

Challenges to the Admissibility of Expert Financial Testimony: 2005-2008

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Introduction

“In U.S., Expert Witnesses Are Partisan” was the headline of an article by Adam Liptak in the *New York Times* of August 12, 2008. This should not have been a surprise. The same *New York Times* published the following, referring to expert testimony, in a letter to the Editor entitled, “A Growing Evil in Our Courts Which Calls for Radical Reform”:¹

Lawyers admit the value of such evidence before a jury chiefly by the array of the experts’ qualifications, but they hold the experts in contempt as a class, and assume an expert’s convictions to be purchasable, determined by the highest bid. This obloquy is not confined to the legal profession and cartoonists, but is increasing with the public at large, from which come all trial jurors. Courts have based rulings upon the absence of any inherent value in such testimony. Even the more intelligent jurors give small credence or weight to an expert’s opinion per se, unless it is consonant with their own understanding or has a basis of common sense.

That was more than 100 years ago. And even before that, in 1901, the young Learned Hand (prior to becoming a judge) wrote:

The trouble with all this is that it is setting the jury to decide, where [experts] disagree. The whole object of the expert is to tell the jury, not facts, as we have seen, but general truths derived from his specialized experience. But how can the jury judge between two statements each founded upon an experience confessedly foreign in kind to their own? It is just because they are incompetent for such a task that the expert is necessary at all . . . What hope have the jury, or any other layman, of a rational decision between two such conflicting statements each based upon such experience.²

The main complaints against the use of experts in the U.S. legal system focus on bias and knowledge: (1) is their testimony simply bought and paid for (as opposed to their honest opinion), and (2) do they know what the hell they are talking about.³ The problem has been put thus:

Experts in other fields see lawyers as unprincipled manipulators of their disciplines, and lawyers and experts alike see expert witnesses—those members of other learned professions who will consort with lawyers—as whores.⁴

¹ *New York Times*, July 11, 1906.

² Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 Harv. L. Rev. 40, 54-55 (1901).

³ Jennifer L. Mnookin, Vice Dean and Professor of Law at the UCLA School of Law, labels these issues with different names. See Mnookin, *Expert Evidence, Partisanship and Epistemic Competence*, Vol. 73:3 Brooklyn Law Review 1009 (2008).

⁴ Samuel R. Gross, *Expert Evidence*, 1991 Wis. L. Rev. 1113, 1115 (1991) quoted by Mnookin *ibid*.

The Daubert Trilogy - Admission of Expert Testimony

In *Daubert v. Merrell Dow Pharmaceuticals*,⁵ the U.S. Supreme Court determined that expert testimony, to be admissible, must meet the two-part test of the Federal Rules of Civil Procedure Rule 702: (a) it must be reliable—based on recognized knowledge, and (b) it must be relevant—of assistance to the trier of fact. Prior to *Daubert*, the “general acceptance” standard of *Frye v. United States*⁶ was the rule.

In *Daubert*, the Supreme Court concluded that the *Frye* test, which was limited to the single question of whether the expert’s methods were generally accepted in the relevant scientific community, did not survive the enactment of Rule 702 in 1972. Under *Daubert*, the court interpreted Rule 702 to require that the trial judge use a variety of sources in determining whether an expert’s proffered evidence meets the “reliability” standard.

Daubert directed trial courts to consider at least four factors when making the threshold determination, as “gatekeepers,” of whether or not to admit expert testimony: (1) whether the theory or technique can be tested, (2) whether the expert’s work has been subjected to peer review, (3) whether the rate of error is acceptable, and (4) whether the method utilized enjoys widespread acceptance.

The second case in the *Daubert* trilogy came four years later in *General Electric Co. v. Joiner*,⁷ which has two major holdings: (1) that the “gatekeeper” function allows the court itself to investigate the expert’s reasoning process as well as the expert’s general methodology (frequently analyzed under the rubric of “reliability”), and (2) that the standard of review for an appellate court of such a trial court’s decision is “abuse of discretion.”

In the third case of the trilogy, *Kumho Tire v. Carmichael*,⁸ the U.S. Supreme Court rejected the argument that *Daubert* applied only to “scientific” testimony, holding that the *Daubert/Joiner* test applies to all expert witnesses.

The obligation of courts to exercise their “gatekeeper” function has created an enormous stir since *Daubert*. In the 50 years following the *Frye* decision, it was only cited 96 times. In the 6 years following the *Daubert* decision, there were 1,065 federal court opinions issued on the admissibility of expert testimony. And the number has continued to grow.

However, there is a common misperception that *Daubert* is unequivocally the law of the land. Although that is true in federal courts, it is not so with respect to the various states. In fact, only nine states have adopted the full *Daubert* trilogy.⁹ Other states have adopted either the *Frye* rule, the *Daubert* trilogy, or some hybrid, in determining the initial quality of

⁵ 509 U.S. 579, 113 S.Ct. 2786 (1993).

⁶ 54 App.D.C. 46, 293 F. 1013 (1923).

⁷ 522 U.S. 136 (1997).

⁸ 526 U.S. 137, 119 S.Ct. 1167 (1999).

⁹ For an excellent review of this issue see Bernstein, David E. and Jackson, Jeffrey D. “The Daubert Trilogy in the States,” 44 *Jurimetrics J.* 351 (2004).

the expert's proffer. Six states have adopted *Daubert* and *Kumho Tire* but have not adopted *Joiner*. Eight states have adopted *Daubert* (at least in part) but have not adopted *Kumho Tire* and/or parts of *Joiner*. Six states, while not adopting *Daubert*, have utilized part of its holding to develop their own tests. And there are other non-*Frye* states that nonetheless reject *Daubert*. Both *Frye* and *Daubert* require the expert's reasoning to be "of a type reasonably relied upon by experts in the field" and many states continue to apply *Frye*.¹⁰

Purpose and Methodology

This study has been designed to review challenges in state and federal courts to the admission of expert financial testimony, and the results of those challenges for the period between January 1, 2005 and September, 2008. We originally set out to supplement the study done by PricewaterhouseCoopers of similar issues for the period 2000 to 2004, being unaware that PwC was going to do updates.¹¹ However, our methodology is somewhat different from PwC and is designed to benefit lawyers and practitioners more than accountants and statisticians.

First of all, PwC "searched written court opinions issued between January 1, 2000 and December 31, 2006 using the citation search string '526 U.S. 137' the citation for *Kumho Tire*" – the third of the U.S. Supreme Court's *Daubert* trilogy of cases.¹² PwC's 2000-2005 "search was conducted in the LexisNexis database and in 2006 [PwC] used the WestLaw database."

For this study, we used a different methodology because (1) using only *Kumho* as the research criterion leaves out (a) all the state cases that either do not follow *Daubert* at all or (b) the states that have only partially adopted the *Daubert-Joiner-Kumho* trilogy; and (2) it apparently leaves out all the federal and state court decisions on experts that do not follow *Daubert* or which do not cite *Kumho* and may only cite *Daubert* or *Joiner* or *Frye*. Accordingly, our search methodology was to use the West Keynote System, searching the West databases ALLSTATES and ALLFEDS using the connector "157K543! & da(aft 2004)".¹³ We recognize there is no perfect methodology and that ours too has flaws.¹⁴

¹⁰ See generally Byron E. Fox and Bruce S. Schaeffer, CCH *Franchise Regulation and Damages* Section 21.06, "The Rules in the Various States: *Frye* and the *Daubert* Trilogy," (2005-2008).

¹¹ However, PwC has updated its study. See e.g. "2000-2006 Financial expert witness *Daubert* challenge" study.

¹² *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S.Ct. 2786 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167 (1999).

¹³ The applicable West keynote system is categorized:

- 157 Evidence
 - 157XII Opinion Evidence
 - 157XII(C) Competency of Experts
 - 157k543 Value.
 - (1) In general
 - (2) Services
 - (3) Real property
 - (4) Personal property
- k543.5 Damages

¹⁴ For example, we know our search failed to pick up *In re Med Diversified*, 346 B.R. 621 (Bankr ED NY 2006), which is surely an important, if imperfectly decided, case in this area.

The Overall Results - Data

After excluding most of the cases involving medical experts, we were left with about 85 cases where there were challenges. In the 37 decisions made at the trial court level (state and federal), some of which involved multiple experts, 43% of the challenges were unsuccessful and 57% were successful.

In the 10 federal appellate cases we examined, trial court decisions were affirmed 100% of the time, allowing experts to testify and affirming two cases where trial courts excluded expert financial witnesses.

In state court appellate cases, by far the largest segment of our search, we reviewed 53 cases. On appeal 84% of state trial court decisions were affirmed. When trial courts admitted expert financial witnesses, they were confirmed 35 times on appeal and overturned twice. However, when trial courts excluded expert financial witnesses, they were sustained eight times and overturned six. Overall, as has been shown by previous studies, despite some vigorous challenges, appeals courts were reluctant to overturn trial court decisions.

Issues and Trends

Failure to Disclose Expert or Comply with Standards

Several cases have made it very clear that in order to offer expert testimony, a party has to play by the rules. Regardless of qualifications, experts will be precluded from testifying without proper and timely disclosure of their proposed testimony or if their reports fail to meet statutory requirements.¹⁵

Failure to Preserve Objection

In seeking review, appellants must be sure they have preserved their objections. A motion *in limine* to preclude has been deemed adequate, while failing to object or put on a rebuttal expert has been deemed inadequate to preserve the objection for appeal as to admissibility of the expert.¹⁶ In one case, failure to cross examine the witness was held insufficient to preserve the issue for appeal.¹⁷

¹⁵ See e.g. *Kozak v. Medtronic*, 512 F.Supp.2d 913, (SD TX 2007); *Compania Administrador v. Titan International*, 533 F.3d,C.A.7 (ILL.),July 10, 2008; *Laura's Products v. Conti*, 982 So.2d 934, 2007-0819 (La. App. 3 Cir. 4/4/07); *Loeffel Steel v. Delta*, 387 F.Supp.2d 794 (ND IL 2005) a particularly scathing preclusion. But see also *Melancon v. Lafayette*, 926 So.2d 693, (La. App. 3 Cir. 3/29/06) where there was a failure to timely disclose the vocational rehabilitation expert but the testimony was nevertheless allowed.

¹⁶ See e.g. *Holden v. Holden*,728 N.W.2d 312 (2007); and *KMG v. Davis*, 175 S.W.3d 379 (Tex. App. – Hous. 3/10/05) which held that filing a *Daubert* motion preserves the issue for appeal.

¹⁷ *Brewster v. Blue Mountain*, 68 Mass. App. Ct. 1102, 845 N.E.2d 450.

Part Within Expert's Expertise – Part Without Expert's Expertise

It is commonplace for courts to allow an expert to testify about some matters but to preclude the same expert from testifying as to other matters. Some examples are:

- A physician was allowed to testify regarding future medical expenses but not about special clothing or morbidity rates;¹⁸
- An economist could testify regarding fraud and unjust enrichment but could not opine that an ophthalmologist's submissions were critical to a project to develop a drug treatment;¹⁹
- A lawyer with over 20 years experience in corporate and securities matters could give expert testimony as to the standards of conduct applicable to directors in general, but could not testify as to ultimate issue as to whether directors violated their fiduciary duties;²⁰ and
- A franchisee's expert, a CPA, could testify as to damages for lost future profits, but could not speculate as to the results if the franchisee's son took over the business.²¹

Beyond Expert's Expertise

In exercising their “gatekeeper” function, courts frequently scrutinize the proposed expert's qualifications and find them inapposite to the proposed proffer or just totally off the wall. Some examples:

- a psychologist was not qualified to provide expert medical advice about emotional distress;²²
- a chief mate on a tugboat not qualified to render an expert damages report;²³ and
- a photographer/plaintiff was not qualified as an expert in marketing or profits from infringement and therefore could not provide his own expert damages report.²⁴

Qualified but Unreliable

These are cases where the courts basically exercise the discretion provided them under *Joiner* to look behind the proposed expert's qualifications and into their methodology. When they find it unacceptable, they commonly label it “unreliable.” Some examples of these situations are:

- A witness was qualified to testify as to motor home valuation based on over thirty years experience in the automotive repair industry, but was not reliable and, therefore, could not testify as to diminution in a motor vehicle's value as a result of alleged defects where the expert's report lacked any discernable methodology;²⁵ and

¹⁸ *Morales v. E.D. Etnyre*, 382 F.Supp.2d 1273 (NM 2005).

¹⁹ *Dastgheib v. Genentech*, 438 F.Supp.2d 546 (ED PA 2006).

²⁰ *Floyd v. Hefner*, 556 F.Supp.2d 617 (SD TX 2008).

²¹ *Tri State v. John Deere*, 532 F.Supp.2d 1102 (WD MO 2007).

²² *Woods v. Wills*, 400 F.Supp.2d 1145, (ED MO 2005).

²³ *U.S. v. John Stapp*, 448 F.Supp.2d 819 (SD TX 2006).

²⁴ *Masterson v. KSL Recreation*, 495 F.Supp.2d 1044 (SD CA 2007).

²⁵ *Smith v. Freightliner*, 239 F.R.D. 390 (NJ 2006).

- A witness with an MBA and 25 years of experience in public accounting was qualified to offer an opinion as to damages and lost profits—despite his lack of business valuation certifications—but not reliable because he failed to explain how he determined that profits earned by a competitor were “stolen away.”²⁶

Relevance

In rare cases, the proposed expert’s testimony is precluded on grounds of relevance. For example, if damages is the issue, the expert needs to testify about fair market value and similar considerations. Otherwise the testimony can be excluded as irrelevant.²⁷

Expert Relied on Others

Experts are regularly disqualified when they rely on others rather than their own expertise. When an appraiser of horses relied on the opinions of others he had questioned, his testimony was precluded because he hadn’t used independent judgment.²⁸ Also excluded was proposed testimony about the value of roadside signs when the witness had merely called others to get their opinion.²⁹ But where an expert relied on her supervisor, that testimony was admitted.³⁰

Lay Experts

As a general rule, lay experts (witnesses whose knowledge comes from life experience) are admitted freely when their testimony is focused on the issues they know well and will help the trier of fact. For example, a backhoe operator could testify to the value of excavation services;³¹ a worker’s compensation attorney could testify as to worker’s compensation awards.³²

However, non-attorney plaintiffs lacked competence to testify as lay witnesses as to the reasonableness of attorneys’ fees;³³ and a corporate officer was not allowed to give his lay opinion on value when he admitted that his opinion was based solely on what other people had told him.³⁴

²⁶ *Trugreen v. Scott’s Lawn*, 508 F.Supp.2d 435 (DE 2007).

²⁷ See e.g. *Lafayette City v. Entergy*, 975 So.2d 177 (La. App. 3 Cir. 1/30/08).

²⁸ *Alaimo v. Racetrack at Evangeline Downs*, 893 So.2d 190, (La. App. 3 Cir. 2/2/05).

²⁹ *Martin v. Mississippi Transp.*, 930 So.2d 1163, (Miss. App. 4/10/07).

³⁰ *McCombs v. Meijer*, 395 F.3d 95 (CA6 2005).

³¹ *Moran v. Hubbart*, 178 S.W.3d 604, (Mo. App. W.D. 9/27/05).

³² *Frasier, Frasier & Hickman v. Flynn*, 114 P.3d 1095 (Okla. Civ. App. 2/15/05).

³³ *Chase v. Bearpaw Ranch*, 331 Mont. 421, 1133 P.3d 190, 2006 MT 67, Mont., April 11, 2006.

³⁴ *Proctor v. CNL Income Fund IX*, Not Reported in N.E.2d, 2005 WL 635031, 2005-Ohio- 1223, Ohio App. 6 Dist., March 18, 2005.

Mixed Questions of Fact and Law

Finally, courts seem to allow experts to testify on mixed questions of fact and law but do not surrender their prerogative by allowing experts to testify solely on questions of law.³⁵

Appendixes - Case Digests

1. Trial Court Decisions – State and Federal
2. Appellate Court Decisions – State
3. Appellate Court Decisions – Federal

³⁵ See e.g. *Hagen Ins. v. Roller*, 139 P.3d 1216 (AK 2006), which allowed an expert to address mixed question of fact and law; but see *Housing Works v. Turner*, 362 F.Supp.2d 434 (SD NY 2005), holding that a proper measure of damages is a question of law for the court.

About the Authors

Bruce S. Schaeffer, co-author of *CCH Franchise Regulations and Damages*, is an attorney in private practice with offices in New York City. A nationally-recognized expert, he has over 30 years' experience dealing with tax issues, complex transactions, and valuations and appraisals of franchises. Mr. Schaeffer holds a Master of Laws (in Taxation) from New York University School of Law and a Juris Doctor degree from Brooklyn Law School. A frequent speaker and lecturer, he has appeared before audiences at the New York University Institute on Federal Taxation, the Practising Law Institute, the International Franchise Association, the New York State Bar Association, and many other forums. Mr. Schaeffer is the founder and president of Franchise Valuations, Ltd (www.franchisevaluations.com), which provides expert testimony, performs lender due diligence, and resolves succession and estate planning problems for the franchise community. A leading expert in the field of damages in franchise disputes, he served for many years on the International Franchise Association's Finance, Accounting and Tax Committee; Franchise Relations Committee; and Legal/Legislative Committee. He is also a member of the Institute of Business Appraisers, the American Association of Franchisees and Dealers, the American Bar Association, and the New York State Bar Association.

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APPENDIX 1
TRIAL COURT DECISIONS - STATE AND FEDERAL

| Case | Citation | State | Type of Expert | Comments |
|--|--|-------|--|--|
| Guiles v. Simser (trial court) | 9 Misc.3d 1083, 804 N.Y.S.2d 904, 2005 N.Y. Slip Op. 25408, N.Y. Sup., August 23, 2005 | NY | Social worker | Lawyer had sex with client in domestic relations matter. She (client) claimed emotional damages and attempted to support claim with affidavit from social worker. Trial court grants motion to dismiss saying plaintiff's expert not qualified to give expert opinion. |
| Weaver v. Zusman (in limine) | 2006 WL 2567990, 77 Pa. D. & C.4th 129, Pa.Com.P., January 04, 2006 (NO. 2003-0964) | PA | Psychologist | Plaintiff's expert witness was allowed to testify regarding present and future psychological damages the minor plaintiff would suffer as a result of negligently performed surgery to correct adhesions following neonatal circumcision. |
| Morales v. E.D. Etnyre (trial court motion in limine) | 382 F.Supp.2d 1273, D.N.M., June 20, 2005 (NO. CIV. 04-0558 JBWDS) | US | Physician | Physician would be allowed to testify regarding future medical expenses; would not be allowed to testify regarding retraining, lifestyle changes, or special clothing; and would be allowed to provide background information regarding calculation of a burn patient's morbidity, but would not be allowed to testify regarding operator's morbidity rate. |
| Housing Works, Inc. v. Turner (trial court motion in limine) | 362 F.Supp.2d 434, S.D.N.Y., March 30, 2005 (NO. 00 CIV. 1122 (LAK)) | US | Professor of Non-Profit Management | Expert proposed to testify principally that the sum of the face value of the lost contracts is the proper measure of damages. But the proper measure of damages is a question of law for the Court. Expert is not the proper vehicle for introducing evidence of the alleged injury. Her relevant expertise is in general nonprofit management damages is a question of law for the Court. |
| Vulcan Materials v. Atofina (trial court motion in limine) | 355 F.Supp.2d 1214, 56 UCC Rep.Serv.2d 278, D.Kan., February 14, 2005 (NO. 02-1251-JTM) | US | Transportation Manager/Lay expert | Expert testimony of transportation manager, regarding expected damages to chemical supplier from purported breach of chloroform requirements contract, would be properly allowed in action by supplier against refrigerant manufacturer; manager had first-hand experience in refilling of railroad cars from chlorine-bearing to fluorochemical and lime and cost involved. |
| Wright v. American Home Products (trial court motion in limine) | 557 F.Supp.2d 1032, Prod.Liab.Rep. (CCH) P 17,982, W.D.Mo., April 18, 2008 (NO. 06-CV-4183-NKL) | US | 1) Economist 2) Life Care Planner | Expert testimony of economist regarding damages carried sufficient indicia of reliability to be admissible in action brought by consumer against pharmaceutical manufacturers and marketers, alleging injuries from use of prescription diet drug; economist was qualified to assist jury in understanding relative financial impact of various punitive damage awards on typical household and on manufacturer. And a life care planner who had outlined three alternative expense scenarios, depending on different courses of treatment, was allowed to testify as to such costs. |
| Woods v. Willis (trial court) | 400 F. Supp.2d 1145, 205 Ed. Law Rep. 350, E.D.Mo., November 18, 2005 (NO. 1:03-CV-105CAS) | US | Psychologist | Psychologist who was not a licensed physician or a licensed psychiatrist, was not qualified to provide expert medical testimony that students suffered medically significant and medically diagnosable emotional distress. Therefore, no proof of damages and case dismissed. |
| Evoy v. CRST (trial court motion for retrial) | 430 F. Supp.2d 775, N.D.Ill., April 28, 2006 (NO. 04 C 4211) | US | 1) Marketing co. VP 2) Investment firm 3) Pres. 4) Lost profits expert 5) Financial expert | Economist was not qualified to give expert testimony about motorist's life expectancy. Proffered expert testimony of a marketing company's vice president was not admissible; although president of investment advisory firm was qualified to provide expert testimony, such testimony was unreliable and inadmissible to establish lost profits or lost enterprise value; testimony of expert whose methodology was too sensitive to highly subjective variable was inadmissible to establish lost enterprise value; expert testimony calculating lost profits by using yardstick approach projecting growth based on combined information for three cruise lines was sufficiently reliable to be admissible; and proffered expert opinion about cruise-ship line's legal standing was beyond province of a financial expert. |
| Celebrity Cruises v. Essee (district court) | 434 F.Supp.2d 169, S.D.N.Y., May 12, 2006 (NO. 96 CIV. 3135(JCF)) | US | | Business appraiser's lack of experience with particular machine did not disqualify him from being considered as expert to offer opinion on economic loss. However, appraiser's opinion was not admissible because it was based upon definition of economic loss that was contrary to Illinois law; calculation of economic loss by appraiser was not reliable; appraiser's opinion was not admissible as irrelevant; comparison portion of opinion was unreliable and speculative; and report did not comply with rule that governed disclosure of expert testimony. |
| Loeffel Steel v. Delta (trial court motion in limine) | 387 F. Supp.2d 794, N.D.Ill., July 22, 2005 (NO. 01 C 9389) | US | Appraiser | Economist's expert testimony regarding fraud and unfair trade practices damages under North Carolina law was allowable in action brought by ophthalmologist against biotechnology company. Economist's expert testimony regarding unjust enrichment damages under North Carolina law was allowable, on limited basis; expert could not opine that ophthalmologist's submissions were critical to company's project to develop drug for treatment of AMD, or that his estimated value constituted wrongfully-obtained benefit, which were matters exceeding expert's economic expertise. |
| Dasgheib v. Genentech (trial court motion in limine) | 438 F.Supp.2d 546, E.D.Pa., July 10, 2006 (NO. CIVA 04-1283) | US | Economist | US's expert was qualified to establish damages from a crash. Damages estimate proffered by tugboat owner's witness was insufficient to raise genuine material issue of fact, for summary judgment purposes, on amount of damages suffered by United States in action brought against owner, stemming from collision involving tugboat and stationary vessel; witness was not qualified to render expert damages opinion, did not base opinion on reliable facts, and did not utilize reliable methods in reaching opinion. |
| United States v. John Stepp (trial court summary judgment motion) | 448 F.Supp.2d 819, S.D.Tex., July 28, 2006 (NO. CIV A. H-05-0678) | US | Independent Surveyor/Chief Mate on the tugboat | Qualified: Witness was qualified to testify as expert as to motor home valuation in buyers' suit against manufacturer and seller for breach of warranty, violations of Magnuson-Moss Act, and consumer fraud, where witness had over thirty years experience in automotive repair industry, had ASE certifications in vehicle damage appraisal, authored numerous articles in field of automobile repair and valuation, owned his own automotive appraisal business, analyzed vehicles with vibration and frame concerns, and had conducted appraisals on approximately 700 vehicles. But not reliable: Expert in vehicle valuation could not testify as to diminution of motor home's value as result of alleged defects, where expert's report and proposed testimony lacked discernable methodology, and expert did not determine what cost of repairs would have been had they not been covered under warranty or what it would cost to fix alleged vibration condition. |
| Smith v. Freightliner (trial court summary judgment motion and motion to exclude expert) | 239 F.R.D. 390, 71 Fed. R. Evid. Serv. 951, D.N.J., November 13, 2006 (NO. CIV.A. 05-2439 (NLH)) | US | Vehicle Valuation Expert | Marine surveyor, who had both training and experience in vessel appraisals, was qualified as an expert to offer opinion that value of barge that sank after its cargo of steel coils shifted during transport was \$1,06,000. |
| Ingram Barge v. Lewis & Clark (trial court bench trial) | 504 F. Supp.2d 665, E.D.Mo., January 04, 2007 (NO. 0404CV652 RWS) | US | Marine Surveyor | |

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| Case | Citation | State | Type of Expert | Comments |
|--|---|-------|--|---|
| Inline Connection v. AOL (trial court motion in limine) | 470 F. Supp.2d 435, D.Del., January 23, 2007 (NO. C.A. 02-477-MPT, C.A. 02-272-MPT) | US | Royalty Rate Determiner | Their reports showed that defendants' experts compiled the appropriate data and used standard methods for calculating a reasonable royalty rate. Their techniques and theories are clearly explained and documented. |
| Trugreen v. Scott's Lawn (summary judgment and motion to strike expert report) | 508 F. Supp.2d 937, D.Utah, February 13, 2007 (NO. 106CV00024) | US | Accountant with MBA | Qualified: Witness with masters in business administration and 25 years of experience in public accounting was qualified to offer expert opinion as to damages and lost profits in former employer's action against former employees for breach of contract and tortious interference with economic relations, despite his lack of business valuation certifications indicating expertise and ability in evaluating and analyzing markets. But Not Reliable: Witness's opinion was not sufficiently reliable to be admissible as expert testimony as to damages and lost profits in that former employer failed to explain how witness could reliably determine that profits earned by former employer's competitor were stolen away from former employer by former employees who went to work for competitor, and witness's report did not seriously contend with potentially confounding causes of revenue gains and losses. |
| Kozak v. Medtronic (trial court motion to preclude expert testimony) | 512 F. Supp.2d 913, S.D.Tex., March 14, 2007 (NO. CIV A H-03-4400) | US | Surgeon and other expert | Plaintiff, an orthopedic surgeon, was not qualified by specialized knowledge, education, training, or experience to render an expert opinion on future damages for misappropriation of trade secrets in developing anterior lumbar plating system; plaintiff made no showing that his training to become an orthopedic surgeon and his study of biomedical engineering or experience as inventor qualified him to formulate a complex damages model. Other expert was precluded from testifying on future damages for failure to disclose anything in his report but an analysis of past damages. |
| Weiss v. Allstate (trial court motion in limine) | 512 F. Supp.2d 463, E.D.La., April 09, 2007 (NO. CIV.A. 06-3774) | US | Construction foreman | Foreman on construction of insureds' house had sufficient experience in residential construction to testify as valuation expert for insureds in suit against insurer to recover cost to replace house, even though foreman did not use blueprints or subcontractor bids to produce his estimate and developed it in three days; foreman had been in the residential construction industry since 1984 and had estimated replacement cost numerous times. |
| Masterson v. KSL Recreation (trial court motion for summary judgment) | 495 F. Supp.2d 1044, S.D.Cal., April 13, 2007 (NO. CIV02-CV-2028L(CAB)) | US | Photographer/Party | Photographer was not qualified as expert in marketing or profits from infringement and therefore could not provide his own expert report in support of his position that there was causal connection between use of copyrighted images and profits of alleged infringer; and photographer, as purported expert, made conclusions based on incomplete suppositions |
| Floyd v. Hefner (district court) | 556 F. Supp.2d 617, S.D.Tex., March 31, 2008 (NO. CIV.A. 03-5693) | US | 1) Engineer 2) Lawyer 3) Lawyer 4) Accounting, economics & finance expert 5) Corporate law professor | 1) Registered professional engineer with long experience in the petroleum industry and in assessment of fair market value of oil and gas properties, but no accounting degree, was qualified to give expert opinion on the fair market value of oil and gas properties; 2) Lawyer, with 20+ years in corporate and securities matters, could give expert testimony as to the standards of conduct applicable to directors in general, but could not testify as to ultimate issue as to whether directors violated their fiduciary duties and/or were negligent, grossly negligent, or reckless in approving certain transaction; 3) Licensed attorney, experienced in litigation practice and board certified in civil trial law, who had been on numerous state disciplinary board, could offer his expert opinions regarding the ethical obligations of lawyers sued for legal malpractice and breach of fiduciary duty; 4) Expert in accounting, economics and finance, with education and training related to valuation methodologies, could opine on the value of oil and gas company's oil assets; 5) Corporate law professor, who had testified as an expert on a broad range of corporate governance issues, was not qualified to give opinions in the area of professional responsibility. |
| Tri State HDWE v. John Deere (pretrial motion) | 532 F. Supp.2d 1102, W.D.Mo., December 06, 2007 (NO. 06-5020-CV-SW-FJG) | US | CPA | District court would not exclude affidavit of franchisee's expert, a certified public accountant, from evidence in franchisee's action to recover damages for lost future profits from franchisor after franchisor terminated franchise agreement, despite franchisor's arguments that expert's opinion would not assist the jury, lacked sufficient facts, that expert's methodology was unreliable, and that expert lacked qualifications to support his opinion, where many of franchisor's objections went to the weight of the testimony, not its admissibility, and franchisee's expert presented sufficient evidence as to franchisee's history of sales and gross profits prior to damaging event so as to assist the trier of fact. Also, portions of affidavit speculating as to franchisee's damages if shareholder's son took over dealership, were overly speculative and would not have assisted the jury, and were therefore inadmissible in franchisee's action to recover damages for lost future profits. |
| Smolow v. Hafer (plaintiff's motion in limine) | 513 F. Supp.2d 418, E.D.Pa., June 25, 2007 (NO. CIV.A. 04-941) | US | CPA/CVA | Accountant was qualified to testify as expert on subject of costs incurred by state in processing claim for confiscated property, even though he had no experience or training in area of government accounting, where accountant was certified public accountant (CPA) and certified valuation analyst (CVA) with more than twenty years of public, accounting experience, serving both for-profit and non-profit entities. |

APPENDIX 2
APPELLATE COURT DECISIONS - STATE

| Case | Citation | State | Type of Expert | Comments |
|---|---|-------|---|---|
| Hagen Ins. v. Rolier | 139 P.3d 1216, Alaska, January 20, 2006 (NO. S-11275, S-11256) | AK | Lawyer with workers' comp expertise | Jury awarded Randall Roller damages against Hagen Insurance, Inc. after finding that Hagen negligently failed to secure workers' compensation insurance for Roller's business, leaving Roller without coverage for an on-the-job injury. Hagen argued Roller's expert inappropriately applied law to facts and opined about probable impairment post-surgery. |
| Carter v. Carter | 934 So.2d 406, Ala. Civ.App., December 30, 2005 (NO. 2031104) | AL | Stockbroker and financial planner | Appeal by husband from divorce judgment. Husband argues that wife's expert not qualified to give opinion on present value of retirement benefits. |
| Redevelopment Agency of City of San Diego v. Atlisha | 128 Cal.App.4th 357, 27 Cal.Rptr.3d 126, 05 Cal. Daily Op. Serv. 3092, 2005 Daily Journal D.A.R. 4182, Cal.App. 4 Dist., April 11, 2005 (NO. D043044) | CA | Valuation Expert | Eminent domain matter. Trial court excluded Atlisha's experts' testimony because he based valuation of goodwill on expectation of lease renewal which was "speculative." Trial court then issued directed verdict. Error was in not allowing testimony about goodwill to be weighted by jury. |
| Antolovich v. Brown Group Retail Structural Preservation Systems v. Petty | 183 P.3d 582, Colo.App., August 23, 2007 (NO. 04CA1528) | CO | Economist | Toxic tort case brought by class of homeowners against Brown for polluting their property and groundwater. Homeowners argued at appeal that trial court should have excluded testimony by Brown's expert because he was not a real estate appraiser and therefore was not qualified to express an opinion about effect of environmental contamination on property values. |
| Onusko v. Keir | 927 A.2d 1069, D.C., June 21, 2007 (NO. 02-CV-1147) | DC | Chiropractor | Treating chiropractor went beyond her expertise without being designated expert. |
| Woodland Partners v. Dept. Transportation | 880 A.2d 1022, Del.Supr., August 01, 2005 (NO. 503.2004) | DE | Orthopedic Surgeon | Treating physician's use of average number of therapy treatments per year is allowable to support estimate of future medical costs. |
| Mayo v. City of Stockbridge | 286 Ga.App. 546, 650 S.E.2d 277, 07 FCDR 2192, Ga.App., June 29, 2007 (NO. A07A0719) | GA | Real estate appraiser | In condemnation proceeding plaintiff challenged admissibility and weight given defendant's expert's testimony. |
| Kunz v. Little Co. of Mary Hosp. | 285 Ga.App. 58, 646 S.E.2d 79, 07 FCDR 1085, Ga.App., March 27, 2007 (NO. A06A1703) | GA | Real estate appraiser | Mayo contested condemnation of her property by city. Trial court within discretion in allowing jury to weigh credibility of testimony of city's expert. |
| Warren v. Heartland Auto Services | 373 Ill.App.3d 615, 869 N.E.2d 328, 311 Ill.Dec. 654, Ill.App. 1 Dist., May 25, 2007 (NO. 1-06-1707, 1-06-1814) | IL | Medical doctor | To establish damages, plaintiff tried to introduce past and future medical expenses and unpaid bills by having nephrologist testify as to usual and customary charges for dialysis treatments. |
| Jones v. Jones | 36 Kan.App.2d 758, 144 P.3d 73, Kan.App., October 20, 2006 (NO. 95.577) | KS | 1) auto salesperson; 2) service manager at dealership; 3) service technician | Operator of Jiffy Lube found liable for damages to Warrens' auto. Allowing plaintiffs' experts' testimony within trial court's discretion. |
| Alaimo v. Racetrack | 245 S.W.3d 815, Ky.App., February 01, 2008 (NO. 2006-CA-001870-MR) | KY | Expert in appraising horses | Neither side offered experts; owner of property not qualified to give opinion on market value. Remand to family court where "expert testimony will most likely be required." |
| Jefferson v. Jefferson | 893 So.2d 190, 2004-1230 (La.App. 3 Cir. 2/2/05), La.App. 3 Cir., February 02, 2005 (NO. 04-1230) | LA | Expert in residential restoration construction | Qualifications of defendant's expert were challenged by trial court because it was shown that he did not use independent judgment when appraising. |
| Lafayette v. Entergy | 946 So.2d 191, 06-301 (La.App. 5 Cir. 10/31/06), La.App. 5 Cir., October 31, 2006 (NO. 06-CA-301) | LA | Expert in electric utility economic valuation | Appeal by wife from partition of community property. Husband found to be liable for uninsured losses to home due to fire. Wife's expert (also her brother) was licensed contractor who performed the repairs and provided sufficient documentation. |
| | 975 So.2d 177, Uhil. L. Rep. P 26.993, 2007-1065 (La.App. 3 Cir. 1/30/08), La.App. 3 Cir., January 30, 2008 (NO. 07-1065) | LA | | In condemnation proceeding trial court did not abuse discretion in excluding Entergy's expert pursuant to motion in limine. Proposed witness not a certified appraiser and did not seek fair market value; therefore testimony would have been neither relevant nor reliable. |

APPENDIX 2
APPELLATE COURT DECISIONS - STATE

| Case | Citation | State | Type of Expert | Comments |
|---|--|-------|--|--|
| Melancon v. Lafayette | 926 So.2d 693, 2005-762 (La.App. 3 Cir., 3/29/06), La.App. 3 Cir., March 29, 2006 (NO. 05-762) | LA | Vocational rehabilitation expert | Melancon was awarded damages as result of injuries suffered when Lafayette insurance company's policyholder backed into Melancon's parked truck. Lafayette argued Melancon's expert should not have been allowed to testify regarding cost of medical treatment which had not been disclosed prior to trial. Trial court correctly ruled expert had sufficient knowledge and familiarity. |
| Trost v. O'Connor | 955 So.2d 246, 2006-1281 (La.App. 3 Cir. 4/4/07), La.App. 3 Cir., April 04, 2007 (NO. 06-1281) | LA | Economist | O'Connor violated non-compete agreement and was ordered to pay judgment to Trost. O'Connor argued that Trost's expert's calculation of lost profits should not have been admitted. Since O'Connor did not offer any expert witness to rebut nor provide competing testimony, trial court was within its discretion to assign whatever weight it deemed appropriate. |
| Laura's v. Conti | 982 So.2d 934, 2007-0819 (La.App. 4 Cir. 4/9/08), La.App. 4 Cir., April 09, 2008 (NO. 2007-CA-0819) | LA | CPAs | Laura's was awarded damages in breach of lease suit against landlord. Each side argued other side's expert's testimony should have been disregarded by jury because of improper methodology. Appeals court said it is function of jury to evaluate and weigh such testimony. No error found in refusing Daubert hearing because plaintiff's motion made during trial was untimely. |
| D'Ambrosia v. Lang | 985 So.2d 800, 07-298 (La.App. 5 Cir. 4/29/08), La.App. 5 Cir., April 29, 2008 (NO. 07-CA-298) | LA | Licensed rehabilitation counselor | D'Ambrosio, a resident in orthopedic surgery, suffered injuries to shoulder when he was a passenger in a car hit by another car being driven by Lang. Trial court did not allow plaintiff's expert to testify to the average wages of orthopedic surgeons holding only economist could do so. |
| Brewster v. Blue Mtn. | 68 Mass.App.Ct. 582, 864 N.E.2d 518, 62 UCC Rep.Serv.2d 552, Mass.App.Ct., April 06, 2007 (NO. 05-P-1044) | MA | Plaintiff's VP Operations | Claim of improper calculation method for lost profits not enough to overturn trial court since defendant's counsel failed to cross examine expert on that point. |
| In the matter of the trusts under the will of Lotta M. Crabtree | 66 Mass.App.Ct. 1102, 845 N.E.2d 450, (Table, Text in WESTLAW), Unpublished Disposition, 2006 WL 1006367, Mass.App.Ct., April 18, 2006 (NO. 04-P-1721) | MA | Attorney/executive with charitable foundation | Fact that attorney testifying as to the reasonableness of trustees' fees had work experience making grants from a charitable foundation, rather than as experience acting as a trustee of a charitable trust, did not preclude his testimony as expert witness; attorney was not required to be qualified in subspecialty, and an intimate level of familiarity with every component of trust transactions was not a prerequisite to offering expert testimony as to the fees. |
| Walker v. Grow | 170 Md.App. 255, 907 A.2d 255, Md.App., September 12, 2006 (NO. 2613 SEPT. TERM 2004) | MD | Accountant | Issue is modification of child support. Mother argued court should not have relied so heavily on father's accountant's testimony. |
| Coble v. Green | 271 Mich.App. 382, 722 N.W.2d 898, Mich.App., June 15, 2006 (NO. 257946) | MI | Proximate causation and mitigation of damages expert | Defendant Green's expert properly excluded by trial court because trial court correctly determined Green's lawyer's negligence was proximate cause of damages. This was a legal malpractice claim which arose out of paternity and support actions. |
| Scott v. Minneapolis Public Schools | Not Reported in N.W.2d, 2006 WL 997721, Minn.App., April 18, 2006 (NO. A05-649) | MIN | Psychologist | Clinical psychologist was competent to testify regarding emotional distress suffered by student, in action brought on student's behalf against school district based on violation of Data Practices Act; psychologist had doctorate in clinical psychology, he was licensed social worker, he had evaluated more than 600 children in his career, and he had met with student six times following incident in which other students taunted him based on information contained in records that were discovered in school trash bin. |
| Santa Fe Trail Neighborhood | 154 S.W.3d 432, Mo.App. W.D., January 25, 2005 (NO. WD 63699) | MO | Real estate appraiser | Property consisting of dental offices was condemned. Owners (Knudsens) received award part of which was designated for their tenant Walker. Knudsens appealed arguing Walker not entitled based partly on claim that Walker's expert's methodology was flawed. |

APPENDIX 2
APPELLATE COURT DECISIONS - STATE

| Case | Citation | State | Type of Expert | Comments |
|---|---|-------|---|---|
| State Ex Rel Highways Com v. Stewart | 156 S.W.3d 496, Mo.App. S.D., February 28, 2005 (NO. 26422) 178 S.W.3d 604, Mo.App. W.D., September 27, 2005 (NO. WD64419) | MO | Non-licensed real estate appraiser | Condemnation matter. Property owners argued state's expert not licensed to appraise commercial property. Appeals court said trial court was correct to admit testimony and had discretion to evaluate weight. |
| Moran v. Hubbard | 936 So.2d 917, Miss., August 24, 2006 (NO. 2004-CA-01522-SCT) | MS | Value of excavation services Psychiatrist | Plaintiff qualified as expert by virtue of experience in his field. Patient sustained injuries after falling from 3rd story window of hospital. Hospital argued psychiatrist not qualified to testify about physical injuries and future medical expenses. |
| Miss. Dept. of Mental Health v. Hall | 953 So.2d 1163, Miss.App., April 10, 2007 (NO. 2005-CA-02287-COA) | MS | Real estate appraiser | Defendant's (MTC's) expert was not himself an expert on value of signs; was just quoting another expert. Trial court should have stricken his testimony as to value of billboards. |
| Martin v. Mississippi Trans Comm | 331 Mont. 421, 133 P.3d 190, 2006 MT 67, Mont., April 11, 2006 (NO. 05-220) | MT | Attorney's fees experts | Plaintiffs, a non-attorneys, lacked competence to testify as lay witnesses as to the reasonableness of attorneys fees. Testimony would not have been relevant. |
| Chase v. Bearpaw Ranch | 728 N.W.2d 312, 2007 ND 29, N.D., February 28, 2007 (NO. 20060212) | ND | Real estate appraiser and real estate broker | Following divorce judgment, husband argued wife's expert's testimony as to value should not have been accepted; given that husband did not object at trial and failed to present contrary evidence, trial court's decision stands. |
| Holden v. Holden | Not Reported in A.2d, 2006 WL 2335073, N.J. Super.A.D., August 14, 2006 (NO. A-0175-04T3) | NJ | Property owner/plaintiff | Owner of condominium penthouse, who brought an action against condominium association for nuisance due to elevator noise, was not qualified to testify as an expert to the diminution in the value of his property, owner was not a licensed real estate appraiser, he did not know what qualifications were needed to qualify, and he was unable to describe the method he used to quantify any loss in value. |
| Ocean Club Condominium Assoc. v.D'Amato | 30 A.D.3d 932, 819 N.Y.S.2d 121, 2006 N.Y. Slip Op. 05182, N.Y.A.D. 3 Dept., June 29, 2006 (NO. 99309) | NY | Vocational rehabilitation expert | Following motor vehicle accident, jury awarded Madden (Plaintiff) damages for lost past and future earnings, expenses and pain and suffering. Defendants argued trial court should not have allowed testimony beyond scope of his expertise. No abuse of discretion found because expert was subjected to cross-examination and jury was free to disregard or give less weight to disputed testimony. |
| Madden v. Dake | 21 A.D.3d 1080, 803 N.Y.S.2d 572, 2005 N.Y. Slip Op. 06915, N.Y.A.D. 2 Dept., September 26, 2005 (NO. 2004-06237, 2004-06238, 644/03) | NY | Architect | New hearing ordered at which husband should be allowed to offer proof of qualifications to testify as expert. |
| Thoma v. Thoma | 9 Misc.3d 1063, 804 N.Y.S.2d 904, 2005 N.Y. Slip Op. 25408, N.Y. Sup., August 23, 2005 (NO. 2003-0775) | NY | Social worker | Lawyer had sex with client in domestic relations matter. She (client) claimed emotional damages and attempted to support claim with affidavit from social worker. Trial court now grants motion to dismiss saying plaintiff's expert not qualified to give expert opinion. |
| Gules v. Simser | 164 Ohio App.3d 136, 841 N.E.2d 393, 2005-Ohio- 5720, Ohio App. 1 Dist., October 28, 2005 (NO. C-050065, C-050070) | OH | Specialist in value of signage and visibility | Appeal from compensation trial for taking of property by city. City argued property owner's expert's testimony should not have been allowed in because he was not competent and methodology was unreliable. |
| Nonwood v. Burton | Not Reported in N.E.2d, 2005 WL 635031, 2005-Ohio- 1223, Ohio App. 6 Dist., March 18, 2005 (NO. WD-04-027) | OH | 1) Appraiser 2) Corp. officer | CNL appealed amount of compensation awarded in eminent domain matter. Appeals court found no error in exclusion of one of CNL's experts on basis of lack of qualifications and unreliable methodology. "[Expert] appeared to rely on boastful hyperbole, doubtful sources, and vague generalizations as evidence of his qualifications and in support of his conclusions." CNL also failed to get in lay opinion on value by corporate officer who admitted during voir dire that his opinion was based solely on what other people had told him. |
| Proctor v. CNL Income Fund IX | | | | |

APPENDIX 2
APPELLATE COURT DECISIONS - STATE

| Case | Citation | State | Type of Expert | Comments |
|--------------------------------------|--|-------|--|---|
| Martin v. Lake Mohawk | Not Reported in N.E.2d, 2005 WL 36:10352, 2005 -Ohio- 7062, Ohio App. 7 Dist., December 27, 2005 (NO. 04 CA 815) | OH | Realtor | Property owner sued lake association and neighbors for permitting the neighbor to build a house that blocked owner's view of lake. Trial court granted motion to dismiss. Because trial court imposed unreasonable time limit on presentation of evidence by realtor on damages and sustained objections without good reason, owner entitled to new hearing on loss of value. |
| Okla Trans Auth v. Turner | 183 P.3d 168, 2008 OK CIV APP 31, Okla.Civ.App. Div. 2, October 31, 2007 (NO. 103187) | OK | Appraiser | OTA sought property for turnpike project. After negotiations failed, went to trial. Trial court allowed expert testimony from OTA that put value lower than what independent appraisal found during negotiations but excluded independent appraisal sought by Turner. |
| Frasier Frasier & Hickman V. Flynn | 114 P.3d 1095, 2005 OK CIV APP 33, Okla. Civ App. Div. 4, February 15, 2005 (NO. 100,019) | OK | Workers' compensation attorney | Atty Flynn left law firm. Dispute arose over division of workers' comp awards. Flynn argued Frasier's expert did not meet Daubert standards and testimony should have been excluded. |
| King v. West Penn Power Co. | 946 A.2d 184, Pa.Cmwith., April 09, 2008 (NO. 1925 CD 2007) | PA | Real estate broker | Dispute over valuation and highest and best use of condemned property. Reversing trial court's in limine ruling that real estate appraiser license necessary in order to qualify as valuation expert. |
| Weaver v. Zusman | 2006 WL 2567990, 77 Pa. D. & C.4th 129, Pa.Com.Pl., January 04, 2006 (NO. 2003-0964) | PA | Psychologist | Ruling on motion by defendants in limine. Plaintiffs' expert witness was allowed to testify regarding present and future psychological damages the minor plaintiff would suffer as a result of negligently performed surgery to correct adhesions following neonatal circumcision. |
| Freeman v. Blue Ridge Paper Products | 229 S.W.3d 694, Tenn.Ct.App., January 25, 2007 (NO. E2006-00293-COA-R3CV) | TN | (1) Licensed real estate broker and appraiser. (2) occupational health physician specializing in internal medicine and clinical toxicology. | Freeman, on behalf of class, sued paper company for damages from pollution. Defendants challenged reliability of experts' testimony. Marginal qualifications in one area of expertise are a factor to consider when determining testimony's reliability. |
| Boles v. National Development Co. | 175 S.W.3d 226, Tenn.Ct.App., April 26, 2005 (NO. M2003-00971-COA-R3CV) | TN | Real estate appraiser | Class action against real estate developer for breach of contract. At issue: damages caused to property values when lake at centerpiece of development wouldn't hold water. |
| Alon USA v. State | 222 S.W.3d 19, Tex.App.-Austin, May 26, 2005 (NO. 03-03-00431-CV) | TX | Gasoline tax auditor | State sued gasoline dealer for unpaid state gas taxes. Alon challenged State's expert testimony on amount of tax owed as unreliable. |
| Bright v. Addison | 171 S.W.3d 588, Tex.App.-Dallas, August 03, 2005 (NO. 05-04-00170-CV) | TX | Accountant | Issue was lost profits in Carribbean casino. Challenge by Bright (defendants) based on lack of qualifications and unreliable methodology of plaintiffs' expert. Trial court within discretion to allow even though limited experience with casinos and lack of training in international transactions. |
| Carlisle Corp v. Medical City Dallas | 196 S.W.3d 855, Tex.App.-Dallas, June 27, 2006 (NO. 05-04-00157-CV) | TX | Licensed commercial property adjuster | Medical City claimed breach of warranty by Carlisle for roofing material that leaked. On appeal Carlisle argued MC's expert who testified on replacement cost was unqualified and testimony was irrelevant and unreliable. |
| City of Sugarland v. Home and Hearth | 215 S.W.3d 503, Tex.App.-Eastland, January 18, 2007 (NO. 11-05-00062-CV) | TX | Appraiser, and land planner with expertise in drainage and safety issues | Eminent domain matter. Home & Hearth appealed award for taking of property adjacent to hotel that H&H intended to use for restaurant. Dispute was over highest & best use. City argued that one of H&H's experts' testimony was inadmissible due to lack of relevance and reliability, also land planner was not qualified and opinions unreliable. |

APPENDIX 2
APPELLATE COURT DECISIONS - STATE

| Case | Citation | State | Type of Expert | Comments |
|-------------------------------------|---|-------|------------------------------------|---|
| Hong v. Bennett | 209 S.W.3d 795, Tex.App.-Fort Worth, November 22, 2006 (NO. 2-05-408-CV) | TX | Chiropractor | Bennett sued Hong for personal injuries suffered in auto accident. Hong submitted affidavit from chiropractor in opposition to Bennett's affidavits concerning necessity of medical treatments. Bennett argued that Hong's expert was not qualified to opine about medical treatment. Trial court abused discretion in admitting affidavits from both sides in lieu of requiring Bennett to provide expert testimony as to chiropractic expenses. |
| KMG v. Davis | 175 S.W.3d 379, Tex.App.-Hous. (1 Dist.), March 10, 2005 (NO. 01-02-00344-CV) | TX | Economist | Breach of employment contract and negligent misrepresentation. KMG argued plaintiff's expert was unqualified and testimony was irrelevant and unreliable. Also held filing Daubert motion preserves objections on appeal. |
| Rogers v. Alexander | 244 S.W.3d 370, Tex.App.-Dallas, June 29, 2007 (NO. 05-05-00233-CV) | TX | Accountant (CPA & CMA) | Rogers committed fraud, theft & conspiracy against home health agency operators Alexander et al. Rogers argued trial court should not have admitted testimony of Alexanders' accountant about value of the business based on lack of qualifications, irrelevance and unreliability. |
| Toshiba Machine v. SBM Flow Control | 180 S.W.3d 761, Tex.App.-Fort Worth, November 10, 2005 (NO. 2-03-156-CV) | TX | VP of finance/Party | SBM sued Toshiba for fraud, negligent misrepresentation, breach of contract and breach of warranty over some machine tools. Toshiba argued that SPM's damages expert on lost profits was unqualified, used inadmissible hearsay and gave testimony based on speculation. |
| Seaniver Maritime v.Pike | Not Reported in S.W.3d, 2006 WL 1553264, Tex.App.-Corpus Christi, June 08, 2006 (NO. 13-05-0033-CV) | TX | Life care planning expert | Trial court's denial of motion to exclude entire testimony of injured employee's expert life-care planner regarding employee's future medical costs resulting from injury sustained at sea was not an abuse of discretion, given that expert had over 30 years experience in health care management for people with disabilities and advanced degrees in counseling, and expert's testimony regarding future medical expenses was based on physicians' records and recommendations, and prescription costs were based on employee's past treatment history. Challenge cited fact that expert was not a medical doctor and that portions of testimony were unreliable. |
| Page v. State Farm | -- S.W.3d ---, 2008 WL 2374760, Tex.App.-Waco, June 11, 2008 (NO. 10-07-00228-CV) | TX | Licensed public insurance adjuster | Witness was qualified as a damage assessment expert in insured's action to recover following insurer's denial of homeowners insurance coverage for mold damage resulting from plumbing leakage; witness was a licensed public insurance adjuster and a licensed mold assessment consultant; witness had more than twelve years of experience assisting property owners with insurance claims, including the providing of estimates for reasonable and necessary costs of repairing residences and cleaning personal contents; and witness had performed investigations of hundreds of homes to determine the reasonable and necessary cost of repair |

APPENDIX 3
APPELLATE COURT DECISIONS - FEDERAL

| Case | Citation | Year | Type of Expert | Comments |
|---|--|------|-----------------------------|---|
| Compania Administrador v. Titan International | 533 F.3d 555, C.A.7 (Ill.), July 10, 2008 (NO. 07-1996) | 2008 | Prior Owner/Valuation | Witness's testimony as to value of collateral was properly characterized as expert, rather than lay, testimony; witness's only connection to the items in question was the fact that he was an officer of a company that, at one time, held a controlling interest in a company that, at one time, owned the collateral, and his valuations were based on his extensive experience purchasing and selling the type of goods at issue. Because proponent failed to disclose expert witness prior to the disclosure deadline, district court did not abuse its discretion when it excluded his testimony. |
| Homick v. Boyce | Slip Copy, 2008 WL 2329550, (Not Selected for publication in the Federal Reporter), C.A.10 (Colo.), June 06, 2008 (NO. 07-1040, 07-1041) | 2008 | Owner/Party | Testimony of 50% owner of Colorado limited liability company regarding the fair market value of ranch that the company owned qualified as expert witness testimony under Federal Rules of Evidence, and thus did not have to be based on personal knowledge; regarding fair market value of ranch that company owned was not based on improper considerations, under Colorado law, where it was based on comparable sales information from two local realtors and his review of ranch magazines. |
| Dollar Rent A Car v.P.R.P. Enterprises | 242 Fed.Appx. 584, 2007 WL 2203603, (Not Selected for publication in the Federal Reporter), C.A.10, August 02, 2007 (NO. 06-5140) | 2007 | CPA | District court did not abuse discretion in considering testimony of expert, a certified public accountant with training in business appraisal and valuation, on the likelihood of rental car franchisees' future profitability, for purposes of rental car franchisor's action against franchisees seeking declaratory judgment that franchisor was entitled to terminate its relationship; notwithstanding franchisees' contention that expert lacked experience in evaluation of rental car franchisees, expert's assessments of franchisees' finances were extensively examined on cross-examination regarding both the limits of expert's experience and the limits of the methodology he used in analyzing franchisees business. |
| Softbank v.MPO Canada | 225 Fed.Appx. 687, 2007 WL 870349, (Not Selected for publication in the Federal Reporter), C.A.9 (Cal.), March 22, 2007 (NO. 04-17129, 05-17297) | 2007 | Accountant | Testimony of judgment creditor's financial expert was properly admitted in civil action against judgment debtor and its alleged alter-ego, a Canadian corporation, since Canadian accounting principles were not so esoteric as to make him incompetent to apply his experience and judgment to the value of a Canadian company. |
| Popovich v. Sony Music Entertainment | 508 F.3d 348, C.A.6 (Ohio), November 21, 2007 (NO. 06-3463, 06-3464) | 2007 | Business valuation expert | Trial court found Sony failed to fulfill contractual obligation to place logo on certain albums resulting in non-payment of royalties to Popovich and awarded damages to Popovich. Experts testified as to market value of intangible assets. Sony argued on appeal that Popovich's expert was not qualified and his model of damages was inapplicable to present case. |
| Tharo Systems v. Cab Produkttechnik | 196 Fed.Appx. 366, 2006 WL 2441049, 2006 Fed.App. 0663N, (Not Selected for publication in the Federal Reporter), C.A.6 (Ohio), August 24, 2006 (NO. 05-3876) | 2006 | CPA | Certified public accountant who had testified in nearly 100 trials and worked as an auditor at an international accounting firm was qualified to testify as a damages expert in breach of contract action against German manufacturer; to the extent that witness lacked familiarity with some aspects of German accounting, such unfamiliarity merely affected the weight and credibility of his testimony, not its admissibility. |
| Monsanto v. McFarling | 488 F.3d 973, 82 U.S.P.Q.2d 1942, C.A.Fed. (Mo.), May 24, 2007 (NO. 05-1570, 05-1598) | 2007 | Certified valuation analyst | McFarling bought patented genetically engineered seed from Monsanto but saved some for future use and failed to pay license fee in subsequent years. Jury awarded damages to Monsanto. On appeal McFarling challenged qualifications of Monsanto's expert who was neither a farmer nor an agronomist. |

APPENDIX 3
APPELLATE COURT DECISIONS - FEDERAL

| Case | Citation | Year | Type of Expert | Comments |
|----------------------------|---|------|------------------------------|--|
| Levin v. Dalva Bros. | 459 F.3d 68, 70 Fed. R. Evid. Serv. 1025, C.A.1 (Mass.), August 15, 2006 (NO. 05-2284) | 2006 | Antique furniture appraisers | Plaintiffs (Levin) challenged trial court's limitations on the scope of their own witness's testimony. Also challenged court's allowing defendant's expert too much latitude. Appeals court confirmed district court on both challenges. |
| Wash Solutions v. PDQ Mfg. | 395 F.3d 888, 66 Fed. R. Evid. Serv. 356, C.A.8 (Mo.), January 24, 2005 (NO. 04-1039) | 2005 | Damages expert | Jury awarded damages to Wash Solutions after finding PDQ terminated Wash's exclusive distributorship unlawfully. PDQ argued Wash's expert's testimony should not have been allowed because he had no experience in car wash industry and calculation of future lost profits was speculative. |
| McCombs v. Meijer | 395 F.3d 346, 95 Fair Empl.Prac.Cas. (BNA) 1, 86 Empl. Prac. Dec. P 41,958, 2005 Fed.App. 0030P, C.A.6 (Ohio), January 19, 2005 (NO. 03-3612, 03-3756, 03-4357) | 2005 | Psychologist-in-training | McCombs was awarded damages after claiming sexual harassment by employee of Meijer. Meijer argued McCombs's expert was not qualified. Because expert was under supervision of licensed psychologist, no abuse of discretion. |

