Daubert Challenges to Financial Experts

A yearly study of trends and outcomes (2000-2018)
About the study

In 1993, the US 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 with respect to expert 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 in federal jurisdictions, including financial expert testimony.

In this study, we analyze post-*Kumho Tire* challenges to financial expert witnesses under the *Daubert* standard. By examining these challenges, we seek to highlight trends in *Daubert* challenges to financial experts, and provide insight into the reasons behind expert exclusions.

To identify exclusions, we searched written court opinions issued between January 1, 2000, and December 31, 2018, using the citation search string “526 U.S. 137” (*Kumho Tire v. Carmichael*). Our search identified 10,546 cases that involved 15,740 *Daubert* challenges to expert witnesses of all types.\(^1\) For each *Daubert* challenge, we classified experts into two categories: financial experts (accountants, economists, statisticians, finance professors, financial analysts, appraisers, business consultants, etc.); and non-financial experts (scientists, engineers, psychologists, etc.). As a result, we identified 2,623 *Daubert* challenges to financial experts between 2000 and 2018.

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1. Some case opinions citing *Kumho Tire* cover challenges to more than one expert, and some case opinions cite *Kumho Tire* but do not include a *Daubert* challenge.
Overview

In the 19 years since the U.S. Supreme Court’s 1999 ruling in *Kumho Tire Co. v. Carmichael*, we have analyzed 2,623 financial expert challenges, including 213 financial expert challenges decided during calendar year 2018.
How have exclusion rates changed over time?

In 2018, there were 213 reported challenges to financial expert witnesses - an increase of 3% from 2017.

Of the 213 challenges against financial expert witnesses in 2018, 91 challenges (43%) resulted in partial or full exclusion of the expert.
Why are financial experts being excluded?

Federal Rule of Evidence No. 702, “Testimony by Experts,” governs the admissibility of expert witness testimony and incorporates the precedent set by Daubert, Kumho Tire, and other rulings. Rule 702 provides that a qualified expert’s testimony is admissible if it is both relevant and reliable, and identifies criteria for evaluating relevance and reliability. We used the criteria from Rule 702 to evaluate the reasons for financial expert witness exclusions.

Lack of reliability, either on its own or in combination with other factors, has consistently been the main reason for financial expert witness exclusions over the course of our study. This pattern held true for 2018.

When excluding testimony due to a lack of reliability, courts most frequently cited a lack of sufficient data or the use of methods that are not generally accepted as reasons for exclusion.

The second most common reason for exclusion in 2018 was that the testimony was not considered relevant to the case. This, again, is consistent with historical trends. When a financial expert is excluded for lack of relevance, it is often caused by testimony that was beyond the scope of the financial expert’s role (e.g., testimony related to legal matters) or testimony that will not help the trier of fact (e.g., the opinion is not tied to the specific facts of the case).
What types of cases have higher exclusion rates?

Financial experts testify in a wide range of disputes. The most common cases where we see challenges to financial expert witness testimony are ones arising from a breach of contract or of fiduciary duty, intellectual property, fraud, and antitrust matters.
What types of cases have higher exclusion rates?

For the 19 years captured in our study, securities litigation, fraud, and intellectual property cases have had the highest rates of exclusion for financial expert witness testimony.

During 2018, cases involving breach of contract or fiduciary duty resulted in the most challenges to financial expert witnesses. Personal injury cases had the highest exclusion rate.
The *Daubert* criteria are the standard of review for the admission of expert witness testimony in the federal courts. Some states have also adopted *Daubert* factors as their standard of review.

Over the 19 years of our study, the Second, Fourth and Tenth Circuits have, on average, had the highest exclusion rates, while the First and Third Circuits have had the lowest.
Where are exclusion rates highest?

In 2018, *Daubert* challenges to financial experts most frequently occurred in the Second, Fifth, and Ninth Circuits, which include New York, Texas, and California, respectively. The Ninth Circuit has seen the most challenges over the course of our study.

The most frequent case types in these jurisdictions in 2018 were breach of contract/fiduciary duty and antitrust cases.
Who experiences higher numbers of challenges — accountants, appraisers, or economists?

The most common types of experts engaged to provide financial expert witness testimony are accountants, appraisers, and economists. We also see other financial experts such as statisticians, financial analysts, finance professors, etc.

Over the last 19 years, of the three most common financial expert types, accountants and economists have been the most frequently challenged experts. In 2018, economists faced the highest number of *Daubert* challenges.
Who experiences higher exclusion rates—accountants, appraisers, or economists?

In 2018, economists had the highest exclusion rate of the three most common financial expert types.

43% of *Daubert* challenges to economists resulted in full or partial exclusion during 2018, which is in line with the 19-year average exclusion rate for economists.

41% of Daubert challenges to accountants in 2018 resulted in full or partial exclusion - a rate nearly 5% lower than the 18-year average.
Who experiences higher exclusion rates — plaintiff- or defendant-side financial experts?

On average, defendant-side financial experts experience a marginally higher exclusion rate than plaintiff-side financial experts.

This trend held true in 2018 - 49% exclusion for defendant-side financial experts vs. 40% for plaintiff-side financial experts.

Over the course of our study, there have consistently been approximately twice as many Daubert challenges to plaintiff-side financial experts (67%) as there have been to defendant-side financial experts (33%). This pattern held true in 2018.
When lower-court *Daubert* challenge rulings are appealed, how often are they overturned?

In 2011, we began analyzing the approach of appellate courts to lower-court rulings on financial expert *Daubert* challenges.

Between 2011 and 2018, there were 85 appeals of lower court rulings on financial-expert *Daubert* challenges. More than half of the appeals were related to financial experts whose testimony had been accepted by the lower court.

In the majority of appeals, the appellate court upheld the ruling of the lower court.
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