2000–2007
Financial expert witness
Daubert challenge study*

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The heart of the matter

Three key factors influence *Daubert* challenges to financial expert witnesses.

PricewaterhouseCoopers' 2000–2007 examination of *Daubert* challenges to financial expert witnesses indicates a continued overall increase in the number of challenges over the past eight years, in spite of a slight decrease in challenges to all expert witnesses during 2007. As our survey draws from written case opinions only and does not represent expert admissibility decisions handled, for example, by motion, we caution that our focus is on trends and comparative metrics rather than on the absolute number or percentages of challenges or exclusions. Still, the overall upward trend continues to have important implications for litigators and experts alike, requiring litigators to ensure that their financial experts are qualified and that their testimony satisfies the standards of relevance and reliability under *Daubert*.

Several key factors in particular have been identified by our most recent study as highly influential to the number and success rates of challenges over the span of the entire study, as well as during the isolated 2007 timeframe.

These factors vary in focus and scope. A key finding from our study indicates that the jurisdiction in which the testimony is challenged influences the challenge's rate of success. Case in point: From 2000 through 2007, the Eleventh Circuit was more likely to exclude financial expert witnesses (it excluded 69% of testimony in whole or in part), while the First Circuit excluded 21% of challenged financial expert witnesses.

Study results also indicate that the type of financial expert in question affects the number and outcome of challenges. From 2000 to 2007, 50% of all financial expert challenges were directed specifically at economists, accountants, and statisticians. Interestingly, these groups were also the most likely of any of the financial witnesses to survive a *Daubert* challenge.

Additionally, the study identified lack of reliability of the work of financial experts as a key influencer in successful exclusions — in fact, it continues to be the top reason for exclusion of financial experts. In 2007 alone, three out of four exclusions of financial expert testimony were attributed to the unreliability of the experts' work.

The following 2007 PricewaterhouseCoopers' *Daubert* study identifies characteristics of some of the most typical targets of challenges, factors influencing challenge success rates, and unusual/untested analytical methods that courts have found inadmissible.

An in-depth discussion

Financial expert witnesses are growing targets of *Daubert* challenges.

Challenges to financial expert witnesses are increasing

In 1993, the U.S. Supreme Court's opinion in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* addressed the admissibility of expert scientific testimony in federal trials, affirming a gatekeeping role for judges in determining the reliability and relevance of the testimony. In 1999, the Supreme Court's decision in *Kumho Tire Co. v. Carmichael* clarified that the *Daubert* criteria were applicable to all types of expert testimony, not merely testimony relating to science.

PricewaterhouseCoopers' research in previous years showed that *Kumho*'s broadening of *Daubert*'s application led to a steady increase in the number of challenges to all expert witnesses, and the results of our 2007 *Daubert* study of published court opinions certainly do not buck this trend.

In this latest study, PricewaterhouseCoopers examined 3,681 *Daubert* challenges to expert witnesses of all types in federal and state courts during the years 2000–2007. Findings indicate that the number of per-year challenges rose from 251 in 2000 to 704 in 2007, an overall increase in spite of a slight dip in the number of challenges between 2006 and 2007 — 741 challenges in 2006 (an all-time high) versus 704 challenges in 2007 (see Figure 1).

A growing target among these *Daubert* challenges is financial expert witnesses. Of the 3,681 *Daubert* challenges identified in our study, 635 were targeted to financial expert witnesses — and 116 of these are from 2007 alone. This represents a 9% increase over the number of similar challenges in 2006 (see Figure 2).

Figure 1. Challenges to expert witnesses of all types (2000–2007)

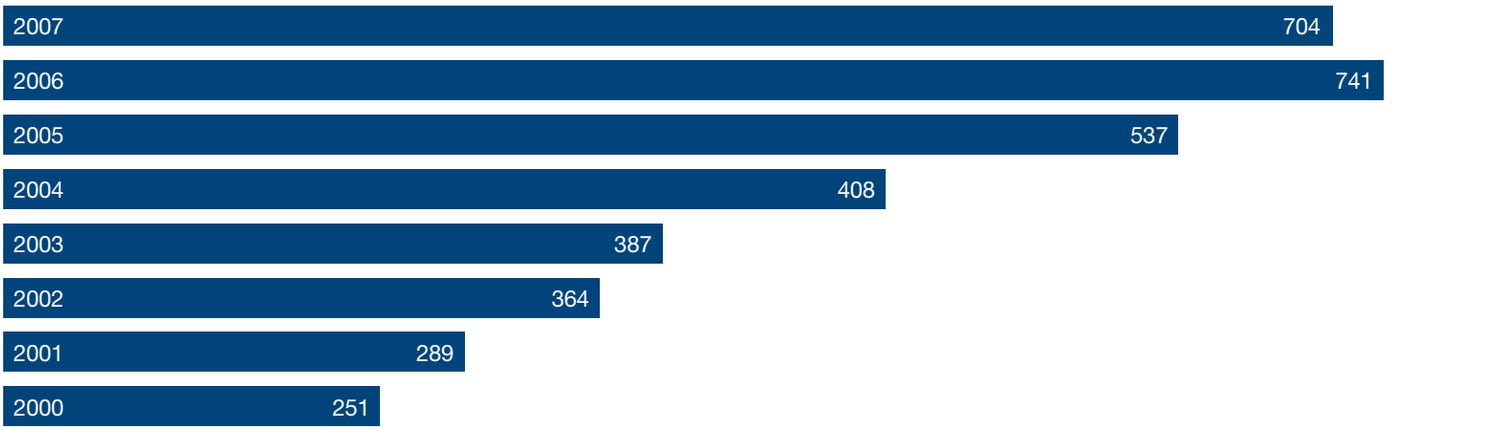
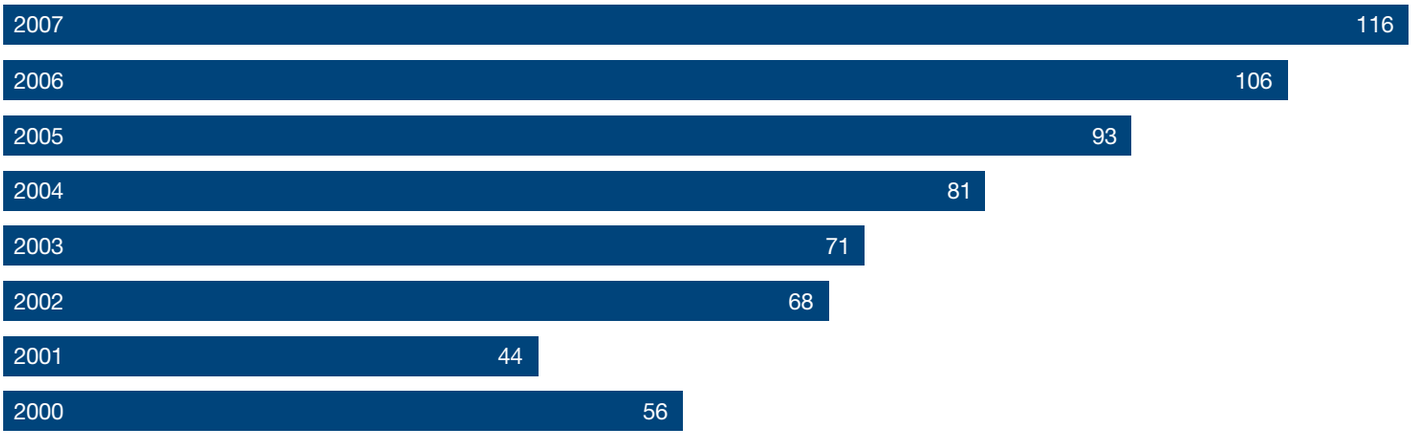


Figure 2. *Daubert* challenges to financial expert witnesses (2000–2007)



Overall success rates remain steady, but hit a five-year low among financial expert witnesses

Of all the expert testimonies challenged during 2000–2007 (based on written court opinions that addressed this issue), 46% were excluded in whole or in part and 50% were admitted (see Figure 3).[1] In 2007 specifically, 322 expert testimonies were excluded in whole or in part as a result of *Daubert* challenges, nearly three times the figure in 2000 (see Figure 4). Still, the percentage of all experts excluded in whole or in part decreased from 47% in 2006 to 45% in 2007, and the percentage of successful challenges has remained relatively consistent over the past eight years, with the highest percentage (50%) in 2003 and the lowest (41%) in 2002 (see Figure 5).

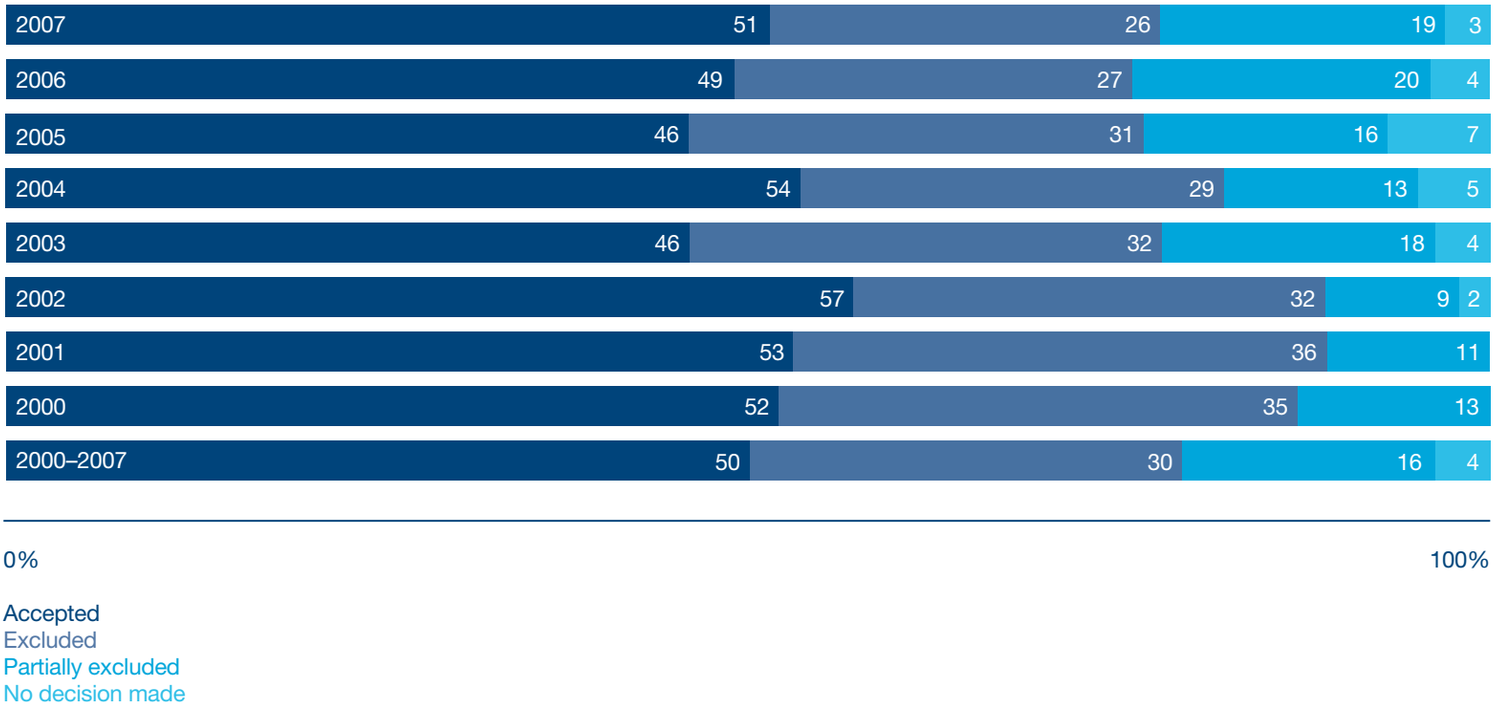
The breakdown of success rates for challenges to financial expert witnesses during 2000–2007 is nearly the same as the outcome of challenges to experts of all types (see Figure 6 compared to Figure 3), with 29% of financial expert witnesses excluded, 18% partially excluded, and 50% admitted (see Figure 6).[2]

However, in 2007 specifically, the success rates of challenges to financial expert witnesses hit a five-year low. The testimony of 47 financial experts was excluded in whole or in part, down from the all-time high of 55 in 2005 (59% of all financial expert challenges that year) (see Figure 7). This means that 41% of all 2007 challenges to financial experts were successful at excluding the expert's testimony in whole or in part. While this is higher than the all-time low of 29% in 2002, it is below the eight-year rate of 47% (see Figure 8).

In 2007, 41% of all challenges to financial experts were successful at excluding the expert's testimony in whole or in part.

1 Judges did not render a decision in 4% of the challenges reviewed.
2 Judges did not render a decision in 3% of the challenges reviewed. Due to rounding, totals may not equal 100%.

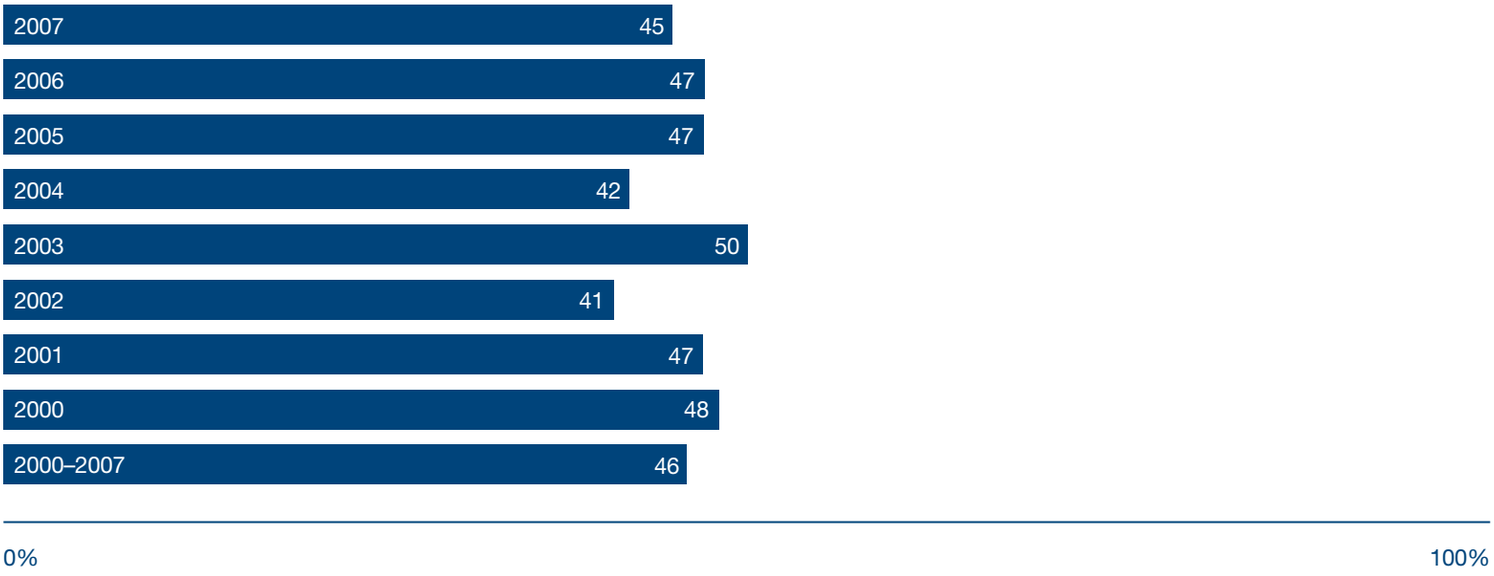
Figure 3. Outcome of *Daubert* challenges to expert witnesses of all types (2000–2007)



Note: Due to rounding, totals may not equal 100%.

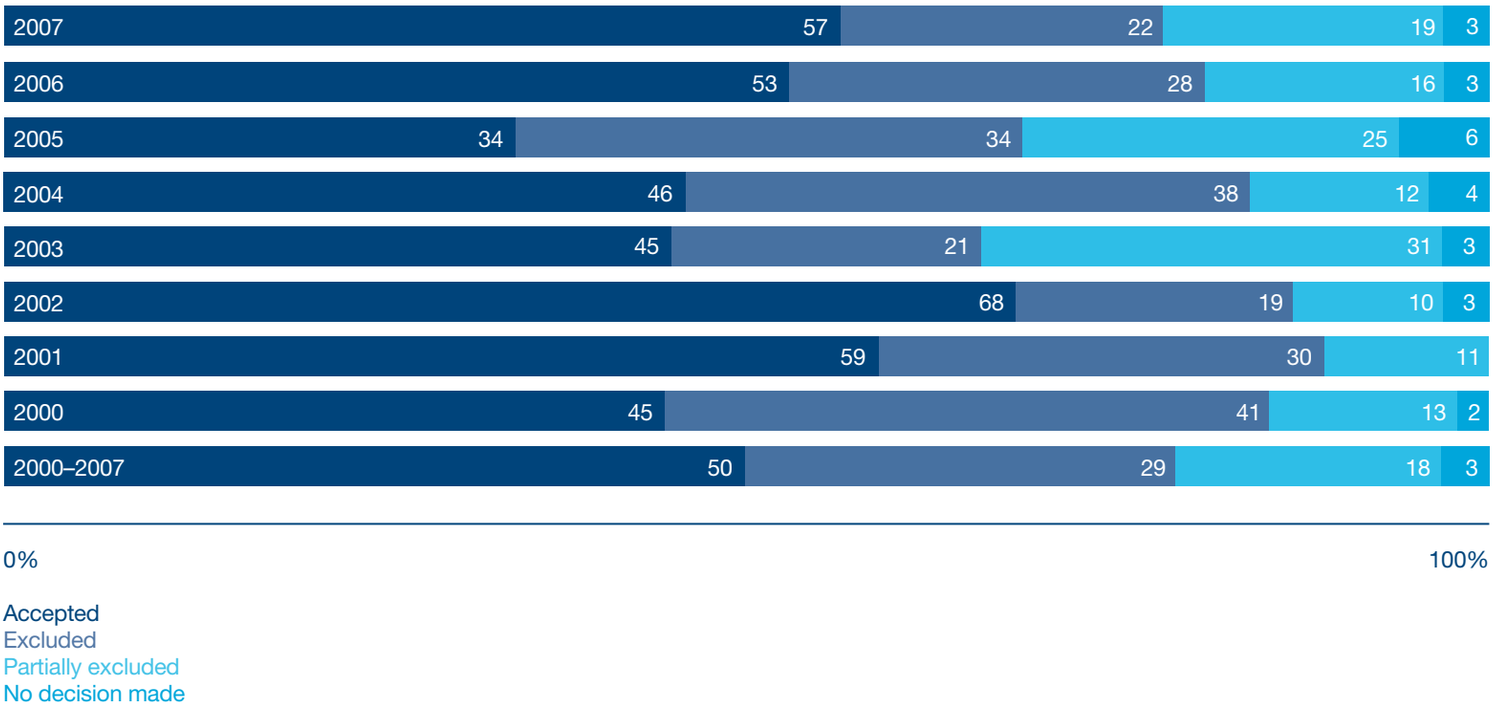
Figure 4. Total *Daubert* exclusions to expert witnesses of all types (2000–2007)

Figure 5. Success rate of *Daubert* challenges to expert witnesses of all types (2000–2007)



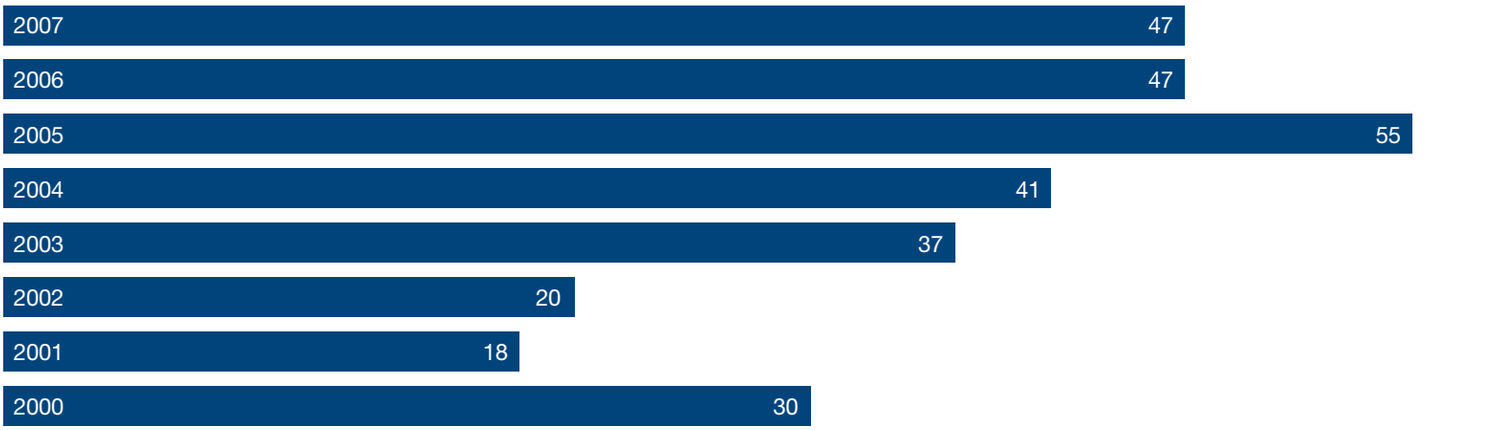
Note: Figures include exclusions made in whole or in part.

Figure 6. Outcome of *Daubert* challenges to financial expert witnesses (2000–2007)



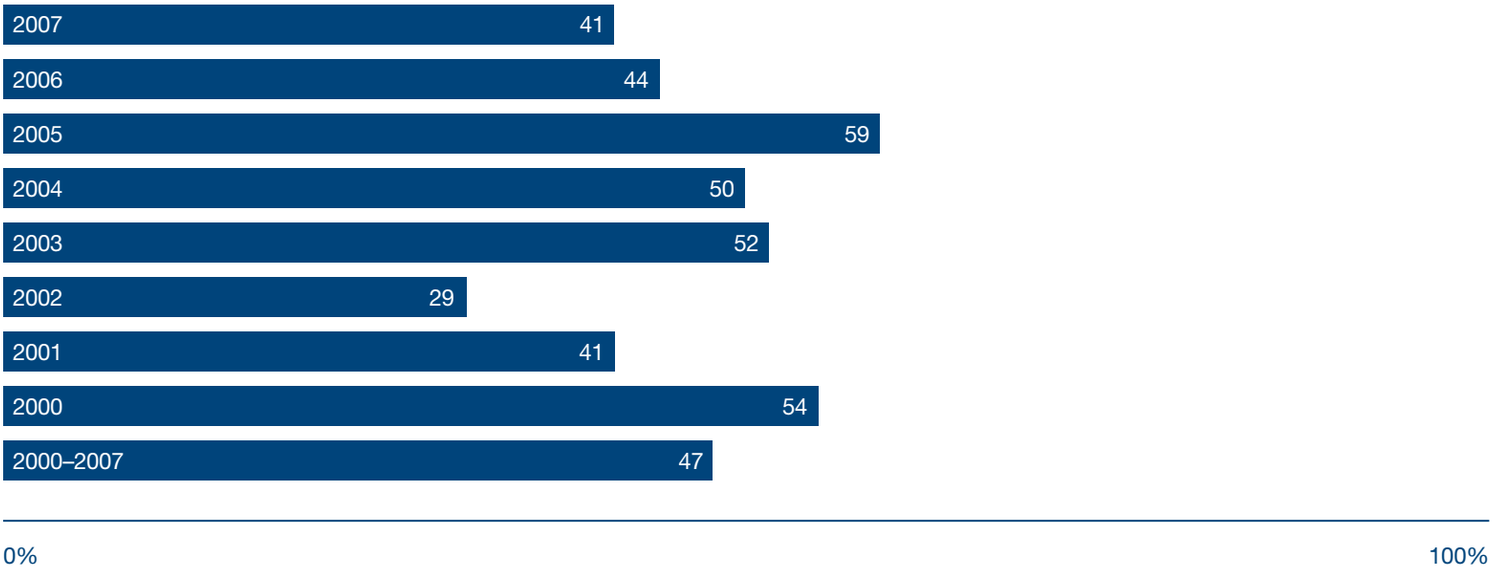
Note: Due to rounding, totals may not equal 100%.

Figure 7. Successful *Daubert* challenges to financial expert witnesses (2000–2007)



Note: Figures include exclusions made in whole or in part.

Figure 8. Success rate of *Daubert* challenges to financial expert witnesses (2000–2007)



Note: Figures include exclusions made in whole or in part.

A closer look at financial expert targets and survivors

Plaintiffs' financial expert witnesses are challenged more frequently, but their exclusion rates match those for the defense

Being a plaintiff-side expert witness versus a defendant-side expert witness appears to influence the frequency of *Daubert* challenges. Among all challenges to financial experts during 2000–2007, 70% targeted the plaintiff-side expert (see Figure 9).

In 2000–2003, challenges to plaintiff-side financial experts had a higher success rate than challenges to defendant-side financial experts. However, the reverse has been true each year since. In 2007, 39% of plaintiff-side financial experts were completely or partially excluded from testifying once challenged, versus 44% of defendant-side financial experts (see Figure 10).

Looking at the full 2000–2007 period, challenged plaintiff-side and defendant-side financial experts were excluded from testifying in almost equal proportion: 47% on the plaintiff side versus 46% on the defendant side were either completely or partially excluded (see Figure 10).

Annual statistics, however, indicate that the outcome of challenges varies greatly from year to year, with the success rate of challenges ranging from 36% to 58% for plaintiff-side financial experts and 11% to 70% for defendant-side financial experts (see Figure 10).

Figure 9. *Daubert* challenges to financial expert witnesses, plaintiff side vs. defendant side (2000–2007)

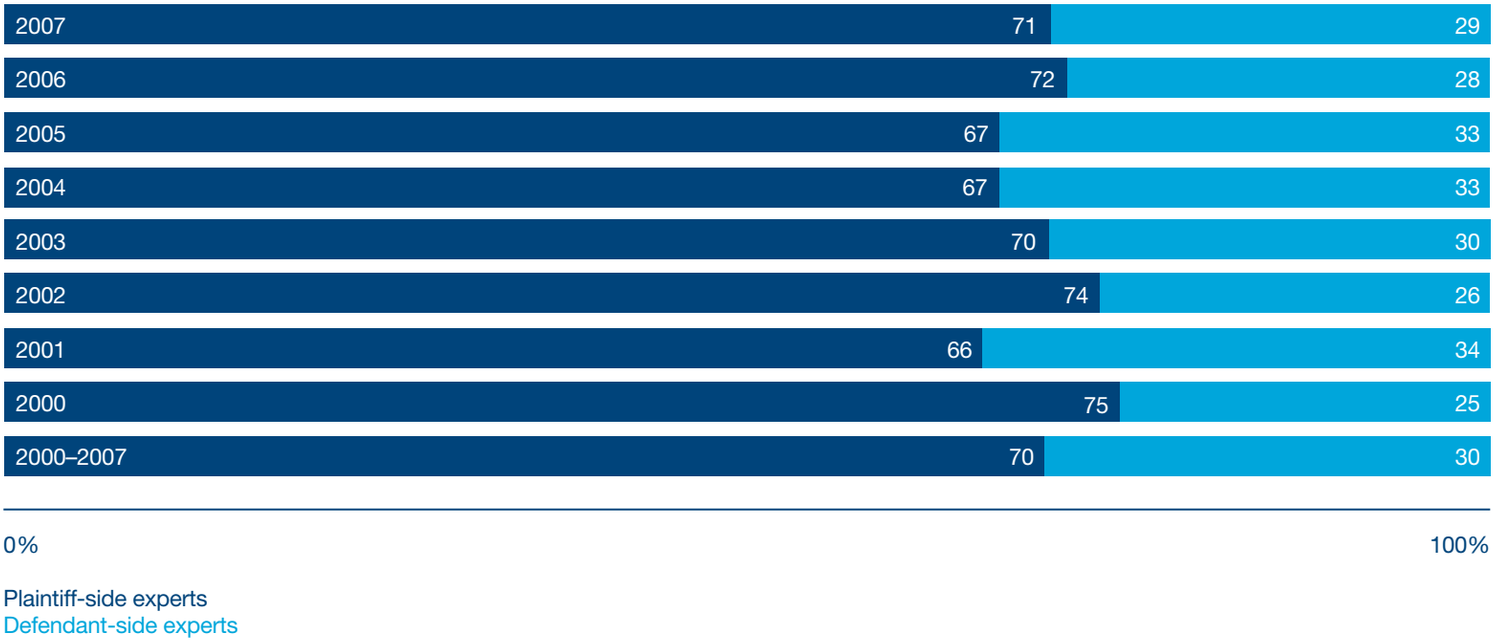
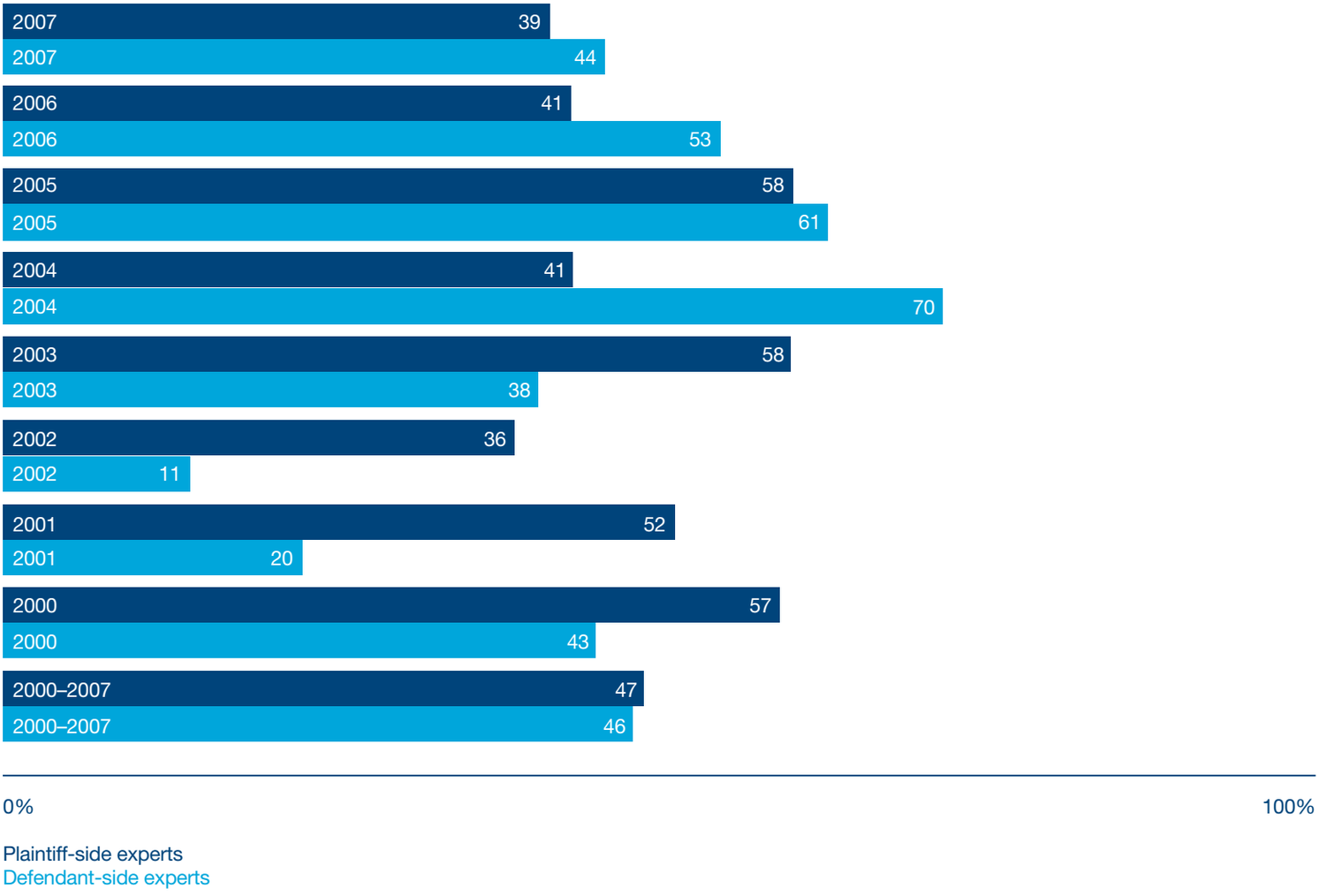


Figure 10. Success rate of *Daubert* challenges to financial expert witnesses, plaintiff side vs. defendant side (2000–2007)



Economists, accountants, and statisticians are the most frequently challenged financial expert witnesses, and also the ones most likely to survive

To examine whether certain types of financial expert witnesses were challenged or excluded more frequently than others, we grouped the challenges based on the type of experts targeted and observed two paradoxical trends.

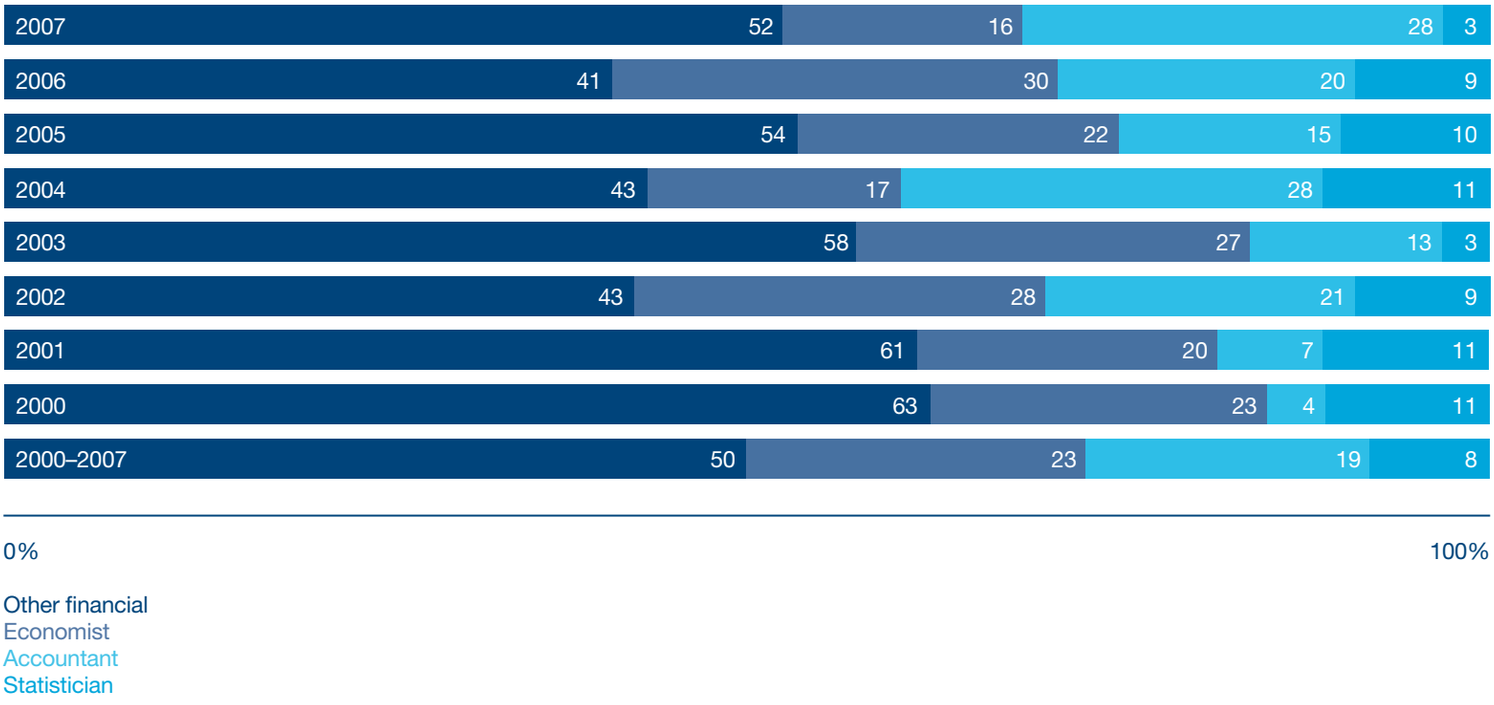
First, economists, accountants, and statisticians were the most frequently challenged financial expert witnesses, accounting for 23, 19, and 8% of all financial expert challenges, respectively, during 2000–2007 (see Figure 11). This trend is likely due to the fact that economists, accountants, and statisticians are the most frequently engaged financial expert witnesses.[3]

Second, although more frequently challenged, economists, accountants, and statisticians were more likely to survive a *Daubert* challenge than other financial expert witnesses. During 2000–2007, the success rate of challenges to other financial expert witnesses (51%) was higher than that of challenges to economists (41%), accountants (43%), and statisticians (43%) (see Figure 12).

Challenges to economists, accountants, and statisticians accounted for 50% of all challenges to financial expert witnesses.

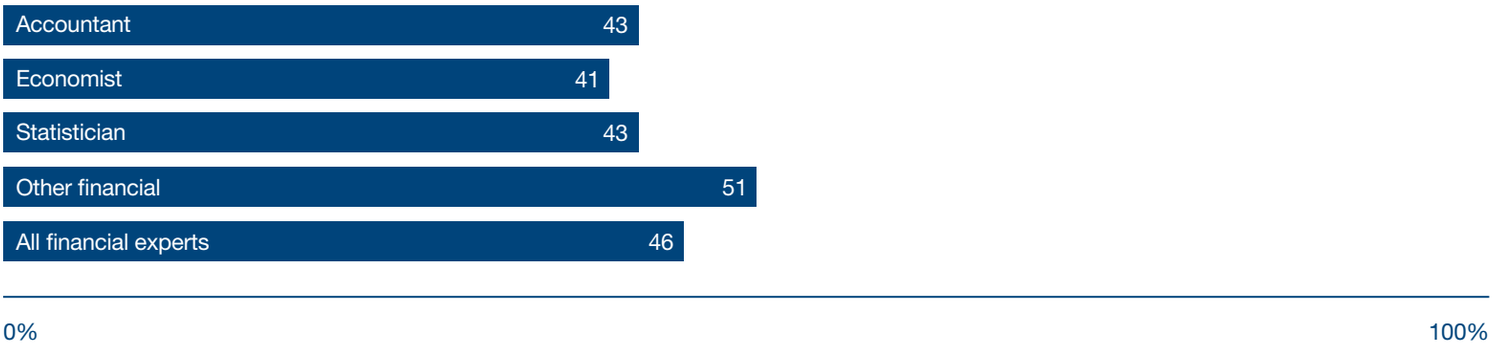
3 Other financial expert witnesses include appraisers, financial analysts, finance professors, business consultants, etc.

Figure 11. *Daubert* challenges to financial expert witnesses, by expert type (2000–2007)



Note: "Other financial" includes appraisers, financial analysts, finance professors, business consultants, etc.
Due to rounding, totals may not equal 100%.

Figure 12. Success rate of *Daubert* challenges to financial expert witnesses, by expert type (2000–2007)



Note: "Other financial" includes appraisers, financial analysts, finance professors, business consultants, etc.
Figures include exclusions made in whole or in part.

Success rates vary widely depending on the jurisdiction

The *Daubert* criteria are the standard of review for the admission of expert witness testimony in federal courts, and the twelve federal circuits opine on a preponderance of all *Daubert* challenges to financial expert witnesses. In fact, federal courts reported 98% of all challenges in 2007 and 93% overall during 2000–2007 (see Figure 13).

Daubert challenges to financial expert witnesses were concentrated in the Second, Seventh, Fifth, Third, and Sixth Circuits, which together heard nearly 58% of all challenges. During 2000–2007, the Second Circuit alone accounted for 18% of the total challenges to financial experts (see Figure 14).

The success rate of challenges varied widely by jurisdiction. During 2000–2007, 69% of the financial expert witnesses challenged under *Daubert* in the Eleventh Circuit were excluded from testifying in whole or in part, the highest success rate of exclusions among all federal circuits. By contrast, the First Circuit excluded 21% of challenged financial expert witnesses, the lowest success rate among all circuits (see Figure 15).

In the Eleventh Circuit, 69% of financial expert witness testimony challenged under *Daubert* was excluded in whole or in part during 2000–2007.

Figure 13. *Daubert* challenges to financial expert witnesses in federal vs. state courts (2000–2007)

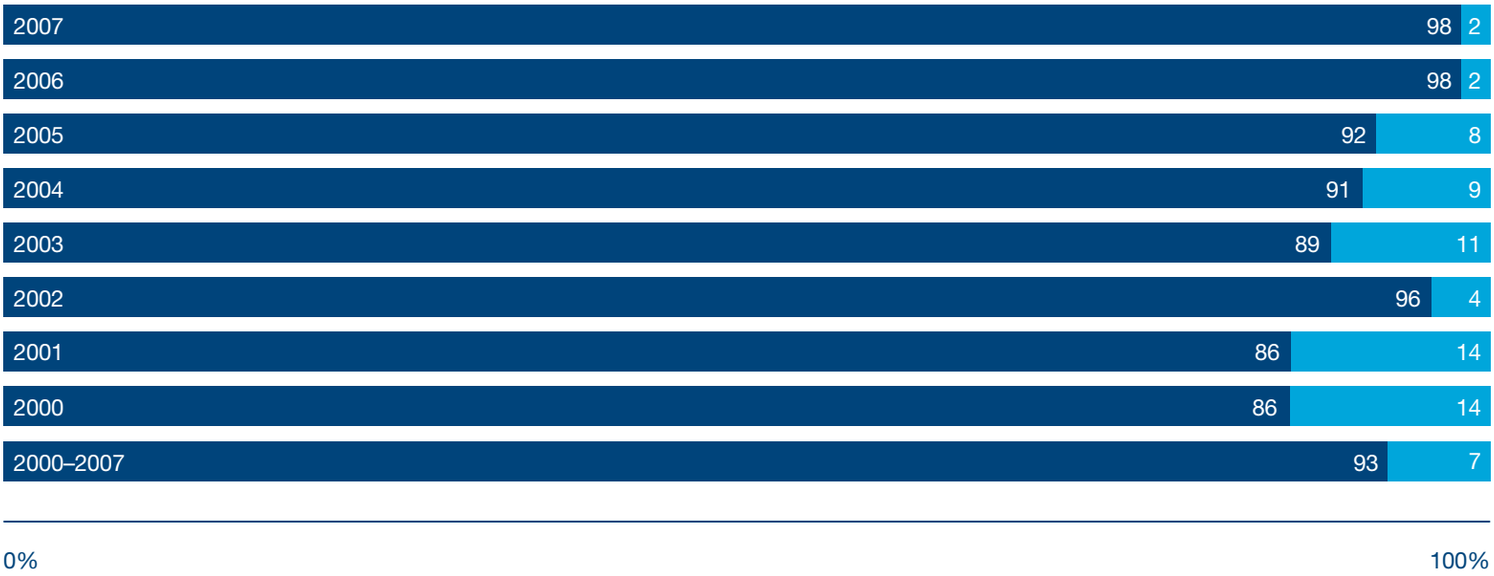
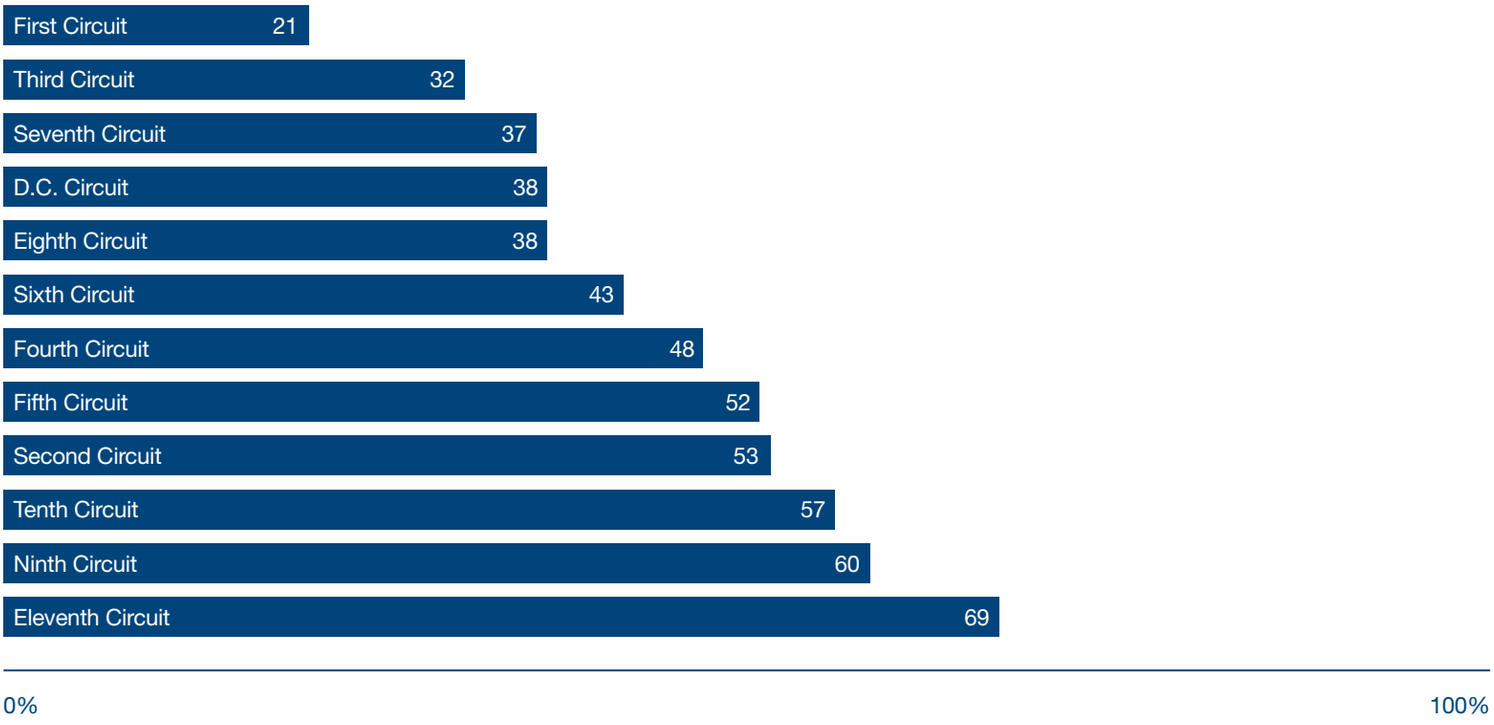


Figure 14. *Daubert* challenges to financial expert witnesses, by year and jurisdiction (2000–2007)

Jurisdiction	2000	2001	2002	2003	2004	2005	2006	2007	Total	%
Second Circuit	9	7	9	17	16	20	27	8	113	18
Seventh Circuit	7	5	13	3	6	15	8	14	71	11
Fifth Circuit	8	2	8	5	5	10	4	21	63	10
Third Circuit	2	4	4	4	10	7	19	13	63	10
Sixth Circuit	1	3	12	11	7	3	6	13	56	9
Tenth Circuit	5	5	–	1	7	3	13	13	47	7
Eighth Circuit	4	3	5	8	8	4	5	8	45	7
Ninth Circuit	1	2	2	4	5	7	7	7	35	6
Eleventh Circuit	5	2	1	–	2	5	10	4	29	5
Fourth Circuit	3	2	3	3	1	1	3	11	27	4
First Circuit	2	2	2	3	4	3	1	2	19	3
D.C. Court	–	1	1	–	1	5	–	–	8	1
Other federal & state courts	9	6	8	12	9	10	3	2	59	9
Total	56	44	68	71	81	93	106	116	635	100

Figure 15. Success rate of *Daubert* challenges to financial expert witnesses, by jurisdiction (2000–2007)



Note: Figures include exclusions made in whole or in part.

Case type affects the frequency and outcome of *Daubert* challenges to financial expert witnesses

Financial experts assist in a wide range of disputes, among which certain types of disputes are more likely to experience *Daubert* challenges than others. During 2000–2007, challenges to financial expert witnesses occurred most frequently (24%) in disputes involving breach of contract or fiduciary duty (see Figure 16).

Challenged financial expert witnesses experienced high rates of exclusion (56%) in matters involving fraud in 2000–2007. In contrast, challenges to financial expert witnesses had lower success rates (42%) in disputes involving breach of contract or fiduciary duty (see Figure 17).

Lack of reliability is the top reason financial experts are excluded

To analyze the reasons financial expert testimony was excluded in whole or in part, PricewaterhouseCoopers used Rule 702 of the Federal Rules of Evidence, "Testimony by Experts," and its focus on the qualifications of the expert and the relevance and reliability of the expert testimony. Our analysis found that in each year during the 2000–2007 period, lack of reliability was the leading cause of a financial expert opinion being excluded in whole or in part, followed by lack of relevance and lack of qualifications. Of the 295 *Daubert* challenges that resulted in full or partial exclusion of financial experts' testimony during the past eight years, lack of reliability was a cause in 217 instances, lack of relevance in 117 instances, and lack of qualifications in 66 instances. Other factors, such as missed deadlines, accounted for 8 exclusions in whole or in part (see Figure 18). In 2007 alone, lack of reliability was a cause in more than half (57%) of all exclusions of financial expert testimony in *Daubert* challenges (see Figure 19).

Figure 16. *Daubert* challenges to financial expert witnesses, by case type (2000–2007)

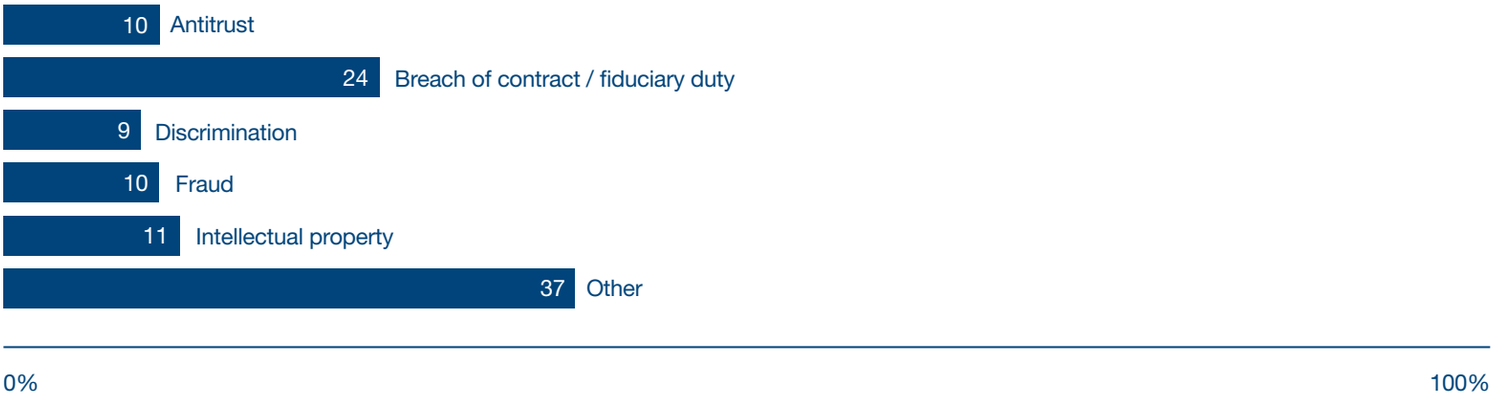
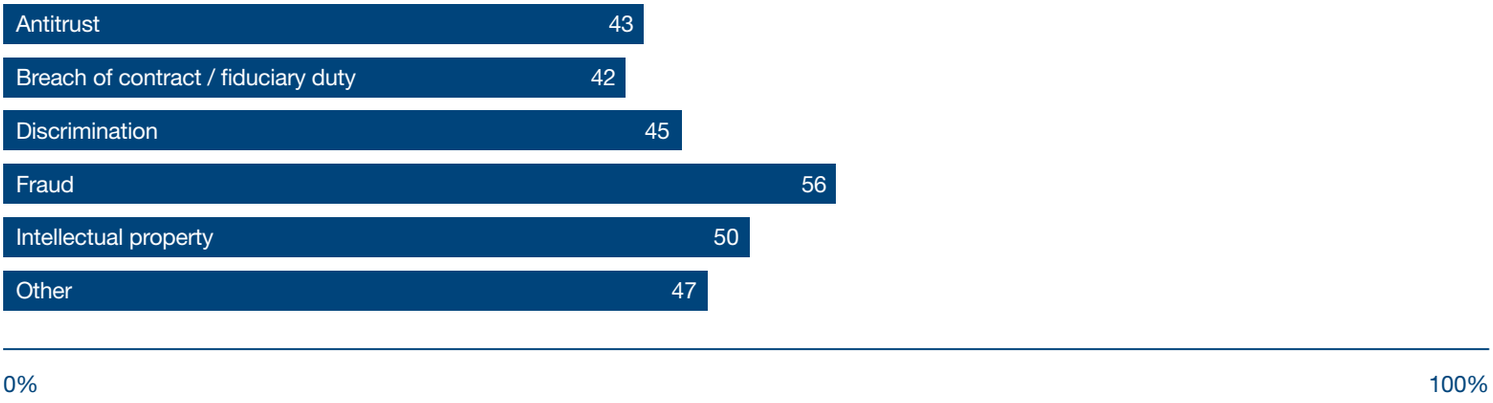


Figure 17. Success rate of *Daubert* challenges to financial expert witnesses, by case type (2000–2007)



Note: Figures include exclusions made in whole or in part.

Figure 18. Exclusions of financial expert testimony, by exclusion reason (2000–2007)

	2000	2001	2002	2003	2004	2005	2006	2007	Total
Total partially or fully excluded financial experts	30	18	20	37	41	55	47	47	295
Breakdown by exclusion reason									
Reliability	25	15	15	28	31	39	37	27	217
Relevance	22	10	7	14	10	26	10	18	117
Qualifications	6	3	9	1	8	9	12	18	66
Other (missed deadline, etc.)	1	–	–	2	1	2	1	1	8
Further breakdown of reliability									
Facts/data									
Quantity	17	8	13	7	3	3	2	–	53
Validity	16	12	15	20	15	31	31	16	156
Methods/principles									
Testability	14	7	5	8	8	6	5	8	61
Peer review	10	6	8	2	–	3	4	2	35
Rate of error	8	6	5	14	9	3	3	1	49
General acceptance	10	9	8	7	17	10	13	17	91
Further breakdown of qualifications									
Education	6	1	4	1	5	3	5	4	29
Knowledge	5	2	7	1	4	5	7	8	39
Skill	5	2	6	1	2	1	3	1	21
Training	3	2	6	–	2	3	2	2	20
Experience	5	3	9	1	6	6	8	14	52
Breakdown of challenges with multiple exclusion reasons									
Reliability & relevance	12	6	2	8	1	11	3	3	46
Qualifications & reliability	2	2	4	–	6	4	3	4	25
Qualifications, reliability & relevance	4	–	3	–	1	2	3	3	16
Qualifications & relevance	–	–	–	–	–	2	1	3	6
Missed deadline, relevance & reliability	1	–	–	–	–	–	–	–	1
Missed deadline & qualifications	–	–	–	–	–	–	–	1	1
Missed deadline, reliability & qualifications	–	–	–	1	–	–	–	–	1
Exclusions resulting from failure to meet two or more criteria	19	8	9	9	8	19	10	14	96

Note: The exclusion reasons are not mutually exclusive. An expert's testimony may have been excluded due to more than one reason. Figures include exclusions made in whole or in part.

Figure 19. Percentage of exclusions of financial expert testimony, by exclusion reason (2000–2007)

	2000	2001	2002	2003	2004	2005	2006	2007	Total
Total partially or fully excluded financial experts	100	100	100	100	100	100	100	100	100
Breakdown by exclusion reason									
Reliability	83	83	75	76	76	71	79	57	74
Relevance	73	56	35	38	24	47	21	38	40
Qualifications	20	17	45	3	20	16	26	38	22
Other (missed deadline, etc.)	3	–	–	5	2	4	2	2	3
Further breakdown of reliability									
Facts/data									
Quantity	57	44	65	19	7	5	4	–	18
Validity	53	67	75	54	37	56	66	34	53
Methods/principles									
Testability	47	39	25	22	20	11	11	17	21
Peer review	33	33	40	5	–	5	9	4	12
Rate of error	27	33	25	38	22	5	6	2	17
General acceptance	33	50	40	19	41	18	28	36	31
Further breakdown of qualifications									
Education	20	6	20	3	12	5	11	9	10
Knowledge	17	11	35	3	10	9	15	17	13
Skill	17	11	30	3	5	2	6	2	7
Training	10	11	30	–	5	5	4	4	7
Experience	17	17	45	3	15	11	17	30	18
Breakdown of challenges with multiple exclusion reasons									
Reliability & relevance	40	33	10	22	2	20	6	6	16
Qualifications & reliability	7	11	20	–	15	7	6	9	8
Qualifications, reliability & relevance	13	–	15	–	2	4	6	6	5
Qualifications & relevance	–	–	–	–	–	4	2	6	2
Missed deadline, relevance & reliability	3	–	–	–	–	–	–	–	–
Missed deadline & qualifications	–	–	–	–	–	–	–	2	–
Missed deadline, reliability & qualifications	–	–	–	3	–	–	–	–	–
Exclusions resulting from failure to meet two or more criteria	63	44	45	24	20	35	21	30	33

Note: The exclusion reasons are not mutually exclusive. An expert's testimony may have been excluded due to more than one reason.

Financial expert testimony was also often excluded due to a failure to meet multiple *Daubert* criteria. Of the 295 instances in which expert testimony was excluded in whole or in part during 2000–2007, 96 exclusions (33%) resulted from failure to meet two or more criteria. Of these, the most common combination was lack of relevance and lack of reliability, which accounted for 46 full or partial exclusions, or an average of 16% (see Figure 18 and Figure 19).

Unusual and untested analytical methods render expert testimony inadmissible

Methodological flaws caused by the misuse of accepted financial/economic methods are another frequent cause of financial expert exclusion. Below are several examples where one or more courts found fault with the approach taken under the *Daubert* standard of reliability, resulting in an exclusion of expert testimony.

Untested "proportional trading model." In a securities litigation matter, the plaintiff's expert applied the proportional trading model to estimate aggregate damages to a class of securities by multiplying the alleged per-share price differential by the aggregate number of shares "damaged" by the alleged fraud. The Northern District Court of Illinois ruled that the proportional trading model does not meet any of the *Daubert* standards because it "has never been tested against reality" and "has never been accepted by professional economists."[4]

Failure to consider discounted cash flow (DCF) analysis in business valuation. The Eastern District Court of New York ruled, *in re Med Diversified, Inc.*, that failing to use the DCF method and relying solely on the comparable companies method did not provide the necessary "check" that would render the expert's value assessment a reliable measure of the company's worth.[5] In a different matter, the Southern District Court of New York, in *Lippe v. Bairnco Corp.*, excluded a financial expert because he "failed to adequately explain why he chose not to use DCF as a check against the comparables he employed in the valuations."[6]

4 *Kaufman v. Motorola, Inc.*, Not Reported in F. Supp. 2d, WL 1506892, 2000 U.S. DISTR. LEXIS 14627 (2000).
5 *In re Med Diversified, Inc.*, 334 B.R. 89 (2005).
6 *Lippe v. Bairnco Corp.*, 288 B.R. 678 (2003).

Enhancement of a reasonable royalty rate through the application of a multiplier. In a patent infringement matter, one methodology for determining actual damages to a patentee that produces the patented item is to determine the sales and profits lost to the patentee due to the infringement. In cases where a patentee cannot establish entitlement to lost profits, the damages section of the U.S. code on patents provides entitlement at no less than a reasonable royalty on an infringer's sales.[7] The Northern District Court of California stated 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." The Federal Circuit law "nowhere sanctions the use of a multiplier to determine adequate compensation for infringement." The court thus ruled that "such an enhancement to the reasonable royalty calculation is simply untethered by legal or factual support."[8]

Unreliable "consumption theory." In proving damages arising from contended fraudulent transfers, the plaintiff's accounting expert applied a "consumption theory," which estimated losses over a period of time by examining the values of "cash assets" — a measure of liquid assets defined by the expert — at two points in time. Damages were calculated as the difference between these two values, the assumption being that all downward change in the amount of "cash assets" was caused or consumed by the company's operating activities. The consumption theory employs "indirect evidence, the decrease in the amount of the 'cash assets,' as proof of both payment of less than reasonably equivalent value and the amount of monies a company was entitled to receive had it been paid the market price, its damages, in lieu of comparing each price paid for products to each's reasonably equivalent value damage measuring point, generally the market price." The Northern District of Alabama Bankruptcy Court found this method of calculating damages unreliable.[9]

7 Title 35 U.S.C. § 284.
8 *Technology Licensing Corp. v. Gennum Corp.*, Not Reported in F. Supp .2d, WL 1274391, 2004 U.S. Dist. LEXIS 10604 (2004).
9 *In Re Perry County Foods, Inc.*, 313 B.R. 875 (2004).

Misuse of the Black-Scholes method of valuation. In this constructive fraudulent transfer case, the plaintiff argued that the Black-Scholes model could be used in valuing an option to purchase 100% of controlled shares in a privately held company, since each of the variables in the model could be substantiated. However, the Eastern District of New York Bankruptcy Court indicated that the Black-Scholes model is principally applied to valuing an option for a minority of publicly traded shares. The court ruled that the method should not be used for valuing an option to purchase 100% of controlled shares in a privately held company.[10]

Determining terminal value. In determining the enterprise value of Chapter 11 debtors' business under a DCF analysis, the debtors' valuation expert used the debtors' projected earnings before interest, tax, depreciation, and amortization (EBITDA) minus capital expenditures (Cap Ex) as the metric of value for determining the debtors' terminal value. The opposing experts testified that "while EBITDA minus Cap Ex is used as a 'credit statistic' to measure, among other things, whether a company can adequately service its debt, it has never been used by any expert before any court in the United States to determine a company's terminal value under a DCF analysis." Given the expert's inability to identify any publications, treatises, or articles that validated his methodology, the Delaware Bankruptcy Court found that "the unprecedented use by the Debtors' expert of EBITDA minus Cap Ex to determine the Debtors' terminal value was so unreliable as to render the opinion of the Debtors' expert witness as to the Debtors' enterprise value inadmissible."[11]

Unreliable "straight-line ramp-up" (SLR) method. The SLR method plots the known value of a stock at one point in time and the known value at a later time, then draws a line between the two points and assumes that the value of the stock changed at a consistent rate in the intervening time. The Utah Court of Appeals ruled that the SLR method is "not an accepted method of business valuation."[12]

10 *In re Med Diversified, Inc.*, 334 B.R. 89 (2005).
11 *In re Nellson Nutraceutical, Inc.*, WL 3479293 (2006).
12 *Haupt v. Heaps,* UT App 436 (2005).

Unreliable economic damages calculation. In proving damages arising from the loss of enjoyment of life, or hedonic damages, the plaintiff's economics expert witness proposed a hypothetical benchmark of the dollar value of a statistical life. However, the District Court of New Mexico ruled to exclude the expert's testimony because of the hypothetical benchmark.[13]

Failure to use accepted methodologies of business valuation. The plaintiff's accounting expert witness acknowledged the three generally accepted methods of business valuation. However, the expert did not use the generally accepted methodologies and chose to formulate his own approach to value a business. The Western District Court of Virginia excluded the plaintiff's accounting expert witness because he failed to base his proposed testimony upon reliable principles and methods.[14]

Unreliable "confusion and dilution" survey. In attempting to prove damages arising from trademark infringement, the plaintiff's expert witnesses conducted a hybrid consumer confusion and trademark dilution survey. The Southern District Court of New York ruled to exclude the report and the expert testimony in its entirety due to the cumulative effect of a number of flaws, including the use of an improper survey, the poor choice of a control group, the failure to instruct respondents against guessing, the improper classification of respondents, and other significant methodological errors.[15]

13 *Harris v. U.S.*, WL 4618597 (2007).
14 *United Co. v. Keenan*, WL 4260930 (2007).
15 *Malletier v. Dooney & Burke, Inc.,* 525 F.Supp.2d 558, WL 4530868 (2007).

What this means for litigation

Understanding the emerging trends in *Daubert* challenges is key.

The steadily rising number of challenges to financial expert witnesses under *Daubert* has made it increasingly important for litigators and experts alike to understand the trends in past *Daubert* decisions. From 2000 to 2007, the outcome of *Daubert* challenges varied significantly based on jurisdiction, type of expert, and whether the expert was put forward by the defense or plaintiff.

It is especially critical for the litigator and the expert to focus on the reliability of the expert's testimony as defined by Rule 702 of the Federal Rules of Evidence, "Testimony by Experts." As our study shows, more financial experts have been excluded because of a lack of reliability in either the inputs used or the methodology applied than for any other reason. Of this group, more financial experts have been excluded due to reliance on invalid facts/data than for any other reason, accounting for 156 of 295 exclusions between 2000 and 2007.

While the number of *Daubert* challenges to financial expert witnesses has increased rapidly overall since 2000, the number of successful exclusions decreased from 2006 to 2007. PricewaterhouseCoopers observes that if the 2007 reduction in the number of exclusions due to invalid facts/data continues, by the ninth anniversary of the *Kumho* decision we will likely see another year of decreased numbers of overall financial expert exclusions.

Methodology

For this study, PricewaterhouseCoopers searched written court opinions issued between January 1, 2000, and December 31, 2007 (i.e., post–*Kumho Tire*), using the citation search string "526 U.S. 137" (*Kumho Tire v. Carmichael*). During 2000–2005 our search was conducted in the LexisNexis database and since 2006 we have used the WestLaw database. Our search identified 2,354 federal and state cases during 2000–2007 that involved a total of 3,681 *Daubert* challenges to expert witnesses of all types. In some instances, more than one *Daubert* motion was filed in a case or several expert witnesses were challenged with one motion.

From each *Daubert* challenge, we extracted detailed information concerning each case, the characteristics of each challenged expert, the nature of the evidence challenged, and the outcome of each challenge. We classified experts into two categories for this study: financial experts (accountants, economists, statisticians, finance professors, financial analysts, appraisers, business consultants, etc.) and non-financial experts (scientists, engineers, mechanics, physicians, policemen, fingerprint experts, psychologists, psychiatrists, etc.). Our search showed that during 2000–2007, 635 *Daubert* challenges were addressed to financial experts. In each instance where a challenge to a financial expert resulted in the full or partial exclusion of the expert's testimony by the court, we categorized the factor(s) that resulted in the inadmissibility of the expert's testimony, using as a basis for analysis Federal Rules of Evidence Rule 702, "Testimony by Experts."

Our methodology entailed searches on all written opinions in the database related to expert challenges and does not encompass all challenges (e.g., unwritten decisions) in all cases. Consequently, our analysis focused on trends and comparative metrics rather than on the absolute number of challenges or exclusions.

Throughout the study, whenever we discuss the "success rate" of *Daubert* challenges (by this or other wording), "success" is defined as the exclusion of expert witness testimony in whole or in part. Similarly, when we refer to the "exclusion" of an expert witness, we are referring to the testimony and opinions the witness intended to proffer.

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