

# Defending Against *Daubert*

5 Ways to Avoid a *Daubert* Challenge

*“Expert testimony is admissible at trial if the testimony is relevant to a fact in issue, is based on sufficient facts or data, and is the product of reliable scientific or other expert methods that are properly applied. Fed. R. Evid. 702. The Supreme Court in Daubert [v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)] interpreted Rule 702 to require that district courts, prior to admitting expert testimony, determine whether the testimony is reliable and whether it will assist the trier of fact in determining some fact that is at issue. That is, the district court serves as a “gatekeeper” whose role is to ensure that an expert’s testimony is reliable and relevant.”*

*- Kumho Tire Co. Ltd. v. Carmichael*

# Making Your Expert Witness *Daubert*-proof

The *Daubert* Standard is one area of the law that concerns both attorneys and financial experts. For financial experts, no other measure in the federal court system goes to the core of their competence and thoroughness. For trial attorneys, cases can often be jeopardized if a *Daubert* challenge is successful.

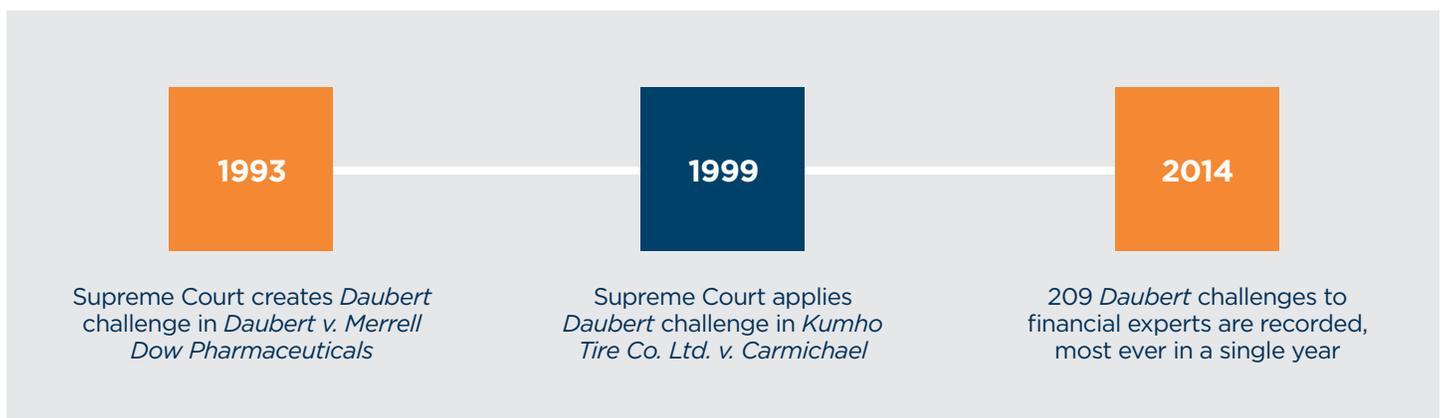
In 1993, the United States Supreme Court issued a ruling in *Daubert v. Merrell Dow Pharmaceuticals* that addressed the admissibility of scientific testimony in federal court. The *Daubert* case gave trial judges in federal court a gatekeeping function in determining the reliability and relevance of the testimony. As the “trier of fact” it has since become the judge’s role to determine if an expert witness is presenting scientific knowledge, which requires a “preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid,”<sup>1</sup> and if that knowledge is being accurately applied to the facts of the case.

In 1999, the Supreme Court’s opinion in *Kumho Tire Co. Ltd. v. Carmichael* applied the *Daubert* standard to expert testimony, including financial

expert testimony. The Seventh Circuit Court of Appeals recently reaffirmed that district courts must use the *Daubert* Standard to determine if expert testimony is admissible at trial:<sup>2</sup>

*Expert testimony is admissible at trial if the testimony is relevant to a fact in issue, is based on sufficient facts or data, and is the product of reliable scientific or other expert methods that are properly applied. Fed. R. Evid. 702. The Supreme Court in Daubert [v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)] interpreted Rule 702 to require that district courts, prior to admitting expert testimony, determine whether the testimony is reliable and whether it will assist the trier of fact in determining some fact that is at issue. That is, the district court serves as a “gatekeeper” whose role is to ensure that an expert’s testimony is reliable and relevant.*

Financial experts are often the subject of *Daubert* challenges. According to a recent study, the number of *Daubert* challenges to financial experts in 2014 represented the highest number of challenges observed in a single year.<sup>3</sup> In short, *Daubert* is here to stay in litigated matters.



<sup>1</sup>*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, at 592-93. <sup>2</sup>*Stuhlmacher v. Home Depot U.S.A., Inc.*, – F.3d –, 2014 WL 7174261, at \*3 (7th Cir. Dec. 17, 2014). While Indiana courts do not expressly adopt *Daubert*, the Indiana Supreme Court stated in *Steward v. State*, “the federal evidence law of **Daubert** and its progeny is helpful to the bench and bard in applying [Ind. R. Evid. 702(b)]” <sup>3</sup>In 2014, there were 209 challenges to financial expert witnesses – an increase of 19% from 2013. *Daubert Challenges to Financial Experts: A Yearly Study of Trends and Outcomes, 2015, PricewaterhouseCoopers LLP.*

## The Best Defense Against a *Daubert* Challenge

A lack of reliability, relevance or expertise is frequently cited under *Daubert* as sufficient reason to disqualify the testimony of an expert witness. It is incumbent on both the attorney and the financial expert to be prepared in confronting

– and defeating – a *Daubert* challenge. The best defense to a *Daubert* challenge begins well before a motion to exclude an expert is issued. It is with this in mind that we offer five tips to consider when hiring and working with a financial expert.

# 5

## Tips to Consider When Hiring and Working With a Financial Expert



**Do your homework.** Ask the expert to provide references. Use the website [DaubertTracker.com](http://DaubertTracker.com) to determine if the expert's testimony has been previously excluded. Put the expert through a mini-deposition to gain insights into their qualifications, knowledge and demeanor. These are all best practices that should be followed prior to engaging with any financial expert, but especially if you have no prior experience working with that individual.



**Don't wait until the last minute.** During the early phases of a case, many attorneys are tempted to focus on developing their legal theory and fighting discovery disputes. You should resist this temptation and involve your expert from the beginning. While financial experts often do work under tight deadlines, their analysis must stand up to the scrutiny of the opposing side's expert, so it is critical that the he or she has sufficient time to prepare. Involving your expert earlier on also gives you ample time to be sure his or her opinion is indeed supportive of your case. Discussing how your expert's damage theory relates to the facts of the case in advance will help you avoid problems down the road.



**Use your expert early and often.** Some of the most significant value an expert can add happens during the discovery phase. From providing assistance with document requests to preparing questions for depositions, using your expert early can help you get the best information possible upon which to base his or her opinions. You should always err on the side of providing *too much* information to your expert. In a number of cases, courts have thrown out damage claims because the expert was spoon-fed documents and had been forced to take the client's summary analysis at face value. When experts are left out of the process until late in discovery, there's an increased likelihood that information critical to his or her opinion won't be available.



**Make the expert explain everything.** Insist that your experts thoroughly explain the analysis that helped them arrive at their opinions. Sometimes, doing so will cause an expert to recognize a logical gap in his or her reasoning. As important, if you are unable to understand the expert's approach yourself, there's a strong likelihood you won't be able to adequately defend it against a *Daubert* challenge, or, for that matter, explain it to the judge or jury during trial. The process of persuading the judge and jury starts with persuading you.



**Involve the expert in the *Daubert* challenge.** To financial experts, it may appear self-evident: if there's a *Daubert* challenge posed against them, they should be closely involved in the rebuttal process. There are, however, numerous examples of attorneys who don't seek out the expert's guidance when his or her testimony is confronted with a *Daubert* challenge. Nobody understands the basis of the expert's opinion better than the expert, and they should always be given the opportunity to defend their work. Not involving your expert in a *Daubert* challenge risks omitting arguments the expert might have made to support his or her opinion, thereby putting your case at risk.

## The *Daubert* Challenge Is Here to Stay

A successful *Daubert* challenge can negatively impact a case, but it can have lasting repercussions on a financial expert's career. While the *Daubert* challenge may be an effective means for excluding unreliable testimony at trial, it has become a very

common trial practice used against experts of all skill and experience. It is crucial that great care be taken to make the expert's opinion as defensible as possible in order to avoid, or to counter, a *Daubert* challenge.

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# Questions? Contact Jay



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Jay Cunningham is a director in Katz, Sapper & Miller's Litigation Services Group. He has more than a decade of experience in providing advisory services to attorneys and clients involved in disputes or litigation. Jay's dispute advisory experience includes all aspects of the litigation process - from discovery and damage analysis to providing deposition and trial testimony and demonstrative evidence - and he offers consulting services in the context of disputes or litigation involving breach of contract, breach of non-compete agreements, insurance claims, intellectual property, shareholder disputes, wrongful death/personal injury, and wrongful termination. In addition to performing industry and market analyses, Jay also has extensive experience in calculating damages based on lost sales, profits and cash flows as well as incremental profits, reasonable royalties, unjust enrichment and valuations.

Jay has worked with public and privately held companies in several industries, including automotive, consumer products, electrical components, financial services, manufacturing, pharmaceuticals, social networking websites and telecommunications. Prior to joining the firm, he served as director in FTI Consulting's Forensic and Litigation Consulting practice, and he worked in KPMG's Forensic Dispute Advisory Services practice.

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