IADC COMMITTEE NEWSLETTER

PRODUCT LIABILITY

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In the 24 years since the United States Supreme Court's decision in Daubert v. Merrell Dow Pharmaceuticals, Inc., moving to exclude expert testimony has become standard operating procedure in almost every type of litigation. But are these motions effective? Are they worth the time and resources spent preparing them? This article will address recent reports that provide insight into the likelihood of success for such motions and some guidance for future Daubert practice.

Daubert: Trends and Statistics

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ABOUT THE COMMITTEE

The Product Liability Committee serves all members who defend manufacturers, product sellers and product designers. Committee members publish newsletters and *Journal* articles and present educational seminars for the IADC membership at large and mini-seminars for the committee membership. Opportunities for networking and business referral are plentiful. With one listserv message post, members can obtain information on experts from the entire Committee membership. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:

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In the 24 years since the United States Supreme Court's decision was handed down in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, moving to exclude expert testimony has become standard operating procedure in almost every type of litigation. Particularly on the defense side, *Daubert* motions are drafted and filed as a matter of course and generally even accounted for at the outset of litigation in budgets and case assessments. The upshot of a successful *Daubert* motion is obvious: *Daubert* rulings that eliminate or greatly impair essential elements of a plaintiff's case can lead directly to summary judgment for the defendant. But the near-ubiquity of these motions has led many attorneys (and, almost certainly, their clients) to wonder whether the time and expense of such motions is actually worth it. Two reports provide some reassurance, as well as some guidance for future *Daubert* practice.

Searle Civil Justice Institute

In October 2015, the Searle Civil Justice Institute (Searle), part of the Law & Economics Center at George Mason School of Law, published an empirical examination of over 2,127 *Daubert* motions from 91 federal district courts. SEARLE CIVIL JUSTICE INSTITUTE, *Timing and Disposition of Daubert Motions in Federal District Courts* (Oct. 2015). Unsurprisingly, the majority (71%) of *Daubert* motions sampled by Searle were made by defendants. And almost half of the cases analyzed in the Searle report involved multiple *Daubert* motions.

The Searle study revealed that defendants obtain at least partial relief 50% of the time and complete relief 25% of the time. The average rate of a civil plaintiff obtaining some relief due to a *Daubert* challenge is 40%, while full exclusions occur only 18% of the time.

These rates vary depending on the type of lawsuit in which the witness is testifying. The likelihood of a defendant obtaining at least some relief is over 50% in disputes involving contracts, torts, civil rights, antitrust, and RICO. Defendants in tort actions succeeded in obtaining full exclusion of the plaintiff's expert in 30% of tort cases, compared to much lower rates in other types of cases (as low as 4% in antitrust matters). *Daubert* rulings in labor and employment cases appear to be "all or nothing" – although defendants only succeeded in obtaining relief 27% of the time, they obtained complete exclusions in each instance. On the other hand, a plaintiff's best chances for at least a partial grant of relief occur in contract, real property, and intellectual property actions and, to a lesser degree, in cases involving torts and labor disputes. Notably, plaintiffs obtain a full grant of relief in only 16% of tort cases.

Looking at the type of expert challenged, nearly two-thirds of the motions examined by Searle involved challenges to medical or technical opinions. "Medical" witnesses, defined to include physicians, psychologists, toxicologists, and allied medical professionals, made up a hefty 31% of the *Daubert* challenges in the Searle study. "Engineering" witnesses, including all types of technical and environmental testimony, were close behind at 24%. Accountants comprised 10% of the challenged witnesses and economists another 5%.

The Searle study also looked at the length of time it took for courts to rule on *Daubert* motions. The average time that a fully briefed motion remained pending before a decision was 84 days. This varies depending on the party filing (87 days for defendants and 77.5 days for plaintiffs) and type of case (from 35.2 days for banking cases to 203 days for environmental cases). Tort cases – which accounted for over 50% of the motions analyzed despite comprising only 30% of the total civil caseload in federal court – remained pending an average of 81.6 days. The type of expert was a factor here as well: motions challenging engineering witnesses and medical experts were found to have lower odds of timely resolution (22% and 26%, respectively).

The data concerning pendency time are important because they appear to be directly related to the rate of termination by settlement or summary judgment. More than half of the cases sampled ended in settlement or summary judgment within 100 days of a *Daubert* ruling. However, the longer a *Daubert* motion remains pending, the less likely it is that the case will settle or end in summary judgment. Notably, the Searle study found that the number of *Daubert* motions filed has a negative impact on the odds of settlement or resolution on summary judgment.

PricewaterhouseCoopers

In May 2016, PricewaterhouseCoopers (PwC) published a report studying *Daubert* trends and outcomes for the years 2000-2015. PRICEWATERHOUSECOOPERS, Daubert *Challenges to Financial Experts* (May 2016). This report used a sample size of 2,014 cases, but focused exclusively on financial experts. With its sharp focus on this subset of expert challenges – recall that accountants and economists were the target in only 15% of the *Daubert* motions analyzed in the Searle study – the PwC report provides more in-depth information about *Daubert* rulings.

Analyzing 2,014 cases between 2000 and 2015, PwC identified 896 cases in which the financial testimony was partially or completely excluded—an average exclusion rate of 44%. Whereas the Searle study found defendants succeeded more often than plaintiffs, the inverse was true for financial experts for all years except 2015. Because financial witnesses typically are not called upon to provide a legal element crucial to establishing a cognizable cause of action, the motivations for challenging financial opinion testimony are less likely to be driven by who has the burden of proof and more likely a function of whether of the witness used reliable methods. In keeping with this assessment, an exclusion rate of financial witnesses in the 40th percentile is common across all types of cases. Only a few percentage points separate securities litigation (47%) from product liability (48%) or intellectual property (49%) from bankruptcy (47%).

PwC also analyzed results by jurisdiction. It found that courts in the Tenth and Eleventh Circuits have the highest rates of exclusion, with grants of whole or partial exclusion exceeding 50%. Courts in the Third and Eighth Circuits, on the other hand, grant *Daubert* motions only 35% of the time.

Finally, PwC's report honed in on the various reasons for exclusion. Year in and year out, lack of reliability is the most common reason for the excluding opinion testimony on

financial subjects. The report cautions, however, that when an expert is challenged for poor application of a generally accepted methodology, courts tend to permit the testimony, opining that such issues can be addressed upon "rigorous cross-examination." After reliability, "relevance" was the second most common reason for exclusion of financial testimony. PwC reported that, when a financial expert is excluded for lack of relevance, the proposed testimony is either not helpful to the trier of fact or beyond the scope of the witness's competence. Lack of qualification, on its own, accounted for only 7% of successful challenges, although it was cited as an additional reason for exclusion in another 11%.

Illustrative Case

The trends discussed above are borne out in a recent ruling from the Eastern District of Kentucky: *Lackey v. Robert Bosch Tool Corp.*, No. 16-29-ART, 2017 U.S. Dist. LEXIS 4956 (E.D. Ky. Jan. 12, 2017). The various *Daubert* motions filed in this products-liability action were pending for only 27 days—well below average for a torts case, but fairly standard timing for then-U.S. District Court Judge Amul R. Thapar (who, prior to being confirmed to the Sixth Circuit in May 2017, was on the short list for Justice Scalia's seat on the Supreme Court). The Court denied the plaintiff's motion to exclude the defendant's mechanical engineering expert as unqualified. But the defendant succeeded in significantly limiting the opinion testimony of two expert witnesses and obtaining outright exclusion of the third. The Court permitted the plaintiff's human-factors expert to testify generally about how safety warnings are developed, but excluded her ultimate opinions about the case for lack of reliability. The electrical engineer was prohibited from testifying that the product at issue was defectively designed due to his failure to propose an alternative design. Finally, noting that the court should act "as gatekeeper, not advocate," *id.* at *33, Judge Thapar granted complete exclusion of the plaintiff's economics expert because the use of a controversial set of work-life expectancy tables was methodologically flawed as a general proposition and unreliable when applied to the facts of the case. The parties entered a stipulation of dismissal with prejudice less than a month after the *Daubert* ruling.

Conclusion

These studies and outcomes should alleviate concerns that *Daubert* practice is overused or unjustified. *Daubert* rulings continue to provide defendants with important leverage for seeking reasonable settlements and even outright dismissal of claims. The gatekeeping role of the trial judge remains robust, and well-crafted arguments can and will succeed.

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