

***Daubert* and the Soft Sciences: Can a Forensic Economist Ever Make It Past the Gatekeeper?[†]**

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I. INTRODUCTION

With the creation of the *Daubert*¹ factors by the Supreme Court in 1993, and the application of those factors expanded in *Kumho Tire Co. v. Carmichael*,² the burden of establishing the admissibility of expert testimony under Federal Rule of Evidence (“FRE”) 702 has been heightened, and the court’s role as gatekeeper reaffirmed. However, this gatekeeper role becomes very difficult when analyzing the qualifications and methodologies used by economic experts whose expertise lies in the often murky world of the “soft sciences.”

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¹ *Daubert v. Merrill Dow Pharm., Inc.*, 509 U.S. 579 (1993).

² 526 U.S. 137 (1999).



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II. GENERAL TEST REGARDING ECONOMIC EXPERTS

Application of the *Daubert* test to many scientific issues has been resolved. Applying the test to expert economic testimony, however, remains enigmatic. With competing schools of economic thought, a variety of “accepted” methods of calculation, and a multitude of fluctuating variables, it can be difficult for judges and lawyers alike to determine when expert economic testimony meets the required *Daubert* standards. When dealing with such testimony, the two central factors generally examined by the courts include the qualifications of the expert and the general acceptance of the theory offered by the expert.³ Reliability of the data and the reasonableness of the assumptions often are used to inform the decision regarding acceptance as well.⁴

Using these factors, courts generally have had a much easier time dealing with the testimony of witnesses such as CPAs and others who are required to be licensed or accredited in their fields. In determining whether to allow expert testimony by an individual in this class, the courts often demonstrate greater comfort with the issues of qualifications and methodology because the profession has promulgated its own standards, such as those developed by the Financial Accounting Standards Board (“FASB”), which develops general purpose

³ Sofia Adrogui & Alan Ratliff, *Kicking the Tires after Kumho: The Bottom Line on Admitting Financial Expert Testimony*, 37 Hous. L. Rev. 431 (2000).

⁴ *Id.*



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accounting practices and the licensing exam. “[A]n accountant is an expert in explaining the financial condition of a corporation, and a certified public accountant is a professional who has been examined and licensed to practice in much the same manner as doctors or lawyers.”⁵ Not only does this pronouncement address the issue of qualifications, but courts also are willing to view this certification process and uniformity in principles as a significant safeguard against applying unreliable or unaccepted assumptions to the opinion.

When dealing with experts in the field of economics and similar areas, the decision of admissibility becomes more difficult. Without the assistance of internal regulations that govern a particular field, the judge must examine carefully the expert testimony.

III. THREE CRITICAL FACTORS FOR MEASURING ADMISSIBILITY OF ECONOMIC EXPERT TESTIMONY

A. *Qualifications*

With respect to an expert’s qualifications, the judge must now review the witness’s education, knowledge, and experience. The proper foundation for a technical expert demonstrates “firsthand familiarity” with the subject of the testimony.⁶ To qualify as an expert under FRE

⁵ National-Standard Co. v. Dep’t of Treasury, 180 N.W.2d 764, 768 (Mich 1970).

⁶ Berry v. City of Detroit, 25 F.3d 1342, 1350 (6th Cir. 1994).

702, a witness must first establish his or her expertise by reference to “knowledge, skill, experience, training, or education.”⁷

This requirement “does not mean that a witness is an expert simply because he claims to be.”⁸ The court must examine “not the qualifications of a witness in the abstract, but whether those qualifications provide a foundation for a witness to answer a specific question.”⁹ Thus, the trial court must first determine “whether the expert’s training and qualifications relate to the subject matter of his proposed testimony.”¹⁰ In other words, “[t]he trial court ha[s] to decide whether this particular expert ha[s] sufficient specialized knowledge to assist the jurors in deciding the particular issues in the case.”¹¹

B. *Acceptance of the Theory*

Regarding acceptance of the expert’s theory, the task is even more difficult because often there is no consensus within the field on any given theory. Thus, the court often will need to review not only the underlying model used by the expert and the rationale supporting the expert’s choice of that model, but also the reasonableness of applying the model to the facts of the specific case.¹²

C. *Implications of the Joiner Decision*

As happened in *General Electric Co. v. Joiner*,¹³ the court may find that there exists such an analytical gap between the accepted theory and the substance of the expert’s opinion that the opinion is tantamount to speculation and should not be admitted. While it is true that the *Daubert* Court acknowledged that the “focus, of course, must be solely on principles and methodology, not on the conclusions that they generate,”¹⁴ trial courts still must decide whether the expert’s conclusions are *reasonable*. As the Court in *Joiner* noted:

[C]onclusions 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

⁷ FED. R. EVID. 702.

⁸ *Pride v. BIC Corp.*, 218 F.3d 566, 577 (6th Cir. 2000) (citation omitted).

⁹ *Berry*, 25 F.3d at 1351.

¹⁰ *Smelser v. Norfolk Southern Ry. Co.*, 105 F.3d 299, 303 (6th Cir. 1997).

¹¹ *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 157 (1999) (internal citation omitted).

¹² *Adrogui & Ratliff*, *supra* note 3, at 500.

¹³ 522 U.S. 136 (1997).

¹⁴ *Daubert*, 509 U.S. at 595.

which 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.¹⁵

IV. CHALLENGING ECONOMIC EXPERT TESTIMONY

When challenging the testimony of an economic expert, opposing counsel might enter a motion to strike at the pretrial conference, using information garnered during the deposition. Although there is no case law or statute requiring the challenge to be made at this time,¹⁶ the pretrial conference often is considered the best time to do so because it clearly preserves the record for possible appeal.¹⁷ In making such a motion, there are three specific items that must be established. First, the movant must identify the specific portion of the testimony subject to challenge. Second, the grounds for the objection must be stated in sufficient detail to allow for a response. Finally, the motion must articulate all relief sought by the movant. Although the party may request a hearing on this motion, the dicta in *Kumho* made it clear that such a hearing is not required.¹⁸ The question, then, is how to use these factors in persuading the trial judge to grant the motion to strike the expert's testimony.

A. *Lack of Qualifications*

In objecting on the grounds that the expert lacks the qualifications necessary to testify regarding the matter at hand, the focus must be on the education, knowledge, and experience of the expert. When considering the expert's qualifications, it is important to examine precisely those opinions that the opponent expects to offer. For example, in *Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc.*,¹⁹ the expert was qualified to calculate the value of the plaintiff's business. The court ruled, however, that those qualifications did not extend to the witness's ability to assess what caused the demise of the business or even how much of the loss of business value was attributable to the defendant's conduct.²⁰ The expert must possess the requisite qualifications for each observation and inference presented in his or her expert opinion. It is not the case that once the expert is qualified at a base level the expert will be permitted to testify to any related issues.

¹⁵ *Joiner*, 522 U.S. at 146.

¹⁶ *United States v. Nichols*, 169 F.3d 1255 (10th Cir. 1999).

¹⁷ *Dodge v. Cotter Corp.*, 328 F.3d 1212 (10th Cir. 2003).

¹⁸ *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

¹⁹ 314 F.3d 48 (2d Cir. 2002).

²⁰ *Id.*

B. *General Acceptance of Theory*

When seeking to demonstrate that the expert's theory is not generally accepted, attention should center on the unreliability of the methods used by the expert. Disproving the reliability of the expert's chosen method offers an effective strategy for excluding the testimony. In *Daubert*, the Supreme Court ruled that the methods are reliable only if they produce reasonably consistent results.²¹ A "party asserting a claim has the burden of proving his damages with reasonable certainty."²² Thus, damages that are based on speculation or conjecture cannot be recovered.²³ It is important to note that damages will not be considered speculative simply because they cannot be ascertained with mathematical precision. In other words, damages are not rendered uncertain because they cannot be calculated exactly. "It is well settled that the evidentiary basis for a court's ruling on damages need only be sufficient to enable a court or jury to make a fair and reasonable approximation."²⁴ Applying that general concept to expert testimony, when the methods used by the expert do not provide reliable and consistent estimates of damages, then it is probable that they will be excluded as unreasonable.

C. *Conclusions (Joiner)*

The important task of gatekeeping was affirmed by the Supreme Court in *Joiner* when that Court ruled that the trial judge may find that there is simply too great a gap between the evidence and the opinion offered.²⁵ A significant example of such a finding is the Eighth Circuit's decision in *Concord Boat Corp. v. Brunswick Corp.*,²⁶ in which numerous boat builders had commenced an antitrust action against an engine manufacturer. The boat builders' economic expert was required to construct a hypothetical market in order to determine damages. The district court allowed the expert's opinions and the jury returned a verdict in favor of the manufacturers. The court of appeals reversed, however, and vacated the damage award because:

Dr. Hall used the Cournot model to construct a hypothetical market which was not grounded in the economic reality of the stern drive engine market, for it ignored inconvenient evidence. The basis for his model was a theoretical situation in which some other manufacturer's engine would be viewed as equal in quality to Brunswick's.

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²¹ *Daubert*, 509 U.S. at 590.

²² *S.C. Gray, Inc. v. Ford Motor Co.*, 286 N.W.2d 34 (Mich. Ct. App. 1979).

²³ *Berrios v. Miles, Inc.*, 574 N.W.2d 677 (Mich. Ct. App. 1997).

²⁴ *Seaboard Lumber Co. v. United States*, 308 F.3d 1283, 1302 (Fed. Cir. 2002) (internal citation omitted).

²⁵ *Joiner*, 522 U.S. at 146.

²⁶ 207 F.3d 1039 (8th Cir. 2000).

Dr. Hall's expert opinion should not have been admitted because it did not incorporate all aspects of the economic reality of the stern drive engine market and because it did not separate lawful from unlawful conduct. Because of the deficiencies in the foundation of the opinion, the expert's resulting conclusions were "mere speculation."²⁷

Additionally, the ruling of the Eighth Circuit in *Group Health Plan, Inc. v. Philip Morris USA, Inc.*²⁸ should be noted. The court there had affirmed the district court's exclusion of opinion testimony from the plaintiff's causation and damages expert. The lawsuit was brought by a group of Minnesota non-profit HMOs to recover certain healthcare costs for their members that resulted from tobacco use. The plaintiff's causation expert was an economics professor at MIT and a treating physician at Massachusetts General Hospital. Notwithstanding the expert's credentials, the Eighth Circuit determined that "we are . . . unable to conclude that the district court committed a clear error of judgment in excluding the testimony, for predictions like the estimated nine percent annual decline in initiation rates strike us as inspired guesses at best."²⁹ (The analysis in question had been based on significant assumptions regarding market share and also ignored significant events that affected the initiation rates). As the court observed:

[w]e believe that the disconnect between Dr. Harris's work and the HMOs' theory of liability weighs heavily against the admission of his testimony under *Daubert* because it undermines the existence of a "legal nexus between the injury and *the defendants' wrongful conduct*" and thus does not properly "fit" the HMOs' case. Based on all the appropriate considerations, we conclude that the district court did not abuse its discretion in excluding Dr. Harris's testimony.³⁰

V.

RECENT TRENDS AND CASE LAW

Noted below are several case summaries taken from recent decisions in which courts have analyzed the admissibility of economic expert testimony. One obvious observation concerns the importance of laying an exhaustive foundation for the proposed testimony of the economic expert that is mindful of the methodologies used. Furthermore, if counsel is

²⁷ *Id.* at 1056-57.

²⁸ 344 F.3d 753 (8th Cir. 2003).

²⁹ *Id.* at 760.

³⁰ *Id.* at 761 (citations omitted).

opposing economic expert testimony, it is critical to register timely and appropriate objections. Given the “abuse of discretion” standard that governs appellate review, the importance of these tasks cannot be over-emphasized. The battle over such experts is won at the trial court level and, if a litigant has the formidable task of winning a *Daubert* challenge on appeal, that battle is lost without proper and timely objections at the trial court level.

Another observation worth noting is that courts increasingly will allow an expert’s opinion, subject to attack on reliability and methodology during cross-examination, when factual disputes exist regarding the basis for an expert’s opinion and choice of methodology. In other words, when credibility is the most apparent issue, courts tend to leave the issue to a jury rather than rule at the outset by invoking the gatekeeper function.

A. *Cooper v. Traveler’s Indemnity Co. of Illinois*³¹

The insured in *Cooper* brought an action alleging insurer breach of the implied covenant of good faith and fair dealing when its insurer investigated and denied insurance coverage following closure of the insured’s restaurant by health officials because the restaurant’s well water tested positive for e-coli contamination. Affirming the trial court determination to exclude the expert’s opinion regarding lost profits, the Court of Appeals for the Ninth Circuit held that the opinion of plaintiff’s economic expert was inadmissible since it was based solely on data provided by plaintiff. Thus, the trial court did not abuse its discretion by denying the plaintiff an opportunity to reopen the direct testimony of its economic expert as to lost profits.

Initially, plaintiff had argued that the trial court improperly excluded its economics expert from offering an opinion on lost profits. The appellate court found no abuse of discretion, however, since plaintiff’s expert himself had testified during voir dire that in his usual professional practice he would verify client-provided data before relying on it to reach a conclusion. Yet, as concerned the instant case, the expert had failed to follow his own procedure. Thus, the court concluded that “his testimony was not based on the type of data on which experts in economics would reasonably rely.”³²

Furthermore, plaintiff contended that after the trial court excluded its expert’s testimony, the court erred in refusing him the opportunity to retake the stand and offer testimony regarding lost profits. The appellate court also rejected this contention, reasoning that “[the plaintiff] had the opportunity to provide testimony on the topic in written narrative form before the trial commenced, but elected not to do so. The district court thus did not abuse its discretion when it denied [plaintiff] the opportunity to reopen his directed testimony.”³³

³¹ No. 03-15551, 2004 U.S. App. LEXIS 21324 (9th Cir. Oct. 13, 2004).

³² *Id.* at *8.

³³ *Id.*

B. *LifeWise Master Funding v. Telebank*³⁴

Plaintiffs in *LifeWise* appealed the trial court's determination that they had failed to produce an admissible damages model attributable to lost profits. Specifically, the Court of Appeals for the Tenth Circuit was asked to determine whether or not the district court erred in rejecting the fourth and final damages model proffered by the plaintiff, and in declining to consider plaintiff's claim for "reliance damages."³⁵

The district court had determined that the damages model proffered by plaintiff: (1) was unduly speculative because it was not sufficiently based on plaintiff's past; (2) failed to meet the requirements of *Daubert* and FRE 702 because plaintiff's expert was not qualified on the methodology employed in the statement, the methodology was not reliable, the expert's testimony did not "fit" the case, and the statement was not helpful to a jury; and (3) was inadmissible under FRE 403 because any probative value was outweighed by the danger of misleading and confusing the jury, for which reason it was unnecessarily time consuming.

Plaintiff's expert, Mr. Livingston, was also its chief executive officer who had created a damages model based on projected loans, gross revenue, and total costs, which were all combined into a formula resulting in estimated damages. That expert, however, admitted that he had never used such methods to create the damages model and admitted that he was not an expert with "regression analysis." Mr. Livingston had taken a single undergraduate class in economics, but had taken no accounting or finance courses, had no training in damage analysis, and had never testified as a damages expert or prepared an expert damages report. Furthermore, he had never taught a course or lectured on damages, and had never been published in the field.

The Tenth Circuit offered that Mr. Livingston was not an expert in damage analysis or in any of the techniques used to create the damages model. Thus, the district court did not abuse its discretion in ruling that he could not testify as an expert regarding such a complex subject matter given his "utter lack of any familiarity, knowledge, or experience with damages analysis"³⁶

The appellate court also affirmed the district court's ruling that the plaintiff's damages model failed to meet the *Daubert* standards. The district court premised its exclusion on findings that (1) Mr. Livingston was not qualified as an expert in most of the methodology used in the model; (2) the methodology was misleading, unreliable and unsupported by use in any other comparable setting; (3) the methodology did not "fit" the present case (since three months' rolling averages were not appropriate for making proper predictions beyond

³⁴ 374 F.3d 917 (10th Cir. 2004).

³⁵ *Id.* at 933.

³⁶ *Id.* at 928.

one period, and S-curves were not appropriate for a young company that claimed to have a vast untapped market in need of its unique loan product); and (4) the model was not helpful to a jury but would tend to confuse, mislead, and waste time. The Tenth Circuit remarked that plaintiff did not challenge any of the district court's bases for excluding the damages model except by arguing that the district court improperly weighed the evidence. Under such circumstances, the district court did not abuse its discretion.

Finally, while the district court did not analyze Mr. Livingston's testimony as lay opinion testimony under FRE 701, the plaintiff argued that Mr. Livingston's position as plaintiff's CEO gave him the necessary personal knowledge to testify regarding its profits. In rejecting the plaintiff's argument, the court stated:

When the subject matter of proffered testimony constitutes "scientific, technical or other specialized knowledge," the witness must be qualified as an expert under Rule 702. Rule 701 applies only "[i]f the witness is not testifying as an expert." Fed. R. Evid. 701. Indeed, the rule expressly prohibits the admission of testimony as lay witness opinion if it is based on "specialized knowledge". *Id.* In other words, "a person may testify as a lay witness only if his opinions or inferences do not require any specialized knowledge and could be reached by any ordinary person." *Doddy v Oxy USA, Inc.*, 101 F.3d 448, 460 (5th Cir. 1996).

.....

In the present case, although Mr. Livingston was the president of the company, he does not have personal knowledge of the factors used by LifeWise's fourth damages model to estimate its lost profits. On the other hand, the district court acknowledged that Mr. Livingston could have testified solely as a businessperson based on his personal knowledge and his experience as president of the company. He could have given a straightforward opinion as to lost profits using conventional methods based on LifeWise's actual operating history. Indeed, the Court essentially invited LifeWise to have him so testify. (Citations omitted).

.....

Instead of limiting Mr. Livingston's testimony to his experience as a business person and president of the company, however, LifeWise had him "enter into the realm of rolling averages, S-curves, and compound growth rates that appear to be an amalgam of logic, hope, and economic jargon." (Citations omitted). But Mr. Livingston himself admitted that he "can't recall any prior instances" where he used such methods at LifeWise. (Citations omitted). Such subject matters fail to be rationally based on Mr. Livingston's perception, and therefore cannot be admissible as lay opinion testimony.³⁷

³⁷ *Id.* at 929-30.

C. *Ashy v. Trotter*³⁸

In the *Ashy* case, the court of appeals upheld the trial court's decision not to admit the defendant's expert on the projection of future slot revenues. The trial court held the purported expert had no education or training in the financial field. He had a theology degree, worked as a minister and an IBM manager for twenty years, and also worked for a software company that developed racetrack computer systems. Additionally, he had never been tendered or testified as an expert.

D. *Craftsmen Limousine, Inc. v. Ford Motor Co.*³⁹

In this case, two limousine manufacturers ("Craftsmen") sued several other limousine manufacturers and Ford for antitrust violations under section 1 of the Sherman Antitrust Act. Craftsmen alleged that the defendants conspired to prevent it from advertising in the limousine industry's two trade publications and from attending trade shows.

On remand from the Eighth Circuit,⁴⁰ and after discovery, the defendant Ford had filed multiple motions, one of which was a motion to exclude the testimony of Craftsmen's new economic expert, John Scoggins. Ford contended that Scoggins did not perform the necessary analysis of competition in a relevant market to support a "rule-of-reason" opinion.⁴¹ For that reason, Ford argued that Scoggins' opinion could not aid the jury to understand the evidence or to determine a fact in issue, as required for admissibility under FRE 702.

The court agreed and granted Ford's motion:

The *Daubert* analysis in this case is informed by the Eighth Circuit's decision. There is no per se illegal restraint. *Craftsmen*, 363 F.3d at 772-76. Craftsmen's expert must "formulate a new opinion using the proper standard under a rule of reason analysis." *Id.* at 777 n.16. The question before this Court is whether Scoggins's testimony will "sufficiently aid the jury in determining whether there was an 'unreasonable' restraint on trade in violation of the Sherman Act." *See id.* at 777. "To determine the legality of a restraint of trade under the rule of reason, one must focus on the detrimental effects to competition . . ." *Flegel*, 4 F.3d at 688 (emphasis added). However, it appears that Scoggins assumes "anticompetitive behavior," and focuses only on Craftsmen's *individual* economic harm. . . . Therefore, his opinion testimony cannot assist a jury in determining harm to competition.

Scoggins's multiple regression tests only whether Defendants' "anticompetitive behavior" caused harm to Craftsmen. Although Scoggins uses an independent variable called "antitrust indicator" to represent alleged anticompetitive conduct, he

³⁸ 888 So. 2d. 344 (La. Ct. App. 2004).

³⁹ No. 98-3454, 2005 WL 3263288 (W.D. Mo. Dec. 1, 2005).

⁴⁰ 363 F.3d 761 (8th Cir. 2004).

⁴¹ *Id.* at 773.

never analyzes the alleged restraints—advertising and trade show restrictions—to determine if they were anticompetitive. In fact, Scoggins flatly and repeatedly denies the need for such analysis. During deposition, he testifies: “I’m an economist, and on the face of it, an advertising ban is anticompetitive, so there was no need to do any kind of statistical analysis on that issue.” . . . Scoggins confirms that answer at the Daubert hearing. Hearing at 101-02. Scoggins cannot opine that there was “anticompetitive behavior” without having analyzed whether the alleged restraints had an anticompetitive effect. Thus, his opinion that Defendants engaged in “anti-competitive behavior” is based only on his speculation that the restraints at issue were “anticompetitive,” which “is not competent proof and contributes nothing to a legally sufficient evidentiary basis. *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1057 (8th Cir.)”⁴²

E. *Galaxy Computer Services, Inc. v. Baker*⁴³

This case involved the admissibility of the plaintiff’s economic expert and a report by the defendant’s economic expert. The defendant had argued that the testimony of plaintiff’s expert should not be admitted with regard to his opinion of the company’s fair market value and the damages resulting from its mismanagement. In support of its argument, the defendant cited the expert’s reliance on a Strawman budget, which the defendant claimed was grossly inflated to attract buyers. Also, defendant claimed that the due diligence report relied on by the expert was compiled by consultants who were not qualified and had worked on the report for only two and one-half days. Plaintiff countered that the Strawman budget was based on proper historic data but that the expert “made certain adjustments in his report to allow for possible infirmities in the data he was using.”⁴⁴

Under the circumstances, the federal district court ruled the expert’s testimony admissible. It held that even though the drafters of the due diligence report were only present at the company for two and one-half days, they had worked on their report for six months. The court also held that they were qualified to present the report as evidenced by their subsequent promotion to CEO and CFO of the consulting firm. Furthermore, beyond the Strawman budget and due diligence report, the expert had relied on profit statements, balance sheets, audited and unaudited financial statements, pipeline reports, and tax returns. At most, the defendants had raised factual issues which could not be resolved by the trial court. It noted instead that, “[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.”⁴⁵

⁴² 2005 WL 3263288 at *7 (internal citations omitted).

⁴³ 325 B.R. 544 (E.D. Va. 2005).

⁴⁴ *Id.* at 560 (internal quotations omitted).

⁴⁵ *Id.* at 561 (quoting *Daubert*, 509 U.S. at 595).

As for the defendant's economic expert, whose testimony was proffered to address the point at which plaintiff became insolvent and whether plaintiff would have survived with sufficient additional capital, such testimony was determined to be inadmissible. Regarding this issue, the plaintiff had argued that the economic expert: "(1) did not apply generally accepted or recognized methodology . . . ; (2) relied on incomplete data; (3) failed to make adjustments in his analyses which he admit[ted] should have been performed; and (4) was unaware of facts that could have affected his analyses and conclusions."⁴⁶

The court reasoned that the expert prepared his report over an eight-day period, which constituted insufficient time to analyze all of the financial documents. Additionally, defendant's expert had failed to incorporate significant assets in determining the plaintiff's value. In particular, he did not evaluate the plaintiff as a "going concern profit making business"⁴⁷ and he did not include the value of goodwill. He also used financial statements without knowing whether they were reliable or correct. The court therefore found his testimony inadmissible.

F. *Loeffel Steel Products, Inc. v. Delta Brands, Inc.*⁴⁸

This dispute arose when the defendant sold "the Line" (a steel machine) to the plaintiff, which did not meet the contractual performance specifications. Claiming breach of contract, breach of express and implied warranties, and fraud, the plaintiff then sued for damages. Likewise focusing on expert testimony, the federal district court held that the methodology underlying the analysis performed by the defendant's financial expert was flawed because: (1) he relied on a legal definition that had no weight in the law and (2) he relied on information that he received from defendant's employees without any sound support. The court also held that the lost profits analysis was not reliable because the expert could not demonstrate that the companies cited for comparative analysis were truly comparable to the plaintiff.

First, the court addressed the definition of economic loss that Mr. Dohmeyer (the defendant's expert) said "he and his boss [devised] many years ago."⁴⁹ The court found that definition flawed because it did not follow contract law or the UCC definitions for economic loss, which provided for diminution of value.⁵⁰ The court went on to hold that because the expert used this definition to calculate damages, it was impermissible as a matter of law.

Next, the court addressed Mr. Dohmeyer's reliance on employee assumptions that the deficiencies in the line could be alleviated by adding two additional workers and increasing the number of shifts. Having accepted these assumptions, neither Mr. Dohmeyer nor his assistants checked to ensure that the proposed solution was credible or valid. The expert

⁴⁶ *Id.*

⁴⁷ *Id.* at 562.

⁴⁸ 387 F. Supp. 2d 794 (N.D. Ill. 2005).

⁴⁹ *Id.* at 803.

⁵⁰ *Id.*

simply calculated the cost of adding two new workers, with no substantiated support upon which to base that theory. When questioned about this issue in his deposition, Mr. Dohmeyer could not say whether the additional labor would solve the problems.

The court opined that such neglect violated FRE 703, which would allow hearsay to be admitted for the limited purpose of informing the jury of the basis for the expert's opinion.⁵¹ The court went on to confirm that an expert could rely on hearsay in formulating his or her opinion — provided the requirements of FRE 702 were met. The economic loss testimony would still require exclusion because the employees from whom Mr. Dohmeyer received the information were never designated as experts in the case.

Lastly, the court held that the lost profits analysis was not reliable because Mr. Dohmeyer chose eight publicly traded companies that were similar to the plaintiff only in type (domestic steel service centers), positing that the “yardstick analysis” would show the plaintiff's damages. However, Mr. Dohmeyer chose the companies without confirming that they were sufficiently similar to substantiate a “yardstick analysis” approach. Under Illinois law, the companies that were selected had to be truly comparable. When asked about these companies, Mr. Dohmeyer could not testify to their geographic locations, product markets, customer base, quality of service, or any other relevant factor that would demonstrate comparability under the yardstick approach.⁵² The court ultimately dismissed Mr. Dohmeyer's relevance by saying, “an expert, who, like Mr. Dohmeyer, supplies nothing but the bottom line supplies nothing of value to the judicial process.”⁵³

G. *Talmage v. Harris*⁵⁴

The court in *Talmage* noted that the defendant's motion to exclude the testimony of plaintiff's economic expert was not based on his expert opinion, but on the underlying assumptions that the expert used to form his opinion. The defendant also had challenged the methods used by the expert to calculate damages, noting in particular that the expert had used book value instead of fair market value to determine the value of plaintiff's business and assumed the ratio of labor costs to materials. The court ruled that the defendant's attacks on the expert's assumptions and computations did have merit, but they spoke to credibility rather than admissibility — an issue better left to the jury.

H. *Cole v. General Motors Corporation*⁵⁵

The controversy in *Cole* was generated by a motion to certify a class action, filed by the plaintiff. The defendant countered, arguing that the plaintiff's damage model was flawed; specifically, the defendant claimed that plaintiff's expert was not an automobile industry

⁵¹ *Id.* at 808.

⁵² *Id.* at 813.

⁵³ *Id.* at 818.

⁵⁴ 354 F. Supp. 2d. 860 (W.D. Wis. 2005).

⁵⁵ No. Civ.A. 01-123, 2005 WL 1861960 (W.D. La. Aug. 4, 2005).

expert, and that the damage model was unreliable because it failed to meet the standards articulated in *Daubert*. The expert's proposed model sought to determine how much the vehicles in question had depreciated from the time of acquisition to the time of repair. From that information, the model purported to determine the fractional amount of the depreciation represented by the air bag system. The damage figure derived from this application. In response, the court found that the damage model proposed by plaintiff was adequate and that the requirements of FRE 702 had been met with regard to the plaintiff's expert, who had masters degrees in economics and chemical engineering and over twenty years experience as an economist specializing in economic damages. The court concluded that the proposed expert's testimony and damage model were "based on sufficient facts and data to address the issue[s] in [the] case; the damage model present[ed] reliable principles and methods; and those methods and principles [had] been reliably applied to the facts of [the] case."⁵⁶

The court then offered that the damage model at issue need not produce an exact measure prior to certification of the class:

It should be noted that the economic expert testimony employed in this case is significantly different from the purely scientific testimony addressed in *Daubert* or the engineering testimony at issue in *Kuhmo*. In any event, this Court finds the requirements of Rule 702, as well as those addressed by the United States Supreme Court in both *Daubert* and *Kuhmo*, have been met.⁵⁷

Given the court's analysis above, it is possible to conclude that the requirements of FRE 702 apply to experts such as economists in a less rigid fashion than they apply to "purely scientific" experts.

However, it is also possible to conclude that the court's relaxed stance resulted from the posture of the case at the moment the issue was decided, i.e., the case was only at the class certification stage. In that regard, the court pointedly observed:

Finally, the Court will not specifically address all of the individual aspects of the damage model which the defendants argue are flawed because it is not necessary to do so at this juncture. As noted, the damage model presents a reliable basis for the calculation of damages. Through the normal course of this case, the parties will have the opportunity to argue their positions with respect to individual damage model issues. What is important at this time is that a model to calculate damages can exist and that damages can be calculated on a class wide basis without being predominated by individual issues. These findings are sufficient for the certification of a class and for meeting the maintainability requirements of Rule 23(b)(3). The

⁵⁶ *Id.* at *5.

⁵⁷ *Id.*

fact that the damage model may be improved should not preclude the certification of a class in this matter because it has been determined that a uniform damage model can be applied to the class.⁵⁸

I. *Legier & Materne v. Great Plains Software, Inc.*⁵⁹

With regard to the challenge lodged by defendant against plaintiff's economic expert, the court in *Legier & Materne* ruled that the expert's methodology was reliable. Plaintiff's economist had relied upon financial projections created by a third party, but then examined the reliability of the third party's projections by independently reviewing the past financial records of the company. Furthermore, the third party's admission that his assumptions regarding the contract renewal and the structure of the projects were not correct did not sufficiently sway the court. The court indicated that the jury could consider the third party's subsequent new testimony in light of the expert's current report. Thus, the court denied the defendant's *Daubert* challenge as to plaintiff's economic expert.

With regard to plaintiff's *Daubert* challenge against defendant's economic expert (a CPA whose report focused on alleged damages sustained by the plaintiff and whether plaintiff's Information Technology division was damaged financially as a result of the change in their commercial relationship with defendant), the court noted that a substantial measure of the plaintiff's *Daubert* motion was directed towards the expert's credibility. Again, however, that matter would be left to the trier of fact:

A large majority of the fact issues and legal issues in this case are unresolved which makes it more likely that the parties will rely upon their own version of the facts and interpretation of the contract which necessarily influences the expert reports before the Court. Accordingly, as stated above, a district court must defer to "the jury's role as the proper arbitrator of disputes between conflicting opinions. As a general rule, questions relating to the basis and sources of an expert's opinion rather than its admissibility should be left for the jury's consideration."⁶⁰

Thus, because credibility apparently was the principal issue, the court deferred to the jury's determination as to the methodology supporting the expert's conclusions.

J. *Summers v. UAL Corporation*⁶¹

According to the court, the plaintiff's expert in *Summers* was not qualified to provide testimony regarding whether the defendant's bankruptcy was imminent. The court reasoned

⁵⁸ *Id.*

⁵⁹ No. Civ.A. 03-0278, 2005 WL 2037346 (E.D. La. Aug. 3, 2005).

⁶⁰ *Id.* at *4 (quotation omitted).

⁶¹ No. 03-1537, 2005 WL 2648670 (N.D. Ill. Oct. 12, 2005).

that even though the expert had prior experience working as a fiduciary, had managed bank and trustee activities, and had served as trustee for employee benefit plans, the plaintiff failed to show that the expert possessed the requisite knowledge, skill, experience, training, or education to opine in areas of bankruptcy, insolvency, economics and the securities industry. Additionally, the expert did not conduct an analysis of the defendant's books nor did he demonstrate that he utilized a methodology commonly employed by experts in analyzing bankruptcy situations. As such, he offered nothing to assist the trier of fact; his conclusion amounted to no more than a guess, and his testimony was rendered inadmissible.

K. *Polymer Dynamics, Inc. v. Bayer Corporation*⁶²

The defendant Bayer Corporation objected to the admissibility of Polymer Dynamics' economic expert, who was scheduled to testify about damages and lost profits caused by the former's defective insole machine. The defendant had argued that plaintiff's expert was not qualified to testify because: (1) he had no expertise in the industry, (2) he used an unreliable methodology, and (3) his opinion did not fit the facts of the case.

The court countered, however, finding that the plaintiff's expert was qualified because he had a Ph.D. in economics, had conducted extensive research in financial economics, and had served as an expert in other litigation. "The fact that a witness is not a specialist in a given specialty area does not disqualify the person from testifying as an expert in that field generally."⁶³

The court found the methodology reliable as well. The expert used the "as is" approach (what happened as a result of the alleged problems with the defendant's equipment) and the "but for" approach (what would have happened if the problems had not occurred). The expert claimed that both methods were widely used for economic damages and the defendant did not argue otherwise. Alternatively, the defendant had argued that the assumptions and sources of the expert's information were unreliable. But the court disagreed, noting that: "the assumption that a business will expand is reasonable [and] [t]he likelihood and extent of the expansion are issues that should be argued to the jury."⁶⁴

Finally, the defendant argued that the expert's testimony did not fit the facts of the case because the testimony did not consider all causes of the lost profits. The court responded that the particular issue did not prevent admissibility and that the defendant was welcome to cross-examine the expert on those aspects of the issue.

⁶² No. Civ.A 99-4040, 2005 WL 1041197 (E.D. Pa. May 4, 2005).

⁶³ *Id.* at *2.

⁶⁴ *Id.*

L. *Technology Licensing Corporation v. Gennum Corporation*⁶⁵

This case concerned conflicting claims of invalidity and infringement of two United States patents. The defendant had filed a motion in limine to exclude the testimony of plaintiff's damages expert, claiming that the expert's measure of damages did not accord with Federal Circuit law.

During his deposition, plaintiff's economic expert conceded that the methodology he advanced in the case "(1) [had] not been tested; (2) [had] not been subjected to peer review and publication; and (3) [had] not gained acceptance as a method for patent damages calculation."⁶⁶ While acknowledging Federal Circuit precedent regarding reasonable royalty calculation, the plaintiff's expert claimed that, in his view, such an award would not adequately compensate plaintiff for defendant's infringement, as required by statutory patent law. Therefore, in addition to calculating a reasonable royalty rate which would accommodate the plaintiff and defendant, the expert indicated that a multiplier should be applied to fully compensate the plaintiff.

During his deposition, plaintiff's expert also "conceded that his conclusion that plaintiff would have been able to license one-half of one percent of defendant's customers was 'purely judgmental' on his part. He further conceded that he had not done any analysis, investigation or study of which two or fewer of [the defendant's] customers [the plaintiff] would have been able to license . . . [He] also acknowledged that [the plaintiff] was unaware of the identity of [the defendant's] customers, or the existence of any judicial decisions which support [the plaintiff's] use of a multiplier in calculating reasonable royalty damages."⁶⁷ The plaintiff's expert admitted that this was the first case in which he had advanced his new theory that a multiplier should be used. He also granted that his theory was "novel," but argued that it was a permissible extension of the Federal Circuit's analysis in previous cases and should, therefore, be presented to the jury for determination.

The court ruled that while plaintiff's expert could testify as to his calculations and opinions regarding the appropriate "royalty rate" which might have been negotiated between the parties, the expert's additional analysis and methodology with regard to damages over and above the royalty rate were not admissible:

The Federal Circuit instructs that application of an additional amount, over and above a royalty rate, must be based on realistic, appropriate factors, such as royalties actually received by the patentee and the patentee's relationship with the infringer. Such an additional amount may not be based on hypothetical situations which are unrealistic or on conditions which do not exist in the marketplace, such

⁶⁵ No. 3:01-CV-4204-RS, 2004 WL 1274391 (N.D. Cal. Mar. 26, 2004).

⁶⁶ *Id.* at *2.

⁶⁷ *Id.* at *5.

as those posited by Feakins. Feakins' application of a multiplier, which is comprised of two separate figures as noted above, renders his methodology improper. Feakins' justification for his use of a multiplier is based on the faulty factual premise that TLC would have been able to license its technology to at least two manufacturers which utilize Gennum's allegedly infringing chips had Gennum not prevented the realization of such negotiations. With this scenario in mind, Feakins attempts to create a methodology which supports his theory. However, that theory, and the methodology used to implement it, fails to comport with applicable Federal Circuit law which nowhere sanctions the use of a multiplier as Feakins employs to determine adequate compensation for infringement. Such an enhancement to the reasonable royalty calculation is simply untethered by legal or factual support.⁶⁸

M. *Acker v. Burlington Northern & Santa Fe Railway Co.*⁶⁹

The plaintiff sued the defendant railway for economic damages sustained as a result of the railway's negligence in leaving cars on the train tracks, which caused a dam effect during heavy rain, flooding the plaintiff's manufacturing plant. The plaintiff presented the testimony of two damages experts to testify regarding the economic impact of the flooding. Mr. Metcalf was to testify as to "lost business value" and Mr. Towle was to testify regarding actual damages and lost profits from October 4, 1998 through December 31, 2001.⁷⁰

The court excluded Mr. Metcalf's testimony, largely upon his own admission that he lacked the expertise to testify regarding lost profits. The court found that Mr. Towle's testimony, on the other hand, was relevant, reliable and generally based on accepted techniques.

The defendant had argued that Mr. Towle's figures were not reliable because he did not distinguish between repair, replacement and cleanup costs. It also argued that Mr. Towle's lost profit calculation was not reasonably certain because he relied on the CEO's statements. The court determined that such testimony was reliable, however, because it could not understand how failing to distinguish hard expenses from lost profits made the testimony unreliable. The court did not oppose designating December 31st as a "key date" for the calculations because there was actual financial data up to that time, which arguably made Mr. Towle's figures more accurate. The court also held that it was acceptable for Mr. Towle to rely on the president's representation that the company lost three clients, although the court did not articulate its reasoning. Mr. Towle had indicated that he used the plaintiff's ten-year growth rate and historical trends to calculate how much the plaintiff should have expected to grow, absent the flooding.⁷¹

⁶⁸ *Id.* at *9 (citations omitted).

⁶⁹ 347 F. Supp. 2d. 1025 (D. Kan. 2004).

⁷⁰ *Id.* at 1030.

⁷¹ *Id.* at 1031.

The defendant next argued that the expert testimony of the plaintiff was irrelevant because a business could only recover under one measure of damages. The court adjudged this issue moot, however, since it had already found that Mr. Metcalf's testimony was not admissible.

Finally, the defendant claimed that Mr. Towle's testimony was "subject to a high error rate and [was] not based on generally accepted techniques."⁷² Additionally, the defendant challenged the projected revenues and sales as having no connection to historical sales because of a five percent discount used in the calculation and Mr. Towle's failure to employ the insurance industry's claim adjustment procedures when calculating damages. The court countered that Mr. Towle had adequately substantiated his reasons for using a five percent discount (i.e., outside economic factors). On the other hand, the defendant never offered any evidence to show why use of the insurance industry claim adjustment procedure was mandatory; the court instead was satisfied that Mr. Towle's testimony was admissible.

N. *Engineered Products Co. v. Donaldson Co.*⁷³

The defendant Donaldson Company argued that plaintiff's expert testimony regarding lost profits should be inadmissible because it was unreliable and lacked any sound economic proof since the expert did not allow for the law of demand in his lost profits calculation. The defendant also argued that the expert was not qualified to testify because he was an accountant and not an economist, which meant he could not provide the necessary econometric analysis. Additionally, defendant urged that there was "ever changing analysis" in five of the expert reports, which proved their unreliability.⁷⁴

Plaintiff countered that because the witness was the national head of the Deloitte & Touche Intellectual Asset Management Practice and regional head of the Intellectual Property Dispute Consulting Practice, holding an MBA in finance, an undergraduate degree in Business, and over twenty years of experience in calculating lost profits damages, he was qualified as an expert. His opinions were arguably reliable as well because the expert "was able to conduct a customer-by-customer market analysis, rather than a broad generalized assessment, [which] properly consider[ed] the law of demand in a unique market" and established "a more than adequate factual and methodological basis" for the opinions.⁷⁵

The court determined that the expert's reasoning and methodology were both valid and could be applied to the facts of the case. The court conceded that the expert's opinion was somewhat fluid and had evolved throughout his reports (including adjustments to facts and methodology), but reserved the issue as one affecting credibility for the jury. The court

⁷² *Id.* at 1032.

⁷³ 313 F. Supp. 2d. 951 (N.D. Iowa 2004).

⁷⁴ *Id.* at 1008.

⁷⁵ *Id.* at 1009.

also noted that the testimony was relevant because it would “provide information beyond the common knowledge of the trier of fact regarding the workings of the market . . . for air filter restriction indicator devices.”⁷⁶

O. *U.S. Information Systems, Inc. v. International Brotherhood of Electrical Workers*⁷⁷

The court in *U.S. Information Systems* entertained a *Daubert* challenge regarding plaintiff’s economic expert, whose testimony was offered to prove anticompetitive conduct and the damages resulting from such conduct. Specifically, the plaintiff alleged that the defendant held a monopoly on telecommunication installation service bids because the vast majority of such bids were awarded to contractors who were members of the defendant union more than any other — even when a lower bid was offered.

The defendant had posed several objections to the expert’s testimony. First, it argued that the expert’s opinion was unscientific because he used no econometric techniques to reach his conclusions on liability. Defendant also alleged that plaintiff’s expert used only arithmetic to show that the number of project bids awarded by defendants to union workers were higher than the other adversarial bids.

The plaintiff countered that it had conducted a statistical analysis of bid prices and bid leveling to test market power. In doing so, one hundred discovery requests were sent to nonparty owners and consultants yielding bid-leveling documents related to seventy-five separate projects spanning the years from 1996-2002. The court responded by allowing the expert’s analysis, noting that “Dr. Dunbar’s analysis [was] not limited to the calculation of bid differentials, but also included the inferences an economist would draw from the facts . . . concerning the nature of the market.”⁷⁸ Additionally, the court reasoned that if the defendant thought Dr. Dunbar (plaintiff’s expert) made inappropriate inferences from the data, that question could be contested by the defense expert and through cross-examination.⁷⁹

The defendant also argued that Dr. Dunbar based his results on flawed market share analyses because he did not use the Jacoby/Elzinga Theory, which was a standard economic theory used by the defendant’s experts. In point of fact, however, Dr. Dunbar had acknowledged the study and demonstrated how the study supported his conclusions. Again, any contrary conclusion could be addressed by cross-examination.

The defendants next objected to the data sample used by Dr. Dunbar, arguing that the sample was biased since it was selected only from those projects associated with the complaint and involved only sixty to ninety telecommunication installation jobs out of

⁷⁶ *Id.* at 1011.

⁷⁷ 313 F. Supp. 2d. 213 (S.D.N.Y. 2004).

⁷⁸ *Id.* at 229.

⁷⁹ *Id.*

thousands. The court responded that the sample size would be considered representative so long as it was not selected in a biased manner. That being said, the plaintiff could not demonstrate an unbiased data set because the projects that were reported in a second round of subpoenas were those in which the plaintiff and other union workers were “unfairly kept out of the bidding process or wrongfully denied the award.”⁸⁰ The court also remarked that Dr. Dunbar had not performed any analysis that might rebut the apparent bias by comparing the price differentials from the first round of subpoenas which were more representative than the second. The court reasoned that, “if the price differential between the two groups was substantially the same, then an argument could be made that the selection process had no impact on the fairness of the sample. But no such sensitivity testing was conducted.”⁸¹ Therefore, the results were not reliable since they were based on the biased sample.⁸²

Equally significant, the court determined that an expert need not address evidence that is contrary to his or her conclusions. Although it is permissible for an expert to rely on deposition testimony to provide background information that aids the development of final conclusions, an expert need not eliminate all of the alternative explanations in order to guarantee a reliable opinion.

Responding to a final objection challenging Dr. Dunbar’s report for containing legal conclusions rather than expert testimony, the court noted the fine-line distinction between the two:

Dr. Dunbar would not be permitted to state that the defendants did or did not engage in anticompetitive conduct. He could, however, point to factors that would tend to show anticompetitive conduct in a market. He could then indicate whether he believed those factors existed here, and what the economic significance of those factors would be. He could also explain how certain conduct could affect a market through the use of hypothetical statements. Recognizing that the ultimate determination of what did or did not happen in this case is to be left to the finder of fact, Dr. Dunbar could hypothesize that if certain conduct did occur, economists would expect the market to react in a particular way. This is different from reaching the ultimate conclusion about whether a conspiracy existed or anticompetitive conduct actually occurred.⁸³

⁸⁰ *Id.* at 233.

⁸¹ *Id.* at 235.

⁸² *Id.*

⁸³ *Id.* at 240-41.

The court held that because there were flaws in Dr. Dunbar's selection of a data sample, his report did not meet the *Daubert* standard. Additionally, the court precluded any testimony on issues relating to liability or causation insofar as they were derived from the original biased data sample.

P. *USGen New England, Inc. v. Town of Rockingham*⁸⁴

In this final case, the court dealt with an appeal from an order allowing the testimony of plaintiff's expert as to the valuation of a hydroelectric plant for property tax purposes. The town's valuation experts (Dr. Silkman and Mr. Biewald) determined a value of \$100,419,000 and \$76,505,700 respectively. Appellant's expert (Todd Filsinger), on the other hand, determined the value to be \$32,706,401. All of the experts agreed on use of the income capitalization approach as the best methodology to prove the plant's value, the period that the income should be measured (twenty years), and the capitalization rate. The price was determined by using a formula in which the net income was divided by the capitalization rate.

The disagreement resulted from the different net incomes that were provided by each expert. At the center of the controversy was the amount determined by Dr. Silkman, one of the town's valuation experts. The court found that Dr. Silkman was qualified because he had a Ph.D. in economics and was president of a company that brokered energy supply contracts in the New England power market.

The defendant had argued that it was inappropriate for Dr. Silkman to base a twenty-year income projection for future electrical power prices on a single year of income data from Natsource, a brokerage firm that specialized in bilateral contracts for the purchase and sale of powers to be delivered in the future. Furthermore, the Natsource data was allegedly unreliable because it did not show trading volumes and liquidity of the market.

The court disagreed with this analysis, however, electing to follow the lower court's reasoning that Natsource was validated by the utility commission's reliance on its information in assigning electricity prices. All experts agreed that the "electrical energy prices would follow the course of natural gas prices, because new plants would generate electricity from natural gas and set the 2001 market prices, but disagreed about the future price of natural gas."⁸⁵ At the time of valuation (April 1, 2001), there existed a trend showing that natural gas prices had increased substantially. Thus, Dr. Silkman had reasoned that the price for future contracts also would reflect such an increase. To the extent that USGen disagreed with Dr. Silkman's opinions, arguing that prices had spiked and would fall dramatically in the future, their objections were judged to concern the weight of the testimony and not its admissibility.

⁸⁴ 862 A.2d 269 (Vt. 2004).

⁸⁵ *Id.* at 280.

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