," and therefore it was excluded. *Lee v. City of Richmond, 3:12-cv-471, 2014.*

Failure to Apply Generally Accepted Methodologies

The defendant's intellectual property expert was challenged for improperly calculating the reasonable royalty rate. The expert disregarded the facts of the case and failed to determine the necessary features to perform the

calculation. His methodology was not considered generally accepted and his testimony was therefore not considered admissible. *Dynetix Designs Solutions, Inc., v. Synopsys, Inc., C 11-05973 PSG, 2013.*

Lack of Qualifications or Knowledge

The expert in this bankruptcy matter who was a CPA and CFE, was challenged for lack of industry and knowledge "about the content and methodology" of a study used in his report. The court found that his 17 years "experience qualified as an expert on issue of insolvency". The expert was given time to cure his lack of knowledge on the study prior to his testimony. *Texans CUSO ins. Group, LLC, 09-35981-BJH-11, 2010.*

Testimony/Report Not Submitted Timely

The plaintiff in this damages case, proffered a fact witness as an expert at trial without proper designation filed by the expert witness disclosure deadline. The court held the witness' testimony fell within the scope of Rule 702. The witness was excluded, however, because the plaintiff did not disclose the witness before trial, denying the defendant the ability to challenge the opinion, obtain rebuttal experts, or take additional depositions. *BRC Rubber & Plastics v. Continental Carbon Co., 1:11-cv-190, 201*

FEDERAL RULES OF EVIDENCE 702

A WITNESS WHO IS QUALIFIED AS AN EXPERT BY KNOWLEDGE, SKILL, EXPERIENCE, TRAINING, OR EDUCATION MAY TESTIFY IN THE FORM OF AN OPINION OR OTHERWISE IF:

- THE EXPERT'S SCIENTIFIC, TECHNICAL, OR OTHER SPECIALIZED KNOWLEDGE WILL HELP THE TRIER OF FACT TO UNDERSTAND THE EVIDENCE OR TO DETERMINE A FACT IN ISSUE;

- THE TESTIMONY IS BASED ON SUFFICIENT FACTS OR DATA;

- THE TESTIMONY IS THE PRODUCT OF RELIABLE PRINCIPLES AND METHODS; AND

- THE EXPERT HAS RELIABLY APPLIED THE PRINCIPLES AND METHODS TO THE FACTS OF THE CASE.

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