Daubert Challenges to Financial Experts

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, 2019, using the citation search string “526 U.S. 137” (*Kumho Tire v. Carmichael*). Our search identified 11,276 cases that involved 17,047 *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 2,842 *Daubert* challenges to financial experts between 2000 and 2019.

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 20 years since the U.S. Supreme Court’s 1999 ruling in *Kumho Tire Co. v. Carmichael*, we have analyzed 2,842 financial expert challenges, including 224 financial expert challenges decided during calendar year 2019.
How have exclusion rates changed over time?

In 2019, there were 224 reported challenges to financial expert witnesses - an increase of 8% from 2018.

Of the 224 challenges against financial expert witnesses in 2019, 83 challenges (37%) 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 2019.

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 2019 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 20 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 2019, cases involving intellectual property resulted in the most challenges to financial expert witnesses. Bankruptcy cases had the highest exclusion rate.²

2. There were only two challenges to financial experts for bankruptcy cases in 2019.
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 20 years of our study, the Tenth, Second, and Fourth Circuits have, on average, had the highest exclusion rates, while the First, Third, and Eighth Circuits have had the lowest.
**Where are exclusion rates highest?**

In 2019, *Daubert* challenges to financial experts most frequently occurred in the Fifth and Ninth Circuits, which include Texas and California, respectively. The Ninth Circuit has seen the most challenges over the course of our study.

The most frequent case type in these jurisdictions in 2019 was intellectual property.

In 2019, the Second and Fourth Circuits had the highest exclusion rates while the Seventh and Eleventh Circuits had the lowest exclusion rates.

<table>
<thead>
<tr>
<th>Circuit</th>
<th>Included or no decision made</th>
<th>Excluded in whole or in part</th>
<th>Number of challenges</th>
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</tr>
<tr>
<td>11th Circuit</td>
<td>17%</td>
<td>83%</td>
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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 20 years, of the three most common financial expert types, accountants and economists have been the most frequently challenged experts. In 2019, economists faced the highest number of Daubert challenges.
Who experiences higher exclusion rates — accountants, appraisers, or economists?

In 2019, accountants and appraisers had the highest exclusion rates of the three most common financial experts at a rate of 43% each.

31% of Daubert challenges to economists resulted in full or partial exclusion during 2019, which is below the 20-year average exclusion rate for economists.

43% of Daubert challenges to accountants in 2019 resulted in full or partial exclusion - a rate 2% lower than the 20-year average.

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### 20-year average exclusion rate

- **Economist**: 41%
- **Accountant**: 45%
- **Appraiser**: 45%
- **Other financial**: 48%

- **Excluded in whole or in part**
- **Included or no decision made**
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 2019 - 41% exclusion for defendant-side financial experts vs. 35% 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 2019.
In 2011, we began analyzing the approach of appellate courts to lower-court rulings on financial expert *Daubert* challenges.

Between 2011 and 2019, there were 89 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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