

Daubert Challenges to Economic Experts

BY WILLIAM R. SAMPSON,
DAVID A. RAMEDEN,
AND MATTHEW J. WILTANGER

You have hired a well-known accountant, David NoDamages, to counter plaintiff's economic expert in a breach of contract and interference with business expectancy lawsuit. Plaintiff's damage claims are familiar—lost profits, lost business opportunities, and diminution in value. In response, your expert has developed a model (an imposing set of spreadsheets and footnotes) that exposes the claims for the fluff that they are. His own view of plaintiff's damages is low—very low. Your client is elated! Until David's report, a simple "splitting of the difference" between your damage estimate and your opponent's would have been a fine verdict. But now your expectations are a lot higher.

The plaintiff's deposition of David NoDamages was a little rough, however. He was not as conversant as you need him to be about data sources and assumptions, to say nothing about the details of the model. The model, of course, was actually prepared by his assistant, a person who will not be testifying. Characteristic of David, he was also a little feisty with plaintiff's counsel. But you've worked with David before, and you are confident he will be more forthcoming and knowledgeable at trial.

Then you receive plaintiff's "Motion *In Limine* to Exclude the Report and Trial Testimony of David NoDamages." He can't be serious! David has testified many times before, often for you. He is a Certified Public Accountant, Certified Valuation Analyst, and a member of both the National Association of Forensic Economics and

the American Academy of Economic and Financial Experts. Who better to calculate economic damages in a commercial case?

There is also a "Motion for a *Daubert* Hearing." *Daubert*? Everyone knows that that landmark decision applies only to the admissibility of novel scientific evidence. The world of accounting and damage estimation, you chuckle to yourself, is neither novel nor scientific! You will use these demonstrably "frivolous" motions to explain to your client's general counsel why the cost of commercial litigation is so high.

APPLICATION OF DAUBERT TO EXPERT ECONOMIC TESTIMONY

Challenges to the admissibility of expert economic testimony are increasing in federal courts, and with some success. The arguments follow *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), which confirmed the trial judge's role as a "gatekeeper" in regard to the admissibility of expert testimony. The decision established that expert testimony will be subject to a two-pronged analysis based on: (1) *reliability*—principally, whether the expert employed sound methodology or followed acceptable protocols; and (2) *relevance*—primarily whether the opinion "fits" the facts of the case and will be helpful to the jury.

Other than, perhaps, the decision in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), no recent Supreme Court decision has had as much far-reaching effect on commercial litigation as *Daubert*. Its most immediate impact was in product liability and medical malpractice cases, which bristle with expert opinions on causation. Commercial litigation, too, can involve expert testimony concerning damages and, sometimes, liability issues. Today, virtually no discussion of expert testimony, economic or otherwise, is complete without some consideration of *Daubert*.

This article will briefly discuss the federal courts' application of *Daubert* to expert economic testimony and present some of the lessons learned from successful (and unsuccessful) challenges to the admissibility of expert economic testimony.

• *Daubert's* basic framework

Daubert held that Rule 702 of the Federal Rules of Evidence, not the "general acceptance" test of *Frye v. United States*, 293 F. 1013, 1014 (D.C.Cir. 1923), governs the admissibility of novel scientific testimony. 509 U.S. at 588-89. The Court held that to fulfill its gatekeeper role, the trial court must be satisfied that expert scientific testimony will do two things: (1) encompass



William R. Sampson is a partner, and David A. Rameden and Matthew J. Wiltanger are associates, in the Overland Park, Kansas office of the law firm of Shook, Hardy & Bacon L.L.P. Their practices focus on business tort and product liability litigation. Bill Sampson was President of the Kansas Association of Defense Counsel in 1989-90, served the Defense Research Institute as Kansas State Representative, and is currently on DRI's national Board of Directors. Both Dave Rameden and Matt Wiltanger are members of DRI and KADC.

“scientific knowledge,” and (2) assist the trier of fact. *Id.* at 592. “This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.” *Id.* at 592-93.

The Supreme Court determined that the “scientific knowledge” prong of this analysis spoke to “evidentiary reliability” while the second part, that which might “assist the trier of fact,” “goes primarily to relevance.” *Id.* at 590-91. The Court also made several non-exhaustive “general observations.” In determining whether proposed expert testimony satisfied the elements of reliability and relevance, the trial court should consider a theory or technique’s testability, its error rate, whether it adhered to controlling standards, its general acceptance, and whether it had been subjected to peer review. *Id.* at 593-94.

Readers are encouraged to study Kathleen Strickland’s article, “Admissibility of Scientific Evidence Under *Daubert*,” found in the May 1998 issue of *For The Defense*. Useful sources for mounting (or defending against) a *Daubert* challenge to economic experts include Robert L. Dunn’s treatise, *Recovery of Damages for Lost Profits*; Gerald D. Martin’s treatise, *Determining Economic Damages*; the “Reference Guide on Estimation of Economic Damages Awards,” in the Federal Judicial Center’s *Reference Manual on Scientific Evidence*; and the *Journal of Forensic Economics*, a periodical.

• Confusion over *Daubert*’s reach

Because of the context under which *Daubert* was decided (a product liability action alleging that Bendectin caused birth defects), some commentators and courts initially limited *Daubert* to novel scientific testimony. Support for this restrictive reading is found in the Court’s statement that “the subject of an expert’s testimony must be ‘scientific... knowledge.’” 509 U.S. at 589-90. Some read this passage to mean that *Daubert*’s analytical framework applies only to “scientific”—as opposed to technical or specialized—expert testimony.

For some lower courts, therefore, the threshold issue was whether the expert testimony was “scientific.” If these courts found the expert to be offering non-scientific testimony, they struggled with which analysis to apply. See *Robert Billet Promotions, Inc. v. IMI Cornelius, Inc.*, 1998 Westlaw 151806 (E.D.Pa.), discussed *infra*. In other courts, if an expert was found to be testifying based solely on “experience and training,” without regard to methodology or technique, *Daubert* became inapplicable. See, e.g., *Compton v. Subaru of America, Inc.*, 82 F.3d 1513 (10th Cir.), *cert. denied*, 117 S.Ct. 611 (1996).

The Supreme Court’s “general observations” in *Daubert* have created other uncertainty about what it is to “apply *Daubert*.” To some, applying *Daubert* means to conduct a thorough review of the reliability of the expert’s methodology using the non-exhaustive indicia—testability, relevance, using a flexible standard of reliability that varies with the field or proposed methodology.

Because so many federal courts have been willing to apply *Daubert* to economic testimony, this article deals with how they have done so and not with whether they should. The Supreme Court will have an opportunity to clarify the metes and bounds of *Daubert* when it decides *Kumho Tire Co. v. Carmichael*, No. 97-1709, probably in the Spring of 1999. In *Carmichael*, the federal appellate court reversed the exclusion of the testimony of an expert who, re-

lying solely on a visual inspection of a tire, explained why it failed. 131 F.3d 1433 (11th Cir. error rate, adherence to controlling standards, general acceptance, peer review, etc. To others, following *Daubert* simply means to filter all experts through the twin screens of reliability and 1997), *cert. granted*, 118 S.Ct. 2339 (1998). For an in-depth discussion that anticipates the Supreme Court’s decision, see Andrews & Hawthorne, “Is *Daubert* Limited to Scientific Testimony?,” February 1999 *For The Defense* 4.

• Courts applying *Daubert* to economic testimony

Some federal courts have barely paused to address whether or how *Daubert* should be applied to expert economic testimony. In *Frymire-Brinati v. KPMG Peat Marwick*, 2 F.3d 183 (7th Cir. 1993), the appellate court ordered a new trial, in part because plaintiff’s economic expert did not meet the reliability and relevance requirements of *Daubert*. When a defendant moved to exclude proposed economic testimony regarding lost profits in *Newport Ltd. v. Sears, Roebuck & Co.*, 1995 Westlaw 328158 (E.D.La.), the district court conducted a thorough *Daubert* analysis. While it found the expert’s use of multiple regression analysis to determine lost profits to be reliable, the court expressed concerns about some of the expert’s underlying assumptions. *Id.* at *2-3. And it stated that the expert would *not* be permitted to testify at trial until plaintiff “establish[ed] sufficient evidence” underlying these assumptions. *Id.* at *4; cf. *Koch v. Koch Industries, Inc.*, 2 F.Supp.2d 1385, 1407-08 (D.Kan. 1998) (applying *Daubert*’s reliability factors and denying motion *in limine* because the method of valuation was reliable, testimony was relevant, and noting that criticisms of certain assumptions only went to the weight, not admissibility, of the evidence).

Other courts have squarely confronted the question of whether any *Daubert* analysis is required for economic testimony—and have answered “yes.” In *Liu v. Korean Air Lines Co.*, 1993 Westlaw 478343 (S.D.N.Y.), the court noted that “although *Daubert* concerned the admissibility of expert testimony based on novel scientific theories,” it is applicable in evaluating expert economic testimony. The court in *Ullman-Briggs, Inc. v. Salton/Maxim Housewares, Inc.*, 1996 Westlaw 535083 (N.D.Ill.), finding *Daubert* applicable to business valuations, noted that “while business evaluation may not be one of the traditional ‘sciences,’ it is nevertheless a subject area that employs specific methodologies and publishes peer-reviewed journals.” *Id.* at *3. The defendant in *Ullman-Briggs* had retained a valuation expert well before litigation was contemplated, when it was seeking a buyer for its business. Because the court ultimately found that the expert’s methodology was “that of an interested dealmaker, relying on his ‘sense as a dealmaker,’ and not that of a disinterested, scientific evaluator,” it refused to let him testify. *Id.* at *4. See also, *Garcia v. Columbia Medical Center*, 996 F.Supp. 617, 621 (E.D.Tex. 1998), where the court held that “*Daubert* should therefore be applied when assessing the admissibility of testimony by experts such as economists” (it admitted expert testimony despite challenge to some of the underlying data).

• Courts rejecting or questioning *Daubert*’s application to economic testimony

In *Hawthorne Partners v. AT & T Technologies, Inc.*, 1993 Westlaw 311916 (N.D.Ill.), the court refused to apply the *Daubert* framework to a real estate appraiser who sought to testify about

the value of plaintiff's commercial real estate. "Commercial real estate appraisal is not a branch of social science. Accordingly, in ruling on the admissibility of an appraisal expert's opinions, the court need not apply the same standards of methodological rigor required of social scientific inquiry." *Id.* at *4.

In *Robert Billet Promotions v. IMI Cornelius*, *supra*, the court questioned the applicability of a complete *Daubert* analysis to expert economic testimony, but considered the reliability and relevance of the expert's method only out of an abundance of caution. 1998 Westlaw 151806, at *1, n.1. Though not striking plaintiff's expert's testimony, the court forced him to limit his lost profits testimony to the number of units specified in the contract. *Id.* at *5.

PRACTICAL CONSIDERATIONS IN CHALLENGING ECONOMIC EXPERTS

Forensic economists are in agreement that, after *Daubert*, the standards for admissibility of economic testimony are being raised. Ireland, "The *Daubert* Decision and Forensic Economics," 10 J.Forensic Econ. 121, 122 (1997). "Inept reports that might have been admitted five years ago are less likely to be admitted today." *Id.* at 126.

A review of reported and unreported cases in which the admissibility of expert economic testimony was challenged provides some lessons for the defense practitioner which bear consideration when challenging your opponent's damages expert or defending your own.

• Retain your own expert.

Persuasive economic testimony can have a profound effect on jury awards in commercial litigation that goes to trial. And the presence of a defense expert is becoming critical to efforts to exclude that testimony, as vigorous cross-examination may well be inadequate. One court refused to grant a new trial based on the inadmissibility of testimony from a plaintiff's damages expert—largely because the defendant made a strategic decision not to employ an expert of its own and failed to challenge plaintiff's methodology through the use of opposing expert testimony. See *Bowman v. International Petroleum Corp.*, 1995 Westlaw 461213, at *2 (E.D. Pa.). Arguments of defense counsel that an expert deviated from Generally Accepted Accounting Principles or otherwise utilized a flawed methodology may go unheeded unless supported by an expert from the appropriate field.

• Challenge early and often.

There is no single best method for challenging an expert's opinion testimony. The various approaches include:

- motions to strike reports pursuant to Rule 37 of the Federal Rules of Civil Procedure (if the report is late or the disclosure does not comply with Rule 26(a));
- motions for summary judgment (if the measure of damages calculated by the expert is unrecoverable or if the flaws in the expert opinion render the claim legally insufficient);
- motions *in limine* (if the expert is unqualified or the opinion is unreliable and/or irrelevant);
- objections to admissibility at trial;

- motions for directed verdict; and
- post-trial motions (*e.g.*, *j.n.o.v.*, new trial, remittitur) based on erroneously admitted expert testimony.

Not mutually exclusive, one or several of these methods may be employed to exclude expert testimony.

It is also important to note that success at any one juncture may provide only temporary relief. One court granted a motion

to exclude expert testimony as unreliable because it failed to consider other factors contributing to a stock's decline in value, used an inappropriate market index, and chose the wrong ten-day window in which to measure damages. *In re Executive Telecard, Ltd. Securities Litigation*, 979 F.Supp. 1021 (S.D.N.Y. 1997). The same court then denied defendant's summary judgment motion and permitted the class action plaintiffs a "reasonable time" to either procure a new damages expert or allow the rejected witness to correct the flaws in his report. *Id.* at 1029. On the other hand, the early denial of a motion *in limine* may be reversed later. See *Lithuanian Commerce*

Corp. v. Sara Lee Hosiery, 179 F.R.D. 450, 457 (D.N.J. 1998) (vacating magistrate's ruling that CPA's testimony on lost profit damages was reliable).

• Ask for a *Daubert* hearing.

A *Daubert* hearing is essentially an *in limine* hearing in which the court makes a preliminary ruling on the admissibility of expert testimony. Such hearings are becoming commonplace and should be requested in the pre-trial order. The *Daubert* hearing, which permits the challenged expert to be examined before the court and allows the opposing party to present evidence from other experts (in person or by affidavit) regarding flaws and shortcomings in the methodology, is emerging as a preferred method of challenging an expert's testimony. In *Newport Ltd.*, *supra*, the court was not satisfied, after a two-day *Daubert* hearing, that certain of the underlying assumptions of multiple regression lost profits study were present; it held that the expert would not be permitted to testify at trial unless the proponent demonstrated the viability of the assumptions prior to calling the expert. See also, *De Jager Construction, Inc. v. Schleining*, 938 F.Supp. 446, 449 (W.D.Mich. 1996) (striking CPA expert after *Daubert* hearing).

A *Daubert* hearing is surely not required before a court can exclude expert testimony. *Target Market Publishing, Inc. v. Advo, Inc.*, 136 F.3d 1139, 1143 n.3 (7th Cir. 1998) (rejecting notion that an *in limine* hearing is required before excluding expert testimony); *Stalnaker v. General Motors Corp.*, 972 F.Supp. 335, 336 (D.Md. 1996), *aff'd*, 120 F.3d 262 (4th Cir. 1997) ("no need for a *Daubert* hearing" before excluding testimony or granting defendant summary judgment); but see, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1319 n.10 (9th Cir.) (noting that where opposing party has raised a material dispute regarding admissibility, "the district court must hold an *in limine* hearing (a so-called *Daubert* hearing)"), *cert. denied*, 516 U.S. 869 (1995).

Importantly, it is the proponent of the expert who has the burden of proof on the admissibility of its expert at the hearing. *Otis v. Doctor's Associates, Inc.*, 1998 Westlaw 673595, at *4 (N.D.Ill.).

The Supreme Court's "general observations" in *Daubert* have created other uncertainty about what it is to "apply *Daubert*."

Further, the exclusion of expert testimony will be reversed only if the district court abused its discretion. *General Electric Co. v. Joiner*, 522 U.S. 136, 118 S.Ct. 512, 517 (1997).

- **Challenge expert testimony in motions for summary judgment.**

Motions for summary judgment or judgment as a matter of law may be effective where the plaintiff lacks admissible expert testimony necessary to support an element of its case, including damages. Indeed, “courts have displayed considerable ingenuity in devising ways in which an adequate record can be developed so as to permit a *Daubert* ruling to be made in conjunction with motions for summary judgment.” *Cortes-Irizarry v. Corporacion Insular de Seguros*, 111 F.3d 184, 188 n.3 (1st Cir. 1997).

The Seventh Circuit recently affirmed the dismissal of plaintiff’s breach of contract and breach of fiduciary duty claims where damages could not exceed the jurisdictional minimums—applying *Daubert* to reject plaintiff’s expert report that lost profits exceeded \$1.4 million despite the expert’s “long experience and voluminous credentials.” *Target Market Publishing, Inc., supra*, 136 F.3d at 1143; cf. *Lithuanian Commerce Corp., Ltd. v. Sara Lee Hosiery*, 23 F.Supp.2d 509 (D.N.J. 1998) (granting FRCP Rule 50(b) motion and dismissing all counts because there was insufficient evidence of lost profits/damages after plaintiff’s damages expert was excluded by *in limine* motion).

- **Make or renew objections to admissibility at trial.**

Timely objections are as important to expert economic testimony as to any other evidence. Waiting until defendant’s case-in-chief before moving to strike plaintiff’s economic expert may be fatal. *Albani v. Southern Arizona Anesthesia Services, P.C.*, 1997 Westlaw 718499 (D. Ariz.), is a good illustration. The trial court ruled that defendant’s failure to question plaintiff’s economic expert regarding his qualifications, and its failure to move to strike his testimony until after plaintiff rested—and the witness was no longer available—constituted a waiver. The court noted at least three prior chances to object to the expert: when he was “qualified” by plaintiff on direct, at the close of his direct testimony, and at the close of plaintiff’s case-in-chief. *Id.* at *6. The court had little patience for defendant’s argument that it took several days for it to “sink in” that the testimony lacked a scientific foundation. *Id.* at *5. And, the court admonished defense counsel for not bringing “the issue to the court’s attention at a time when the plaintiffs could have cured any defect in [the expert’s] testimony.” *Id.* at *5.

In *Concord Boat Corp. v. Brunswick Corp.*, 21 F.Supp.2d 923, 928 (E.D.Ark. 1998), defense counsel’s failure to cross-examine plaintiff’s expert about why his damage opinion did not change after the court dismissed several allegations of wrongful conduct—all considered in the expert’s original report—rendered the issue moot on post-trial motions.

By contrast, a federal court in Illinois examining a post-trial motion relating to defendant’s expert testimony—excluded after plaintiff’s motion *in limine* was granted—found that defendant

did not waive its right to bring a motion for new trial by failing to proffer the testimony. *G.T. Laboratories, Inc. v. The Cooper Cos.*, 1998 Westlaw 704302, at *3 (N.D.Ill.). Because the prior *in limine* ruling did not indicate whether the matter would be revisited, defendant could have considered the ruling “final” rather than preliminary. *Id.*

Defense counsel cannot rely on such generosity, of course, and must proffer the testimony if it is rejected *in limine*. Even the *G.T. Laboratories* court found that the defendant had waived any right to use its expert in rebuttal. *Id.* at *7. The court held that defendant had a duty to inform the court of this desire, notwithstanding the *in limine* ruling—which addressed only direct testimony. *Id.*

- **File post-trial motions or appeals.**

Occasionally, a court will grant post-trial relief regarding expert economic testimony that was improperly admitted or rejected. In *Frymire-Brinati, supra*, 2 F.3d at 186, a plaintiff’s jury verdict was reversed because the valuation expert should not have been allowed to testify; his method of valuation was unreliable because it used historical, rather than potential, cash flows. In *United States v. 14.38 Acres of Land*, 80 F.3d 1074 (5th Cir. 1996), on the other hand, when the appeals court found that a real estate appraiser’s testimony was not speculative and met the reliability standards of *Daubert*, it reversed the decision not to allow the testimony.

Post-trial motions are the least likely opportunity for relief, however. See *Bowman v. International Petroleum Corp., supra*; *Albani v. Southern Arizona Anesthesia Services, supra*; and *G.T. Laboratories, supra*. In *Ed Peters Jewelry Co. v. C & J Jewelry Co.*, 124 F.3d 252 (1st Cir. 1997), the appellate court affirmed the exclusion of expert valuation of a business where the expert inexplicably left out one significant debt and upwardly revised his valuation of the business by \$2.5 million, after a motion for summary judgment motion had been filed.

- **When challenging an expert, characterize the subject matter as “scientific.”**

Although the majority of courts now consider *Daubert*’s overriding principles of reliability and relevance to apply to all expert testimony, some will apply a more complete *Daubert*-type analysis (using some or all of the Supreme Court’s “general principles”) only to scientific testimony. Because it takes little effort to call economic testimony “scientific,” defense counsel should do so. “[E]xpert economic testimony... may better be characterized as relying on scientific methodology than on experience or training, thus warranting the application of *Daubert*, even under the Tenth Circuit’s rule.” *Lithuanian Commerce Corp. v. Sara Lee Hosiery, supra*, 179 F.R.D. at 462; accord, *United Phosphorus, Ltd. v. Midland Fumigant, Inc.*, 173 F.R.D. 675, 683 (D.Kan. 1997) (applying *Daubert* factors and referring to “scientific knowledge in the field of economics” while excluding defendant’s economic expert who opined on the value of a trademark); *Robert Billet Promotions, Inc., supra*, 1998 Westlaw 151806, at *1 (holding that *Daubert* factors apply to technical forms of expert testimony, including damages calculated by CPA, and granting motion to exclude CPA’s testimony regarding damages).

Some federal courts have barely paused to address whether or how *Daubert* should be applied to expert economic testimony.

A “scientific” label will not always stick, however. One judge who did not believe that “commercial real estate appraisal is... a branch of social science” refused to apply *Daubert* to the expert’s opinions on market value. *Hawthorne Partners, supra*, 1993 Westlaw 311916, at *4. There, the expert used informal surveys and interviews to assess diminution in value due to “environmental stigma.” That plaintiff’s surveys might not stand up to rigorous scientific scrutiny was acceptable. *Id.* For the same reason, the court denied defendant’s request for alternative relief. *Id.* at *8. A new rebuttal witness on survey methodology was unnecessary because the testimony was irrelevant: plaintiff’s expert neither used nor was required to use a scientific survey. *Id.*

A forensic economist’s predictions of future loss may be neither certain nor scientific, but they surely strive to be scientific in their foundations. “There is no purely scientific method available that will predict the future with absolute certainty, but by combining the *best of scientific methods* with the best logical interpretations the economist can bring to court a well-founded and rational estimate of a loss.” Martin, *Determining Economic Damages*, §100 (1998) (emphasis added).

One approach to convincing a court that an expert is offering “scientific” testimony is to look to the codes of ethics and professional standards for that area of expertise. For example, Principle 7 of the Code of Ethics for the Profession of Dietetics states that “the dietetic practitioner practices dietetics based on *scientific principles* and current information.” *Lieberman v. American Dietetic Association*, 1996 Westlaw 521176 (N.D.Ill.) (emphasis added). Ironically, defendant’s expert in that case—who was opining that the plaintiff-dietician violated the code of ethics—was himself excluded for failing to follow the scientific method in reaching his conclusions. *Id.* at *2.

Accountants who testify should be held to guidelines and professional standards that are rooted in the principles of good science. *De Jager Construction, supra*, 938 F.Supp. at 452 (rejecting accountant’s testimony after *Daubert* hearing as speculative and noting that professional standards for CPAs who testify include requirements of “technical competence,” “due diligence,” and reliance on “sufficient relevant evidence.”); cf. *JMJ Enterprises, Inc. v. Via Veneto Italian Ice, Inc.*, 1998 Westlaw 175888, at *8 (E.D.Pa.) (applying American Institute of Certified Public Accountants guideline in striking testimony of CPA who did not give much attention to an assumption regarding sales projections that was the linchpin of his opinion).

- **Be prepared for a counter motion *in limine*.**

Where both sides’ experts use similar methodology and/or data, defense counsel must recognize that a similar motion may be brought against the defense expert. If only one side files a motion *in limine*, the proponent of the challenged expert cannot survive by arguing that the other expert “did the same thing.” Such an argument was expressly (and properly) rejected by the court in *GT Laboratories, Inc., supra*, 1998 Westlaw 704302, at *7, which held that failure to file a motion *in limine* to exclude the other expert “deprived the court the opportunity to consider such arguments.” When both sides file, defense counsel must be sure that its own economist can withstand the arguments advanced in the defense’s motion *in limine*.

CHALLENGING ECONOMIC EXPERTS: WHAT WORKS?

A review of the case law reveals a number of grounds for exclud-

ing testimony offered by a purported economic expert. The expert may have committed several of the following “errors.” Defense counsel must identify each of them, and be prepared to advance the most persuasive reasons for excluding the proffered testimony.

- **The expert relied on speculative projections or self-serving assertions.**

The most common attack upon an economic expert is that the calculations are speculative, and therefore “unreliable” under *Daubert*. Damage calculations often rely on *pro formas*—someone’s predictions—and not objective, admissible evidence. In *Nilssen v. Motorola, Inc.*, 1998 Westlaw 513090, at *13 (N.D.Ill.), for example, the trial court applied *Daubert* to exclude expert opinion that was “chock-full of methodological flaws.” Among them was the impermissible reliance on a *pro forma* business prediction, rather than defendant’s actual sales experience, in calculating lost equity damages. The court concluded that it was “*wholly irrational for [the expert] to use a pie-in-the-sky projection* rather than calculating what revenues that 25% [equity] interest would have turned out to generate in real-world terms.” *Id.* at *14 (emphasis added).

The respected jurist in *Nilssen v. Motorola*, Judge Milton Shadur (who is a member of the Advisory Committee on Evidence Rules and chairs a special subcommittee that drafted the proposed revisions to Rules 701 to 703), borrowed the Seventh Circuit’s “pungent criticism” of an expert in another case to assail the expert in his own:

For years we have been saying, without much visible effect, that people who want damages have to prove them, using methodologies that need not be intellectually sophisticated but must not insult the intelligence. *Post hoc ergo propter hoc* will not do; nor the enduing of simplistic extrapolation and childish arithmetic with the appearance of authority by hiring a professor to mouth damages theories that make a joke of the concept of expert knowledge.

Id. at *14, quoting *Schiller & Schmidt, Inc. v. Nordisco Corp.*, 969 F.2d 410, 415-16 (7th Cir. 1992).

Other experts who have relied upon dubious sales projections have been excluded as well. A CPA’s lost profit estimate based entirely on future projections found in a development agreement was excluded because it lacked foundation and was speculative. Such figures were deemed to represent nothing more than the “aspirational hopes” of the parties. *Otis v. Doctor’s Associates, supra*, 1998 Westlaw 673595, at *6.

In *JMJ Enterprises v. Via Veneto Ice, supra*, 1998 Westlaw 175888, at *5, plaintiff’s CPA calculated lost profits by a fairly routine method: projecting sales, determining the net profit margin, multiplying the net margin by projected sales, subtracting operating expenses, and discounting to present value. The “linchpin” of the expert’s testimony was, of course, the sales projection. *Id.* at *7. But the expert did not verify the sales projection or use the common tools for predicting the potential of a business, such as market surveys and studies; neither did he review research on the industry or like businesses, etc. Instead, the expert relied upon testimony from one of the principals and extrapolation of the sales results of a single competitor. *Id.* Noting that the expert paid little attention to the most significant assumption of his calculation—the sales projection—the court found his methodology flawed and his testimony unreliable under *Daubert*. *Id.* at *9. “[Plaintiff] is simply presenting their unrealistic hopes through the mouth of an expert.” *Id.* at *10.

In *Three Crown Ltd. Partnership v. Salomon Bros., Inc.*, 906 F.Supp. 876, 887, 894 (S.D.N.Y. 1995), the court excluded testimony of an economist because lost future profits were based on assumptions regarding trades that were never made by the plaintiffs. The only support for the assumptions were self-serving statements by the party principals that they would have engaged in that investment strategy “but for” the alleged manipulation by defendants. In *United Phosphorus v. Midland Fumigant, supra*, 173 F.R.D. at 685, the court excluded the defense expert’s opinion that plaintiff’s trademark had no value because the defendant had itself paid a premium to purchase trademarked goods. The court also noted that it was “not acceptable methodology” for an economist to rely on the deposition testimony of an interested party “where objective evidence and analysis exists.”

There are many other decisions on speculative projections that defense counsel may wish to review. They include: *Real Estate Value Co. v. USAir, Inc.*, 979 F.Supp. 731, 744-45 (N.D.Ill. 1997) (excluding expert testimony as unscientific speculation because lost profits calculations resulted solely from unsubstantiated client estimates for number of sales and profit per sale); *Lithuanian Commerce Corp. v. Sara Lee Hosiery, supra*, 179 F.R.D. at 457 (vacating magistrate’s ruling and finding that plaintiff’s economic expert lacked reliability, in part because the CPA had built 20 years of lost profits projections on nothing but deposition testimony that defendant had *other* business relationships which *also* exceeded 20 years); *Target Market Publishing, Inc., supra*, 136 F.3d at 1145 (affirming exclusion of plaintiff’s report where accountant’s profit projections were keyed to *defendant’s* internal marketing documents containing “assumptions that had not yet, and might never, come to pass”).

- **The expert lost objectivity.**

Where an expert appears to lose objectivity, or is openly an advocate, the court may exclude the testimony. In *De Jager Construction*, 938 F.Supp. at 449, plaintiff’s economic expert commented broadly about the wrongfulness of defendant’s behavior. The *Daubert* hearing demonstrated that the expert was trying to “weave a story” by selecting portions of the record that helped plaintiff while ignoring portions that did not. *Id.* The expert also “accepted at face value” information that would support the greatest amount of damages to plaintiff. *Id.* at 452. Because the expert had access to documents and information wholly inconsistent with his methodology and calculation of damages but chose to ignore it, the methodology was “misleading” and “untrustworthy.” *Id.*

The *De Jager Construction* court noted that professional standards for CPAs who testify include requirements of “technical competence,” “due diligence,” and reliance on “sufficient relevant evidence.” *Id.* at 455. The expert was not permitted to testify because, in addition to mathematical mistakes, his *modus operandi* included “making unsupported assertions and projections, [of] deliberately ignoring documents and figures which would strike a certified public accountant in the face, and [of] picking and choosing among purported facts to maximize plaintiff’s damages.” *Id.* (emphasis added).

Where an expert appears to lose objectivity, or is openly an advocate, the court may exclude the testimony.

A similar result was reached in *JMJ Enterprises, supra*. The court noted the expert’s methodological flaws and errors, but also excluded the testimony under FRE Rule 403 because the plaintiffs were “simply presenting their unrealistic hopes through the mouth of an expert.” 1998 Westlaw 175888, at *10. The court was likewise concerned with the expert’s self-proclaimed “independence” and “objectivity” during the hearing, which increased the danger of unfair prejudice and confusion to the jury. *Id.* It noted that the witness “argued with defense counsel and made gratuitous remarks” about defendant’s “destroying” the future of plaintiff’s business. *Id.* The court ultimately found the expert’s demeanor consistent with his lost profit projections: he was “acting as an advocate, not as an objective evaluator of evidence.” *Id.*

Deposition, not trial, may thus provide the best opportunity to test an opposing expert’s demeanor and composure. Imperinent responses there may provide high caliber ammunition for a *Daubert* motion.

- **The expert deviated from methods or procedures used by others in the same field.**

“If there is a well-accepted body of learning and experience in the field, then the expert’s testimony must be grounded in that learning and experience to be reliable, and the expert must explain how her conclusion is so grounded.” *Nilssen v. Motorola, supra*, 1998 Westlaw 513090, at *11 (excluding damages expert). The testimony of the CPA in *JMJ Enterprises* was stricken, in part, because he violated a guideline of the American Institute of Certified Public Accountants:

The attention devoted to the appropriateness of a particular assumption should be commensurate with the likely relative impact of that assumption on the prospective results. Assumptions with greater impact should receive more attention than those with less impact.

1998 Westlaw 175888, at *8 (quoting AICPA Guideline 6.31.) The court concluded that because the sales projection was the linchpin of his methodology but received little attention from the expert, his methodology was flawed and unreliable. *Id.* at *9. Because damages testimony will often be proffered through CPAs, defense counsel should obtain a copy of the *AICPA Professional Standards that Relate to Litigation Services Statement on Standards for Consulting Services* and use it as a yardstick when a CPA appears as an expert.

Where an expert opinion is a “moving target,” the underlying methodology is likely to be viewed with “special skepticism.” See *Ed Peters Jewelry Co.*, 124 F.3d at 262 (affirming exclusion of expert valuation of a business where expert revised his valuation by \$2.5 million after summary judgment motion was filed).

- **The expert offered opinions beyond the area of expertise.**

The accountant whose testimony expands into causation may be excluded altogether. In *Parkway Garage, Inc. v. City of Philadelphia*, 1994 Westlaw 412430 (E.D.Pa.), the court applied *Daubert* to an accountant’s lost future profits’ methodology and remitted a jury verdict of \$5 million to \$53,000 because the accountant

was not qualified to say that a 35-day shutdown caused a permanent injury to plaintiff. It was the permanence of the injury that supported the future profits claim. Similarly, a CPA cannot blur the distinction between substantive liability and calculating damages. *De Jager Construction, supra*, 938 F.Supp. at 449. Where the economic expert comments about the wrongfulness of defendant's behavior, the expert confuses the jury. And because confusing testimony cannot help the trier of fact, it fails the threshold test of relevance and must be excluded.

- **The expert computed the wrong measure of recovery.**

If an expert computes "lost profits" and the court determines that only "diminution in value" is recoverable, the expert's testimony will be excluded as irrelevant. In *L & M Beverage Co. v. Guinness Import Co.*, 1996 Westlaw 368327, at *3-4 (E.D.Pa.), the terminated distributor's election to sell its distribution rights precluded it from submitting expert testimony on lost future profits, regardless of the methodology or reliability of the expert's work, because such testimony was not relevant under *Daubert*. Only diminution in value of the distribution rights could be recovered. *Id.*

Similarly, an expert who computes breach of contract damages based on quantities in excess of those specified in the contract may have his testimony limited, if not excluded. See *Robert Billet Promotions, supra* (granting, in part, motion to exclude CPA's testimony regarding breach of contract damages but holding it would be "unduly harsh" to exclude testimony entirely).

- **The expert committed computation errors.**

The CPA in *JMJ Enterprises, supra*, who made improper assumptions and became an advocate for plaintiff's unrealistic dreams, also committed several elementary errors. 1998 Westlaw 175888, at *9. He combined alternative measures of damages and assumed that operating costs were constant despite a projected large increase in sales volume. The omission of some \$60,000 in expenses in the lost profits calculation was deemed "significant" and contributed to a finding of unreliability.

A reasonable accountant does not report certain expenses, and choose to omit other, like expenses. Such accounting practices do not produce consistent results. Further, an expert must be able to point to methods that he applied. An expert cannot simply base his conclusion on his "thirty-one years of experience."

Id. at *10 (emphasis added).

Defense counsel should have someone double-check the expert's tables and schedules for mathematics errors. Discrepancies in the numbers not only undermine the expert's credibility but may also be important building blocks to a successful *Daubert* challenge.

- **The expert failed to revise damage estimates after claims were dismissed.**

Often, an expert report will estimate damages based on *all* of the plaintiff's claims and allegations, without attributing portions to particular wrongful acts. Later, the plaintiff may abandon some claims or the court may dismiss or narrow them. In such cases, logic demands that the expert revise the damage opinion. Not surprisingly, the courts agree.

If an expert testifies that damages are unchanged after the dismissal or narrowing of claims, the original methodology may be

unreliable and inadmissible. In *Nilssen v. Motorola, supra*, the court noted that the expert's original damage opinion was predicated on an undefined and undifferentiated set of misappropriated trade secrets. 1998 Westlaw 513090, at *12. Despite a later court order that plaintiff narrow its claim to ten specific documents, the expert "still came up with the identical damages figure." *Id.* The court noted that this result not only raised a credibility issue but "would also appear to cast a cloud on [the expert's] methodology." *Id.* at n.17. Compare *Concord Boat Corp. v. Brunswick Corp., supra*, where the court dismissed several allegations of wrongful conduct that were included in the expert's report. Defense counsel's failure to ask plaintiff's expert "whether his opinion should have changed because of the exclusion of the conduct from consideration" made the issue moot on post-trial motions. 21 F.Supp.2d at 928.

- **The expert tried to glamorize simple calculations.**

If the expert proposes to testify about damages using a highly simplistic methodology, this opinion may be rejected. In *Israel Travel Advisory Service, Inc. v. Israel Identity Tours, Inc.*, 1993 Westlaw 387346, at *2 (N.D.Ill.), the court rejected plaintiff's proffer concerning average profit per customer. The CPA's method was to subtract total cost from total revenues and divide by the total number of customers. The court barred the expert's testimony under *Daubert* because such simple averages "could be computed by anyone with junior high school mathematics." *Id.* Because neither the expert's CPA training nor experience was required to reach the conclusion, it would not assist the jury and was not admissible.

- **The expert's testimony deviated from the final pre-trial order.**

A pre-trial order that differs significantly from the expert's report or testimony signals that the methodology is unreliable. In *Otis v. Doctor's Associates, supra*, the court noted a substantial difference (approximately 25 percent) between the damages claimed in the final pre-trial order and those claimed by the expert. Because it felt that the expert's methodology was unreliable, the court excluded the CPA's lost profit estimate. 1998 Westlaw 673595, at *2.

CONCLUSION

What to do about David NoDamages? First, you hastily summon an associate to draft a motion *in limine* to exclude plaintiff's expert, Ms. Sky'sTheLimit, who utilized a similar methodology but relied on extremely optimistic projections provided by what may be an interested party. You next ask David to prepare a supplemental report to clear up that nagging inconsistency between his original assumptions and the claims now stated in the pre-trial order. Then you get out your directory of economic experts and begin making calls while a colleague prepares a motion to amend the pre-trial order. You have decided to designate a new witness in the event the judge excludes Mr. NoDamages. You last consider how to explain to your client why it needs to hire yet another economic expert!

Driving home that night, you carry a briefcase that groans with cases, nearly all of them unfamiliar. You have decided to work from plaintiff's authority to the (hopefully) more useful cases found by your associate. But you are still smiling, for you will begin with an old friend, *Daubert v. Merrell Dow*. ■