Excluding Testimony under Daubert

Daubert Standard

Federal Rule of Evidence 702 governs the admissibility of expert testimony and permits a qualified expert to present testimony that "will assist the trier of fact" in understanding the evidence or in determining a factual issue, so long as "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." Fed.R.Evid. 702. Under Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993), the trial judge bears the responsibility of "gatekeeper" to ensure "that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." Daubert, 509 U.S. at 597, 113 S.Ct. 2786.

The court is also responsible for determining whether the specialized knowledge or testimony of the expert is based on the application of reliable theories or techniques. Keep in mind, the court does not address the conclusions reached by the expert, but rather only the methodologies relied upon. To that end, Daubert identified four factors that the court may consider in assessing reliability:

1) whether a theory or technique can be and has been tested;

2) whether a theory has been subjected to peer review and publication;

3) whether a "particular scientific technique" has a known or potential rate of error;

4) and whether the theory or technique enjoys general acceptance within the "relevant scientific community."

Daubert, 509 U.S. at 593-94. This flexible inquiry requires only "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, 113 S.Ct. 2786. Further, the Supreme Court has held that, in cases involving non-scientific testimony, district courts are not limited to the Daubert factors in assessing the reliability of the proffered expert testimony. Kumho Tire Co. Ltd. v. Carmichael, 526 U.S. at 150-151. Rather, they enjoy broad

discretion in determining both how to assess reliability and whether it exists. Id. However, as a result of this broad discretion, the analysis of whether to exclude expert testimony is extremely fact specific and usually limited to the particular case at hand.

Damages Experts

In the context of a Daubert motion, damages experts are critiqued in one of three areas: qualifications, data, or methodology. An attack on a expert's qualifications typically involves an argument as to the lack of experience with the particular industry or business. While "the text of Rule 702 expressly contemplates that an expert may be qualified on the basis of experience," the advisory committee notes emphasize that "[i]f the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts." The failure to do so can provide sufficient basis for exclusion of the testimony. See, Transwestern Pipeline Co., LLC v. 46.78 Acres, More or Less, of Permanent Easement Located in Maricopa Country, Not Reported in F.Supp.2d, 2010 WL 1728936 (D.Ariz.,2010).

An attack on the expert's data involves highlighting incomplete information or incorrect assumptions underlying the data. For example, in Hilderman v. Enea TekSci, Inc., 2010 WL 546140 (S.D.Cal.,2010), testimony from a damages expert in a misappropriation of trade secrets case was found to be unreliable because it rested on a number of unfounded assumptions. In particular, the expert attributed the entire value of the companies' "good will" to the misappropriation by the defendants. Admittedly, a company's "good will" can comprise of a number of different intangible assets including trade secrets, preexisting contracts, and a trained workforce. Here, the expert could not distinguish the portion of "good will" that was apportioned to the trade secret as opposed to the other intangible assets. His decision to attribute the entire value of the corporation's "good will" to the trade secret was incorrect and entirely speculative. As a result, the court reasoned, his opinion was properly excluded.

Similarly, in the securities fraud case of In re Imperial Credit Industries, Inc. Securities Litigation, 252 F.Supp.2d 1005 (C.D. Cal.

2003), a damages expert offered testimony regarding the price at which a stock would have sold absent the alleged misrepresentations or omissions. After excluding the testimony, the court noted that "[a] proper measure of damages in the securities context thus requires elimination of that portion of the price decline or price difference which is unrelated to the alleged wrong." Id. at 1015. The experts failure to distinguish the non-fraud related influences of the stock's price behavior justified the court's refusal to admit the expert's testimony. Id; see also Kemp v. Tyson Seafood Group, Inc., 2000 WL 1062105 (D.Minn.,2000)(Expert failed to account for market variables which would affect the conclusions that he ultimately reached.")

As with the underlying data, methodology used by the expert is commonly attacked when seeking to exclude the testimony. The court assesses an expert's methodology using criteria such as testability, publication in peer reviewed literature, and general acceptance. U.S. ex rel. Cheri Suter v. National Rehab Partners Inc., 2010 WL 1248236, 4 (D.Idaho, 2010)(citing Daubert and Primiano v. Cook, 598 F.3d 558 (9th Cir. 2010). In U.S. ex rel. Cheri Suter, the court determined that the methodology used by plaintiff's damages expert was unreliable. Specifically, the court noted that even assuming that the expert relied on sufficient data, his opinion was not the product of reliable principles and methods. Further, his methodology did not appear in any known peer review or publication, was not based on testable methodology, and lacked general acceptance by any professional community. While peer review is not an absolute prerequisite for the admission of expert testimony, "[i]n the absence of independent research or peer review, experts must explain the process by which they reached their conclusions and identify some type of objective source demonstrating their adherence to the scientific method." In re Phenylpropanolamine (PPA) Products Liability Litigation, 289 F.Supp.2d 1230 (W.D.Wash.,2003)(citing Daubert v. Merrell Dow Pharms., Inc., 43 F.3d 1311, 1315 (9th Cir.1995) (" Daubert II "). Having failed to do so, his conclusions were unreliable under Daubert and Rule 703.

In a patent infringement case, the plaintiff sought to offer evidence of the profits it would have made "but for" the infringement. DSU

Medical Corp. v. JMS Co., Ltd., 296 F.Supp.2d 1140, 1147 (N.D.Cal. 2003). Here, the expert reconstructed the market using a hypothetical contract to determine the amount of potential profits. However, the court noted that nothing in Daubert or the Federal Rules required it to admit evidence that is connected to existing data only the by *ipse dixit* of the expert. The reconstruction did not take into account alternative actions the infringer foreseeably would have undertaken had he not infringed. "A trial court may exclude evidence when it finds that there is simply too great an analytical gap between the data and the opinion proffered." Without sound economic proof of the nature of the market, the expert's hypothetical lapsed into pure speculation. Id. at 1158.

Flaws in Analysis

Ultimately, the key to excluding expert testimony is demonstrating flaws, either in the underlying data or the methodology used by the expert. In McGlinchy v. Shell Chemical Co., 845 F.2d 802, 806-807 (9th Cir. 1988), the court identified seven defects which rendered the reports of plaintiff's two damages experts "hopefully flawed." Those reports were defective because:

(1) expert provided inconsistent testimony regarding whether he limited his analysis of future lost profits to the acts of the defendant;

(2) expert could not "confirm that the relevant market conditions were the same before and after the time the injury was alleged to have occurred;"

(3) expert did not know "which product lines had declined in sales, or in which geographic areas;"

(4) expert's report "rests on unsupported assumptions and ignores distinctions crucial to arriving at a valid conclusion;"

(5) expert's study failed to indicate how he estimated total sales figures for a particular year;

(6) expert's study erroneously assumed plaintiff's expenses would not change for nine years; and

(7) expert "documented little of the basis for his conclusions."

Other damages experts may also suffer from these same flaws. By identifying them, the court distinguishes these types of defects from those that would normally go to the weight of the evidence rather than its admissibility.

Causation

Although it is common for the court to exclude evidence on the grounds that it is speculative, "mathematical precision" is not required. Primiano v. Cook, 2010 WL 1660303, at *5 (9th Cir. Apr.27, 2010)("Lack of certainty is not, for a qualified expert, the same thing as guesswork."). In fact, the courts recognize that lost profits are "necessarily an estimate" and will be upheld so long as they are supported by substantial evidence. Humetrix, Inc., v. Gemplus S.C.A., 268 F.3d 910, 919 (9th Cir. 2001)(citing Portland 76 Auto/Truck Plaza, Inc. v. Union Oil Co., 153 F.3d 938, 947 (9th Cir.1998)). However, while some degree of speculation in computing the amount of damages is acceptable, causation must initially be established. Playtex Products, Inc. v. Procter & Gamble Co., 2004 WL 1658377, 6 (S.D.N.Y.) (S.D.N.Y.,2004)(citing Burndy Corp. v. Teledyne Industries, Inc., 748 F.2d 767, 771 (C.A.Conn., 1984).

In Prepaid Wireless Services, Inc. v. Southwestern Bell Wireless, Inc., 2002 WL 34367328, 3 (S.D.Tex., 2002), the defendant argued that an expert's report was defective because it did not analyze the proximate cause of the plaintiff's losses. Specifically, the damages model failed to distinguish between lawful from unlawful conduct and did not address only those damages caused by the defendant's alleged breach. This failure is a common theme in Daubert motions concerning damages experts. Similarly, in an anti-trust action brought under the Lanham Act for false advertising, the court noted that a damages model incorrectly assumed that defendant's actions were the cause of all of the plaintiff's lost sales. Pharmanetics, Inc. v. Aventis Pharmaceuticals, Inc., 2005 WL 6000369, 10 (E.D.N.C., 2005). The expert did not consider the effect of higher price points, more limited FDA clearance than was requested, or other factors that would have contributed to the loss of sales. This failure, the court acknowledged, would mislead the jury into believing that *all* the lost sales opportunities were due to the defendant's actions. Id; see also Munoz v. Orr, 200 F.3d 291, 301 (5th Cir.2000)(The Fifth Circuit found that an expert's failure to consider, or control for, other explanatory variables is fatal to the reliability of his testimony.)

Finally, even when damages are properly segregated, it is not enough to rely solely on the calculations or assumptions of others. In JRL Enterprises, Inc. v. Procorp Associates, Inc., 2003

WL 21284020 (E.D.La.,2003), the court granted a motion to exclude expert testimony on the grounds that the expert performed no market analysis to verify the reasonableness or accuracy of the projections given to him. Without first verifying the reliability of the assumptions given to him, his calculations were nothing more than "than an exercise in arithmetic based on inherently unreliable values."

Conclusion

The aforementioned cases should provide an overview of the relevant case law on excluding expert witnesses under Daubert. It should be emphasized that this analysis is very fact specific and the outcome of a Daubert motion will likely turn, not on any legal precedent, but on the particular factual circumstances.