



**The Increasing Challenges  
of *Daubert***

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# *Daubert* Challenges

Discussion Overview –

Introduction – *Daubert* overview and impact on financial experts

Recent cases involving *Daubert* challenges of financial experts

# *Daubert* Challenges

Discussion overview –

Recent trends in *Daubert* filings

Best practices for avoiding or  
contesting a *Daubert* challenge

# *Daubert* Challenges

Federal Rules of Evidence govern the admission of facts in federal courts

States usually model their rules after the federal rules

Rule 702 – if scientific, technical or other specialized knowledge will help the trier-of-fact make sense of the evidence or understand the facts, then an expert may testify

# *Daubert* Challenges

1993 Supreme Court case *Daubert v. Merrell Dow Pharmaceuticals, Inc.* confirmed judges' roles as "gatekeepers" against "junk science"

*Daubert* addresses the reliability and relevance of the expert's analyses

15 years later, some believe judges do not know how to apply *Daubert*!

# *Daubert* Challenges

The Supreme Court, in *Kuhmo Tire Company Ltd, et al. v. Patrick Carmichael et al.* expanded the *Daubert* gate keeping function from “scientific” expert testimony to cover all expert testimony

The trier-of-fact must decide if the factual basis, data, principles, methods or their application has a reasonable basis in the knowledge and experience of the relevant discipline

# *Daubert Challenges*

- 1. Has the theory or technique been scientifically tested?*
- 2. Has it been reviewed by other practitioners? Has the methodology been published in professional journals having peer review standards?*

# *Daubert Challenges*

- 3. What is its known rate of error? Has the expert's profession established standards to control its use?*
- 4. Is it generally accepted by members of the relevant scientific community?*

# *Daubert* Challenges

A *Daubert* motion is a motion, raised before or during a trial, to exclude an expert from presenting evidence that is not qualified based upon the factors listed above (the evaluation process)

This motion is used to attempt to exclude the testimony of one having insufficient expertise or using questionable methods

# *Daubert* Challenges

The “bottom line” – Is the evidence both “relevant” and “reliable”?

Relevance refers to whether or not the evidence “fits” the facts of the case

Reliability infers that the expert derived his or her conclusions from the scientific method (the 4 – factor evaluation method)

# *Daubert* Challenges

Recent studies indicate that the number of *Daubert* challenges targeted at financial experts are increasing (over 50% based on federal judiciary and PWC studies)

The PWC study shows, in the Ninth Circuit, 68% of financial expert witness testimony challenged under *Daubert* between 2000 and 2006 was excluded in whole or in part

# *Daubert* Challenges

Although challenges to economists, accountants, and statisticians comprised 50% of all challenges to financial expert witnesses, all three were more likely to survive a *Daubert* challenge than other financial expert witnesses

Lack of reliability has consistently been the top reason for exclusion of financial experts – cited in three out of four exclusions of financial expert testimony during 2000 – 2006

# *Daubert* Challenges

The 2000-2006 PWC Financial Expert Witness *Daubert* Challenge Study examined nearly 3,000 federal and state court opinions, and noted other trends:

Of the 519 challenges, 30% were completely excluded, 18% were partially excluded and 49% were admitted

# *Daubert* Challenges

Lack of reliability has been the leading cause of a financial expert's exclusion, followed by lack of relevance and lack of qualifications.

Methodological flaws caused by the misuse of accepted financial/economic methods are a frequent cause of financial expert exclusion.

# *Daubert* Challenges

Sophia Gatowski's 2001 study of judiciary understanding of *Daubert* found that judges do not understand how to apply it, and another study by Stephanie Domitrovich, an Erie, PA judge, found that of the judges she polled, less than 10% understood the factors of *Daubert*

However, Martin Calhoun, Esq., of Spriggs and Hollingsworth (an 80 member D.C. law firm), in a recent article in *Legal Backgrounder*, has a different opinion

# *Daubert* Challenges

As far as recent cases go, I have experience with 2 in my financial expert career, and I'll "tee them up" for you to discuss your experience, if any, with *Daubert* challenges

But first...let's review some recent cases –

Rosvold, MicroStrategy, Cal. Fed. Bank, Utah Med. Prods., Inc., State Contr. & Eng'g Corp., Atmel Corp., Micro Chem, and Maxwell

# *Daubert* Challenges

Baldwin v Bader – involves valuation of a personal guarantee. Neither expert (both adequately experienced and qualified) had ever valued a personal guarantee, although the defendant’s expert used “...an approach that assessed the risks associated with the benefits purporting to flow from the asset, assigning figures or numbers to those risks.”

# *Daubert* Challenges

Baldwin v Bader – As support for the expert’s opinion in the *Daubert* hearing, *Cost of Capital: Application and Examples* (Pratt and Grabowski) was used. One issue was whether an excerpt from *Cost of Capital* was admissible at a hearing if the expert didn’t rely on it. The judge allowed it in. However, in spite of that, the expert’s testimony was ruled inadmissible because it was deemed unreliable.

# *Daubert* Challenges

Costello cases –

Using a statistical method in a damage analysis. “I am not a statistician...”

Using a sales forecast “...that is totally unrelated to the facts of this case.”

WHEW! Survived, but scary experiences!

# *Daubert* Challenges

Robert Reilly (Tom Decosimo's opponent in a recent case) has developed a list of guidelines for experts presenting damage and valuation testimony –

Know and apply the relevant professional standards.

Know the relevant professional literature.

Know the relevant professional organizations.

# *Daubert* Challenges

Use generally accepted analytical methods.

Use multiple analytical methods.

Synthesize the conclusions of the multiple analytical methods.

Disclose all significant analytical assumptions and variables.

Subject the analysis to peer review.

# *Daubert* Challenges

Test the analysis and conclusions for reasonableness

Finally, consider adding this section to your engagement letters –

“You acknowledge that the exclusion of any opinion or testimony in this matter could be damaging to our goodwill and reputation. Therefore, you agree to notify us immediately of any challenge to the admissibility of our opinions or the qualifications of our professionals. Further, you agree that we may, at our sole discretion, hire outside legal counsel of our choosing in order to represent us and to defend our opinions and professionals. You agree to bear any and all costs of this outside legal defense and to promptly provide any requested funds to us for the initial retention and periodic billings of outside legal consultant.”

# *Daubert* Challenges

In Conclusion –

Expect the increasing challenges of *Daubert* to continue

Protect your goodwill and reputation by following the practices we've discussed

Maintain the highest quality and ethical standards