# Effective Use of Experts

## *From Class Issues to Damages*

Joseph M. Rebein
Laurie A. Novion

*Shook, Hardy & Bacon L.L.P.*

One Kansas City Place
1200 Main Street
Kansas City, Missouri 64105
(816) 474-6550
jrebein@shb.com
lnovion@shb.com

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JOSEPH M. REBEIN is a partner in Shook, Hardy & Bacon L.L.P, a litigation firm with more than 600 attorneys and offices in nine cities. Mr. Rebein is chair of the firm's general litigation division, which specializes in complex litigation. In that role, he oversees more than 200 trial lawyers assigned to the firm's business litigation, tort, intellectual property, environmental, and public policy sections. Mr. Rebein is also a full-time trial lawyer with a focus on complex commercial litigation. He has served as lead counsel in numerous class action cases, including cases alleging securities fraud and antitrust claims.

Mr. Rebein has tried both federal and state trials, NASD arbitrations, general civil arbitrations, administrative proceedings before state and federal regulatory bodies, and CFTC enforcement actions. He also has extensive experience in mediations and is the firm's member of the CPR Institute for Dispute Resolution.

Mr. Rebein received his bachelor of science (journalism) from the University of Kansas in 1982. He earned his doctor of jurisprudence in 1985 from the University of Kansas School of Law.

LAURIE A. NOVION is an associate of Shook, Hardy & Bacon L.L.P. Ms. Novion is a member of the firm's business litigation section, and her practice focuses on class action litigation, antitrust litigation and other complex commercial litigation. She received her bachelor of arts (government, with special honors) from the University of Texas in 1995. Ms. Novion earned her doctor of jurisprudence (with honors) in 1998 from the University of Texas School of Law.

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## I. Introduction

> The mythical juror: "I didn't really follow at all what Dr. Smith was saying, but he sure looked like he knew what he was talking about."

The above reaction is fairly commonly found among many juries who hear complex litigation disputes. In the context of patent infringement, antitrust, securities litigation, and other business disputes come Ph.D.s, C.P.A.s and other learned professionals who give opinions on the A to Z of litigation issues. The hope is that they bring effective and useful information to the jury.

We have all considered the use of experts in complex litigation. Indeed, experts have become so commonplace that some lawyers would fear a claim of malpractice if they had not retained an expert. Having worked with many experts in complex litigation, the key here is not pursuing knee-jerk expert testimony. What is most important is first identifying an area where the expert would truly aid and illuminate the point or argument. Second to the successful use of an expert is identifying the truly effective expert. This is a person with a true expertise in the field and an ability to communicate that information in a meaningful fashion to the judge or jury.

In commercial litigation, experts are becoming increasingly necessary due to the amount of factual information on complex business and industry practices that the jury and/or judge must understand and construe before reaching a verdict or ruling on dispositive motions. An informed evaluation of complicated facts "is often difficult or impossible without the application of some scientific, technical or other specialized knowledge." Fed. R. Evid. 702 advisory committee's notes (1972).

The objective is to strategically use expert testimony to aid in the defense of an action while at the same time assisting "the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. For example, experts can be used to defeat class certification in a securities class action, to show lack of causation or fact of injury in a summary judgment motion, or to refute plaintiffs' damage model at trial.

## II. Deciding Whether an Expert Is Necessary to the Defense of the Case

Although experts are often expensive, they usually play a valuable role in the defense of complex litigation, assuming experts are used wisely and effectively. Before deciding to use an expert, an attorney should consider the litigation strategy, the client's goals and objectives, the stage of the proceedings, and then weigh the cost of an expert with the benefits hoped to be gained through his or her testimony (or consulting role) in the litigation. If cost is an issue, it may be worthwhile considering whether a corporate fact witness can address some of the topics on which a potential expert witness would testify. It is also important to evaluate the effect an expert witness's testimony will have on the credibility of your client with the judge and jury: there is a fine line between too little and too much expert testimony.

Last but not least, the attorney must evaluate the expert witness's credentials, qualifications, and scope of testimony to determine the likelihood that the expert's testimony will survive a *Daubert* challenge. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). If an expert witness's testimony is questioned and ultimately excluded due to an inadequate foundation concerning the witness's qualifications or the relevance and reliability of the testimony, the client's credibility before the court may be tarnished. Make sure to select an expert witness who is qualified and has the necessary experience on the particular issues for which he or she is to testify.

In the midst of all these considerations, it is essential never to forget the overall objective for using testifying expert witnesses: the admission of expert testimony that will supplement the defense's legal strategies and assist the trier of fact.

## A. The Use of Consulting, Nontestifying Experts to Help with Case Strategy

Experts may be used for a variety of purposes, at various stages of litigation. For example, consulting with a nontestifying expert at the beginning stages of a legal action can help develop case strategy, identify key issues, and make initial case assessments on issues such as damages and other technical issues. If the expert consultant has experience in the industry at issue in the case, he or she can provide suggestions on discovery to request from other parties that will help bolster the defendants' legal arguments and may assist in the potential development of an alternative damage model. As the case progresses, the consultant may assist in locating experts in particular fields to use as testifying experts, estimate damages for settlement purposes, and help in a determination of the reasonableness of settlement offers.

### 1. Beware of "handlers"

In certain cases, significant roles are played by nontestifying experts who work with counsel and help identify and develop expert testimony. While these nontestifying experts are important and can greatly enhance the case, counsel should be advised of the danger that such persons will be characterized by plaintiffs' counsel as "handlers" and subject to discovery.

The general proposition is that the work of nontestifying experts is not subject to disclosure where the consulting expert is merely helping counsel understand technical issues and develop case strategy. *See* Fed. R. Civ. P. 26(a)(2), (b)(4). Recently, however, two cases have suggested that in certain factual situations where a consulting expert is coordinating with a testifying expert, the work of a consulting expert may be discoverable. See *Trigon Ins. Co. v. United States*, 204 F.R.D. 277, 289 (E.D. Va. 2001) ("Drafts of expert opinions and communications between experts and third parties assisting and preparing the experts would be highly useful to test both the substance of the testifying experts' opinions and the independence of each testifying expert in arriving at his opinion. That is especially true where the experts are in the retinue of a consultant who admittedly is involved in shaping the experts' testimony and perhaps even their opinions…."); see also *Dura Auto. Sys. of Ind., Inc. v. CTS Corp.*, 285 F.3d 609, 614 (7th Cir. 2002) ("A scientist, however well credentialed he may be, is not permitted to be the mouthpiece of a scientist in a different specialty…. A theoretical economist, however able, would not be allowed to testify to the findings of an econometric study conducted by another economist if he lacked expertise in econometrics and the study raised questions that only an econometrician could answer…. [In such a case,] the author [of the study] would have to testify; he could not hide behind the theoretician."). Therefore, attorneys should proceed with caution when consulting experts are coordinating or communicating with testifying experts in the same litigation. Based on the rulings in *Trigon* and *Dura Automotive Systems*, there is a possibility that a court could order the production of the consulting expert's work product.

## B. The Use of Testifying Experts

Testifying experts can be effectively used to defeat class certification, as ammunition for a motion for summary judgment, as evidence of the existence of a "genuine issue as to [a] material fact" (*see* Fed. R. Civ. P. 56(c)) in opposition to a summary judgment motion, and at trial on a variety of issues, including causation and damages. Expert testimony can take the form of written declarations or affidavits, deposition testimony, or live testimony at an evidentiary hearing or trial.

Litigators are faced with an often difficult task of deciding whether to emphasize the flaws in the analysis

of plaintiffs' expert testimony through briefing and cross-examination or to affirmatively offer opposing expert testimony. This is a particularly difficult strategic decision to make on issues concerning plaintiffs' damage calculations, and that issue will be discussed in more detail later in this article.

In many, but not all situations, some defense expert testimony may be better than no testimony at all. Without expert evidence from a defendant, the jury may not have an alternative model or theory to weigh against plaintiffs' expert theory in a classic "battle of the experts." In a decision approving a settlement of class Racketeer Influenced and Corrupt Organizations Act ("RICO") and Commodity Exchange Act claims against corporations and individual defendants, the District Court for the Southern District of New York explained the possible effect of a battle of experts, while evaluating the risks of establishing damages:

> Damages at trial inevitably would involve a "battle of the experts." As the Court observed in *In re Warner Communications*,… [618 F. Supp. 735, 744-45 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986)]: Undoubtedly, expert testimony would be needed to fix not only the amount, but the existence, of actual damages…. In this "battle of experts," it is virtually impossible to predict with any certainty which testimony would be credited, and ultimately, which damages would be found to have been caused by actionable, rather than the myriad of non-actionable factors….

*In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 283 (S.D.N.Y. 1999); see also *In re Sterling Foster & Co., Inc. Sec. Litig.*, 238 F. Supp. 2d 480, 484-85 (E.D.N.Y. 2002) ("[T]he settling defendants' experts who would have been called at trial would vary substantially with the plaintiff's experts and the trial would therefore be reduced to a 'battle of the experts' which would possibly cause a jury to minimize or eliminate the plaintiffs' losses."); *In re AremisSoft Corp. Sec. Litig.*, 210 F.R.D. 109, 125 (D.N.J. 2002) ("[T]he Class would have to overcome damage defenses that Defendants would assert. As is often the case, the parties would likely engage in a 'battle of the experts,' the outcome of which would be unpredictable."); *In re The Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 539 (D.N.J. 1997) ("[A]nother potential risk [at trial] may be plaintiffs' necessary reliance on expert testimony to establish liability and damages; a jury's acceptance of expert testimony is far from certain, regardless of the expert's credentials. And, divergent expert testimony leads inevitably to a battle of the experts.").

Where no expert testimony from defendants is provided, the lack of a battle of experts may make it difficult for the jury properly to assess the credibility of plaintiffs' expert. Therefore, counsel should carefully weigh the possible cost, simplicity, and efficiency benefits created by a decision to not present expert testimony against the benefits created by presenting the jury with an alternative theory to evaluate.

### C. Reliance on Experts Used by Defendant Corporation or Other Defendants

In most director and officer liability actions, certain directors and officers are named as defendants, along with one or more corporations or business entities. Similarly, in complex commercial litigation not involving directors and officers, it is very common for there to be several corporate defendants. In both of those scenarios, counsel for a particular defendant need to decide whether to rely on testifying experts presented by other codefendants, or present testimony of their own expert.

In many cases, the defendant corporation will assume the role of the primary, lead defendant and the directors and/or officers will take on roles of secondary defendants. *Cf. In re Sprint Corp. Sec. Litig.*, 232 F. Supp. 2d 1193, 1199 (D. Kan. 2002) (30 named defendants were aligned into two groups for purposes of representation: the Sprint defendants, consisting of Sprint Corp., along with its directors and officers, and the WorldCom defendants, consisting of WorldCom, Inc. and Bernard J. Ebbers). It is probably fairly common practice for the various

defendants to jointly submit an expert report on certain key issues in the lawsuit, in an effort to reduce costs, streamline the litigation, and reduce the likelihood of repetitive testimony.

Despite the common practice of relying on the testimony of the corporation's experts or jointly submitting expert reports, counsel for directors and/or officers should consider the appropriateness of this approach. With respect to damages, there may be reasons for a director or officer to submit a damage model that differs from the other defendants' damage model where the corporation's economic footing is unclear, where corporate bankruptcy issues may arise or where the plaintiffs have not brought identical claims against the individual and corporation defendants. See, *e.g., In re Reliance Sec. Litig.*, 135 F. Supp. 2d 480, 510 (D. Del. 2001) (plaintiffs' claim of damages was challenged by only a few of the defendants); *E.J. McKernan Co. v. Gregory,* 623 N.E.2d 981, 998-99 (Ill. App. Ct. 1993) (in action asserting breach of fiduciary duty and tortious interference claims, court held that jury's return of separate verdicts against the individuals and corporate entities was not erroneous); see also *In re Sprint Corp. Sec. Litig.*, 232 F. Supp. 2d at 1200 ("The rule followed by the Tenth Circuit is that the stay provision does not extend to the third party defendants or a debtor's codefendants. However, under §105(a) of the Bankruptcy Code, courts may extend the protection of the automatic stay to a debtor corporation's officers, directors, and employees during the pendency of a Chapter 11 case.") [internal citation omitted]. In addition, depending on the unique claims asserted against the director and/or officer and the factual allegations in the complaint, it may be desirable for a director or officer to present expert testimony on causation or affirmative defense issues that is not applicable to the corporation's defense of the case. See*, e.g., In re Enron Corp. Sec., Derivative & ERISA Litig.*, ___ F. Supp. 2d ___, 2003 WL 1089307 (S.D. Tex. Mar. 12, 2003) (separate motions to dismiss and motions to strike complaint were filed by several groups of defendants, including a group of outside directors); *In re Reliance Sec. Litig.*, 135 F. Supp. 2d 480 (D. Del. 2001) (various individual and corporate defendants moved for summary judgment under several different theories, and each defendant's arguments in support of summary judgment were not identical).

## III. Avoiding Legal Impediments Concerning the Admissibility of Expert Testimony

### A. Avoiding Expert Challenges Based on *Daubert* Requirements

Under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), federal trial judges must act as gate keepers to exclude unreliable scientific expert testimony. Under *Daubert*, the court makes a preliminary assessment of whether the expert's reasoning or methodology is scientifically valid and then looks to whether the testimony "will assist the trier of fact in understanding the evidence or in determining a fact in issue." *Daubert*, 509 U.S. at 591-93. In *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), the Supreme Court confirmed that the trial judge's gate-keeper role applies to the admission of scientific as well as nonscientific testimony related to "'technical' and 'other specialized' knowledge." *Kumho Tire*, 526 U.S. at 141, 147-49. In analyzing the admissibility of expert testimony, there is "no relevant distinction between 'scientific' knowledge and 'technical' or 'other specialized' knowledge." *Id.* at 147.

Federal Rule of Evidence 702 was amended in 2002 to be consistent with the trial court's gate-keeper role as set forth by *Daubert*. Rule 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (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. Pursuant to Rule 702, three criteria are used by federal courts to determine the admissibility of expert testimony: (1) the witness's qualification as an expert; (2) the relevance of the testimony; and (3) the reliability of the testimony. The party offering the expert witness testimony has the burden of proving by a preponderance of the evidence that the requirements of Rule 702 have been satisfied. *See* Fed. R. Evid. 702 advisory committee's note (2000); Fed. R. Evid. 104(a); *Bourjaily v. United States*, 483 U.S. 171, 172 (1987). The *Daubert* analysis is also applied by the majority of state courts; other states use their own unique standards or apply the old federal court test under *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). Under that test, scientific expert testimony must be based on "generally accepted" scientific principles.

The court's initial inquiry is whether the witness qualifies as an expert in the subject area in which he or she proposes to testify. An expert cannot testify on a subject matter in which he or she has no expertise. Before choosing an expert, an attorney should carefully scrutinize the expert's credentials, experience in the field or area in which he would testify, and past expert testimony in other litigation.

Assuming the district court finds the witness has the necessary qualifications, the court then analyzes the relevance of the testimony. Under Fed. R. Evid. 401, "relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. In the context of expert testimony, "[t]his requirement has been interpreted to mean that scientific testimony must 'fit' the facts of the case, that is, there must be a connection between the scientific research or test result being offered and the disputed factual issues in the case in which the expert will testify." *Pride v. BIC Corp.*, 218 F.3d 566, 577 (6th Cir. 2000) [citations omitted].

Finally, the court must conclude that the testimony is reliable before it will be admitted. Scientific knowledge "connotes more than subjective belief or unsupported speculation." *Daubert*, 509 U.S. at 590. *Daubert* provides a nonexclusive, flexible list of factors to consider when determining the reliability of expert testimony: (1) whether the technique or theory can be or has been tested empirically; (2) whether the theory has been subjected to peer review and publication; (3) whether there is a known rate of error for the underlying technique or methodology; and (4) whether the methodology is generally accepted in the relevant scientific community. *Id.* at 593-94. "[N]o single factor is necessarily dispositive of the reliability of a particular expert's testimony." Fed. R. Evid. 702 advisory committee's note (2000). With respect to nonscientific testimony, the application of these four *Daubert* factors will vary based on the "nature of the issue, the expert's particular expertise, and the subject of his testimony." *Kumho Tire,* 526 U.S. at 150 [citation omitted]. "*Daubert*'s list of specific factors neither necessarily nor exclusively applies to all experts or in every case." *Id.* at 141, 152 ("[W]e conclude that the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable.").

An opposing party's *Daubert* motion should base its challenges "solely on principles and methodology" used by the expert and not on the expert's conclusions. *Daubert*, 509 U.S. at 595. In addition, the amendment to Rule 702 is "broad enough to permit testimony that is the product of competing principles or methods in the same field of expertise." Fed. R. Evid. 702 advisory committee's note (2000). When a trial court rules that an expert's testimony is reliable, "this does not necessarily mean that contradictory expert testimony is unreliable." *Id.*

When choosing experts for a case, counsel should always consider the federal court's *Daubert* test and the requirements of Rule 702. In order to avoid an opposing party's successful *Daubert* challenges to experts the defendant intends to use, the defendant should make a preliminary assessment of whether the expert testimony meets the admissibility requirements. The opposing side will always be looking for ways to discredit and possibly

exclude the other party's experts, and there is no reason to provide fuel to their cause. Although "[a] review of the caselaw after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule," an attorney must be confident that its client's experts will satisfy the *Daubert* analysis to avoid, as much as possible, last minute exclusion of expert testimony by the trial court. *See* Fed. R. Evid. 702 advisory committee's note (2000).

### B. The Use of Experts on Mixed Questions of Fact and Law

Apart from the federal courts' analysis of the admissibility of expert testimony under the *Daubert* test, some courts have been reluctant to admit expert testimony on mixed questions of fact and law. Focusing on the legal aspects of the expert's testimony, courts have held that the evidence is not relevant to any of the factual issues in dispute and addresses a legal issue reserved for the court. See, *e.g., In re Initial Public Offering Sec. Litig.*, 174 F. Supp. 2d 61, 64 (S.D.N.Y. 2001) (holding that "[t]he law of this circuit is that while an expert may provide an opinion to help a jury or a judge understand a particular fact, 'he may not give testimony stating ultimate legal conclusions based on those facts.' … In fact, every circuit has explicitly held that experts may not invade the court's province by testifying on issues of law."); *In re Cardizem CD Antitrust Litig.*, 105 F. Supp. 2d 682, 700 n.10 (E.D. Mich. 2000) (refusing to consider testimony of defendant's expert who provided testimony that it was more likely than not that one defendant would have prevailed on its patent infringement claims, that the court would have adopted the claim construction urged by the defendant, and the defendant would have been entitled to a preliminary injunction in earlier litigation on grounds that the testimony "inappropriately renders an opinion on questions of law that rest solely within the province of the Court, *i.e.*, claim construction and the grant or denial of injunctive relief").

Some of those court decisions, however, fail to distinguish between expert testimony solely on questions of law and testimony addressing mixed questions of fact and law. Other cases acknowledge that testimony on mixed questions of law and fact may be admissible, "but the testimony must remain focused on helping the jury or judge understand particular facts in issue and not opine on the ultimate legal conclusion." See *In re Initial Public Offering Sec. Litig.*, 174 F. Supp. 2d at 65-66 (excluding testimony from judicial ethics expert on issues concerning whether the court must recuse itself under 28 U.S.C. §455 because there were no facts in dispute).

Furthermore, testimony concerning mixed questions of law and fact has been allowed by certain federal courts. For example, in ruling on a motion *in limine* to exclude evidence from trial, the court in *In re Blech Securities Litigation*, No 94. Civ. 7696 (RWS), 2003 WL 1610775 (S.D.N.Y. Mar. 26, 2003), held that defendants' expert "can testify as to what ordinary broker activity entails and as to the customs and practices of the industry,… but he cannot conclude that [defendant's] trades were proper." *Id.* at *21. The court limited the overall scope of the defense expert's testimony, however, because the expert's "conclusion that [defendant] did not engage in parking or other stock manipulation improperly impinges upon the roles of the court and jury." *Id.* A similar analysis was applied to the testimony of plaintiffs' experts. In securities actions, the court commented, "the use of expert testimony must be 'carefully circumscribed,' and experts are not to improperly use specific statutory and regulatory language, such as 'manipulation' and 'scheme to defraud' to describe the defendants' actions." *Id.* at *22 [internal citations omitted].

Another court decision ruled that testimony on mixed questions of fact and law was permissible in the context of a class certification motion. See *Midwestern Mach. v. Northeast Airlines, Inc.*, 211 F.R.D. 562 (D. Minn. 2001) (asserting claim under section 7 of the Clayton Act, 15 U.S.C. §18, and alleging that defendant's merger with another airline resulted in a lessening of competition). In that case, the court found that expert reports were admissible for the purpose of determining whether the class should be certified. Plaintiffs sought to strike the expert report of Professor May Kay Kane, dean and professor at Hastings College of Law in San Francisco. *Id.* at 568. Her affidavit provided opinions on the manageability of the class action and the plaintiffs' satisfaction of the superi-

ority requirement, "caution[ing] the Court that the volume and complexity of the evidence will defeat manageability and will create a strong likelihood of confusing the jury." *Id.* Plaintiffs argued that the Kane affidavit consisted of inadmissible testimony on a legal issue. The court responded by stating:

> [t]aken to the extreme, Plaintiffs' theory would argue against testimony by any attorney or legal scholar on legal issues. Moreover, it is not clear that Kane's affidavit is pure legal opinion. More accurately, Kane is discussing the facts of the current case and applying the law. If the affidavit required characterization, it would be better called an opinion of mixed law and fact.

*Id.* The court ultimately found that Dean Kane's affidavit was appropriately filed as an expert opinion and denied plaintiffs' motion to strike the affidavit. *Id.*

Due to conflicting case law, it is unclear to what extent expert testimony on mixed questions of law and fact is admissible. Such testimony is worth pursuing, however, because if admitted, it can help simplify the analysis of factual issues in dispute. For example, an expert can evaluate the extent to which factual issues will need to be resolved in a class action on a class-member-by-class-member basis and offer an opinion as to the predominance of individual issues or the manageability of the action.

## IV. Effectively Using Experts on Class Certification Issues—Avoiding Battle of Experts

In an appropriate case, expert testimony can help defeat a motion for class certification by establishing flaws in the class definition or class period, demonstrating the lack of common issues on questions concerning fact of injury and causation, and showing how the proposed class action will be unmanageable. Counsel should refrain from using expert testimony, however, if it will not assist their arguments in opposition to class certification. One case decision has actually commented that although some of the affidavits and deposition testimony submitted by the parties "w[ere] helpful to the Court in consideration of the class certification motion, [ ] most of it was not." *Dry Cleaning & Laundry Inst. of Detroit, Inc. v. Flom's Corp.*, 1993-2 Trade Cas. (CCH) ¶ 70,408, 1993 WL 527928 (E.D. Mich. Oct. 19, 2003). Recent decisions suggest that the likelihood that expert testimony offered by defendants will be relied upon by a district court in denying a motion for class certification is becoming less likely, since more and more courts are unwilling to engage in a battle of conflicting expert testimony at the class certification stage. A defendant should not give up the battle, though, since some courts have been willing to scrutinize the methodology and reliability of expert testimony that concludes that liability and damage issues can be shown on a classwide basis.

### A. Class Certification Requirements

A class action "may only be certified if the… court is satisfied, after a rigorous analysis," that the procedural prerequisites for class certification have been met. *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 161 (1982). To proceed as a class, plaintiffs must satisfy all four elements of Rule 23(a) (numerosity, commonality, typicality, and adequacy) and at least one of the Rule 23(b) provisions. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997).

Rule 23(a) requires that plaintiffs establish that:

> (1) the class is so numerous that joinder of all members is impracticable ["numerosity"], (2) there are questions of law or fact common to the class ["commonality"], (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class ["typicality"], and (4) the representative parties will fairly and adequately protect the interests of the class ["adequacy"].

Fed. R. Civ. P. 23(a). Since class actions involving director and officer liability, such as securities actions and breach of fiduciary duty cases, usually seek the recovery of money damages from defendants, plaintiffs will need to satisfy the requirements of Rule 23(b)(3). Pursuant to Rule 23(b)(3), the class will not be certified unless

> the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members ["predominance"], and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy ["superiority"].

Fed. R. Civ. P. 23(b)(3).

A rigorous analysis requires the trial court to go beyond the bare allegations of the pleadings "as a court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of certification issues." *Castano v. American Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996). Although courts should not determine the merits in deciding the class question, even at the class stage, the nature of the claims and the proof required to adjudicate them necessarily must be addressed. See *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.12 (1978) ("Evaluation of many of the questions entering into determination of class action questions is intimately involved in the merits of the claims."). As explained by the Seventh Circuit in a recent decision written by Judge Easterbrook:

> Before deciding whether to allow a case to proceed as a class action, therefore, a judge should make whatever factual and legal inquiries are necessary under Rule 23.... And if some of the considerations under Rule 23(b)(3), such as "the difficulties likely to be encountered in the management of a class action", overlap the merits—as they do in this case...—then the judge must make a preliminary inquiry into the merits.

*Szabo v. Bridgeport Machs., Inc.,* 249 F.3d 672, 676 (7th Cir.), *cert. denied*, 534 U.S. 951 (2001).

### B. Applicability of *Daubert* Analysis

Decisions in the antitrust area have repeatedly analyzed to what extent the *Daubert* requirements should apply in the class certification context. Several courts have been willing to scrutinize to some degree the methodologies used by experts, but most are unwilling to engage in a full *Daubert*-based inquiry.

For example, in *In re Visa Check/MasterMoney Antitrust Litigation*, 192 F.R.D. 68 (E.D.N.Y. 2000), *aff'd*, 280 F.3d 124 (2d Cir. 2001), *cert. denied*, 536 U.S. 917 (2002), both sides introduced expert reports, and defendants filed a motion to strike the testimony of plaintiffs' expert. 192 F.R.D. at 74-76. Defendants argued that the testimony of plaintiffs' expert was inadmissible under Fed. R. Evid. 702 and *Daubert* because it is "legally irrelevant and not rationally based on the pertinent facts or on any analysis." *Id.* at 76. Although the court stated that at this stage in the litigation, the court is "far from the 'trier of fact' contemplated in Rule 702" and is "expressly forbidden from engaging in a 'preliminary inquiry into the merits' of the case," the court acknowledged that there is a limited role for a *Daubert* inquiry at the class certification stage. *Id.* at 76-77. A court should not "certify a class... on the basis of an expert opinion so flawed that it is inadmissible as a matter of law." *Id.* at 76. Ultimately, the court concluded that the expert testimony was admissible for the narrow purpose of supporting the class certification motion: the expert's qualifications are "impeccable," defendants have not shown that the expert "failed to 'rely upon the type of methodology and data typically used and accepted' in cases such as this one," and defendants' disagreement with the expert's conclusions "is not a basis for exclusion." *Id.* at 78. See also *Thomas & Thomas Rodmakers, Inc. v. Newport Adhesives & Composites, Inc.*, 209 F.R.D. 159, 162 (C.D. Cal. 2002) ("It is clear to the Court that a lower *Daubert* standard should be employed at this stage in the proceedings" (citing *In re Visa Check/MasterMoney*

*Antitrust Litig.*, 280 F.3d 124, 132 n.4 (2d Cir. 2001), *cert. denied*, 536 U.S. 917 (2002), and *In re Linerboard Antitrust Litig.*, 203 F.R.D. 197, 217 n.13 (E.D. Pa. 2001), *aff'd*, 305 F.3d 145 (3d Cir. 2002)).

In a recent antitrust action, *Nichols v. Smithkline Beecham Corp.*, 2003-1 Trade Cas. (CCH) ¶ 73,974, 2003 WL 302352 (E.D. Pa. Jan. 29, 2003), defendants sought to exclude testimony on class certification issues from plaintiffs' proffered expert, arguing that the testimony did not satisfy Fed. R. Evid. 702. *Id.* at *3. The court denied defendants' motion and held that plaintiffs' expert need not meet the *Daubert* requirements to be admissible with respect to the class certification motion. "At this stage of the proceeding, the Court does not consider whether an expert witness's opinion would be admissible pursuant to *Daubert*, 'the Court simply examines whether [the expert's] methodology, as proposed, will comport with the basic principles of econometric theory, will have any probative value, and will primarily use evidence that is common to all members of the proposed class.'" *Id.* at *4 [citation omitted]. The court then examined the expert's testimony and found that plaintiffs' expert "has identified a generally accepted methodology for determining impact which is applicable to the class," "this methodology uses evidence common to all class members," and the expert opinion "has probative value." *Id.* at *4-8.

Several other recent cases have refused to conduct a full-blown *Daubert* inquiry at the class certification stage. For instance, in *In re Mercedes-Benz Antitrust Litigation*,—F.R.D.—, 2003 WL 556359 (D.N.J. Feb. 19, 2003), defendants filed a motion to strike the testimony of plaintiffs' expert who testified on classwide antitrust impact. *Id.* at *10. Consistent with previous federal court decisions, the court held that it "is not to conduct a preliminary inquiry into the merits of plaintiffs' case" when determining the appropriateness of class certification. *Id.* Although defendants objected to various aspects of the expert's methodology, the court ruled that at this stage, plaintiffs need present only "sufficient evidence and a plausible theory to convince the Court that class-wide impact… may be proven by evidence common to all class members." *Id.* The district court then determined that plaintiffs met their burden of "establish[ing] a method by which [their] or another expert might be able to derive an analytical model to determine the existence of class-wide impact." *Id.* at *11. *Cf. Bacon v. Honda of Am. Mfg., Inc.*, 205 F.R.D. 466, 470-71 (S.D. Ohio 2001) (concluding that a *Daubert* inquiry is not warranted at this stage of the proceedings, but nevertheless examined the expert "testimony to determine whether it in fact supports the certification of the class in this case").

Similarly, in *In re South Dakota Microsoft Antitrust Litigation*, 657 N.W.2d 668 (S.D. 2003), another antitrust class action, the South Dakota Supreme Court held that plaintiffs had made a sufficient threshold showing of classwide injury through expert testimony. Microsoft challenged the proposed methodology of plaintiffs' expert testimony on classwide impact and damages and submitted conflicting expert testimony. *Id.* at 674, 677. The court described its analysis of the admissibility of expert evidence on class certification issues as a "lower *Daubert* standard:"

> [T]his judicial inquiry does not involve a determination as to the likely success of the Class Members' proposed methods. However, the Class Members must present at least one viable method for computing damage on a class-wide basis, one which a reasonable factfinder could accept.

*Id.* at 677. Although the court conceded that "[p]roduction of a self-professed expert is simply not enough to meet the certification requirements under our rigorous analysis standard," it held that the district court did not abuse its discretion by not accepting Microsoft's damage theories at this stage in the proceeding. *Id.* at 679. The court distinguished an earlier opinion of another court that had conducted a "very extensive examination" of the same plaintiffs' expert and concluded that the expert's theories were "insufficient to support class certification, as they were 'slogans, not methods of proof.'" *Id.* at 678; see *A&M Supply Co. v. Microsoft Corp.*, 654 N.W.2d 572, 638-39 (Mich. Ct. App. 2002). Of particular interest, Justice John K. Konekamp, in a concurring opinion, questioned

whether plaintiffs' expert theories on damages will survive a later *Daubert* hearing. *In re South Dakota Microsoft Antitrust Litig.*, 657 N.W.2d. at 680.

### C. Courts' Reluctance to Resolve a Battle of the Experts at the Class Certification Stage

Related to the district court's inquiry into the admissibility and relevance of expert testimony offered in the context of a motion for class certification, case decisions from a variety of jurisdictions have held that the court must not delve into the merits of the action and resolve a battle of the experts at that early stage in the litigation.

In a commonly cited case, *In re Potash Antitrust Litigation*, 159 F.R.D. 682 (D. Minn. 1995), the District Court for the District of Minnesota granted plaintiffs' motion for class certification in an action alleging that defendants conspired to fix the wholesale price of potash, a material used for fertilizer production, in violation of section 1 of the Sherman Act, 15 U.S.C. §1. *Id.* at 687. In support of their class certification motion, plaintiffs presented an expert who testified that the conspiracy had a common impact on all class members. Defendants then offered testimony from their own expert who concluded that impact, or fact of injury, could not be shown on a classwide basis. *Id.* at 696-97. In analyzing the conflicting expert testimony, the court stated that "[t]his case presents the familiar 'battle of the experts.'" *Id.* at 697. Accepting plaintiffs' expert analysis for purposes of the class certification motion, the court held:

> The certification stage of this litigation is not, however, the proper forum in which to resolve this battle…. "[W]hether or not plaintiffs' expert is correct in his assessment of common impact/injury is for the trier of fact to decide, at the proper time." Without trenching on the merits, a court must consider only whether plaintiffs have made a threshold showing "that what proof they will offer will be sufficiently generalized in nature that… the class action will provide a tremendous savings of time and effort."

*Id.* [internal citations omitted]. Many other courts have adopted this approach to dealing with a "battle of the experts" during the class certification stage of litigation. See, *e.g., Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 292 (2d Cir. 1999); *DeLoach v. Philip Morris Cos., Inc.*, 206 F.R.D. 551, 563-64 (M.D.N.C. 2002); *Arden Architectural Specialties, Inc. v. Washington Mills Electro Minerals Corp.*, 2002-2 Trade Cas. (CCH) ¶ 73,818, 2002 WL 31421915, at *10 (W.D.N.Y. Sept. 17, 2002); *In re Bromine Antitrust Litig.*, 203 F.R.D. 403, 408, 414 (S.D. Ind. 2001); *In re Cardizem CD Antitrust Litig.*, 200 F.R.D. 297, 311 (E.D. Mich. 2001); *Drayton v. Western Auto Supply Co.*, 203 F.R.D. 520, 527 n.3 (M.D. Fla. 2000), *aff'd in part and rev'd in part*, 34 Fed. Appx. 387, 2002 WL 518017 (11th Cir. Mar. 11, 2002); *O'Connor v. Boeing N. Am., Inc.*, 184 F.R.D. 311, 324 n.16 (C.D. Cal. 1998); *In re Commercial Tissue Prods.*, 183 F.R.D. 589, 596 (N.D. Fla. 1998); *In re South Dakota Microsoft Antitrust Litig.*, 657 N.W.2d 668, 677 (S.D. 2003). In contrast, however, the Seventh Circuit has been willing to consider issues on the merits and conflicting expert testimony in the class certification context. See *West v. Prudential Secs. Inc.*, 282 F.3d 935 (7th Cir. 2002), and *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672 (7th Cir. 2001), *cert. denied*, 534 U.S. 951 (2001) (both discussed in more detail in *infra* section IV.E).

### D. The Effective Use of Experts to Defeat Class Certification

Federal courts have denied motions for class certification in securities fraud actions when the court has concluded that the fraud on the market theory, and the corresponding presumption of reliance, do not apply to plaintiffs' claims. In some of those cases, expert testimony was effectively used to demonstrate the inapplicability of the fraud on the market theory and emphasize the lack of predominance of common issues. For an in-depth analysis of damage related expert testimony to consider at the class certification stage, *see* Seth Aronson & Benjamin Rozwood, *Effective Use of Damages Experts in Securities Class Actions*, 132 PLI/Corp. 805 (2002).

In *O'Neil v. Appel*, 165 F.R.D. 479 (W.D. Mich. 1996), plaintiffs sought certification of a class in a securities action against individual directors and officers. The parties presented economics experts addressing the fraud on the market theory. *Id.* at 495. Despite plaintiffs' contrary assertions, the court held that an examination of the merits of the fraud on the market theory was appropriate in connection with an evaluation of a class certification motion. *Id.* at 497-98. The court stated that it should "make a preliminary determination concerning the likely strength of the theory, so that an intelligent decision can be made concerning the probable issues for resolution at trial." *Id.* at 500. Based on a review of the record and the parties' expert testimony, the court concluded that "plaintiffs have virtually no chance of succeeding on this theory." *Id.* at 500-06. The magistrate judge filed a report recommending denial of plaintiffs' motion for class certification, which was accepted and adopted by the district court judge. *Id.* at 482-83.

A federal district court in another case denied plaintiffs' motion for class certification after finding that the presumption of reliance provided by the fraud on the market theory did not apply to plaintiffs' claims. *Krogman v. Sterritt*, 202 F.R.D. 467 (N.D. Tex. 2001). In *Krogman*, investors brought securities fraud claims against a corporation's former executives, alleging that defendants "defrauded Plaintiffs by misstating and omitting material facts regarding [the corporation] in numerous SEC filings and other disclosures to the market." *Id.* at 470. Because proof of individual reliance would be needed, the court held that plaintiffs did not satisfy the predominance requirement under Rule 23(b)(3). *Id.* at 478. The court undertook an exhaustive review of the record and the parties' expert testimony to determine if plaintiffs had demonstrated that the market was efficient, ultimately concluding that the fraud on the market theory should not apply. See *id.* at 474-78. See also *West v. Prudential Sec., Inc.*, 282 F.3d 935 (7th Cir. 2002) (discussed in *infra* section IV.E.2); *In re Livent, Inc. Noteholders Sec. Litig.*, 211 F.R.D. 219, 222-24 (S.D.N.Y. 2002) (after reviewing the record and the expert reports submitted by the parties, court concluded that the fraud on the market theory did not apply because plaintiffs had not made an adequate showing of market efficiency); *Serfaty v. International Automated Sys., Inc.*, 180 F.R.D. 418, 423 (D. Utah 1998) (after weighing the expert testimony submitted by the parties in connection with a class certification motion, court concluded that the corporation's stock "was not traded in an efficient market, and Plaintiffs are not entitled to the presumption of reliance available under the fraud on the market theory").

In contrast, defendants were unable to successfully use expert testimony to defeat class certification in *Castillo v. Envoy Corp.*, 206 F.R.D. 464 (M.D. Tenn. 2002), a securities fraud action alleging that officers of the corporation "improperly recorded large, one-time write-offs" for research and development concerning three acquisitions by the corporation, which artificially inflated the corporation's stock price. See *id.* at 467. Defendants argued that the predominance requirement under Rule 23(b)(3) was not satisfied because the presumption of reliance should not apply, and plaintiffs would therefore need to individually prove each class member's reliance. *Id.* at 469. Defendants asserted they had rebutted the presumption of reliance by their expert witness's testimony that the "alleged misrepresentations had no measurable effect on [the corporation's] stock price." *Id.* The court granted the class certification motion, finding that common issues of reliance will predominate under a fraud on the market theory, *id.* at 473; in reaching that decision, the court held that defendants' argument that they had rebutted the presumption of reliance improperly reached into the merits of the case at the class certification stage. *Id.* at 471-73. See also *Cheney v. Cyberguard Corp.*, ___ F.R.D. ___, 2003 WL 1089296, at *15 (S.D. Fla. Mar. 7, 2003) ("Mindful that the Court may not rule on the merits of Plaintiffs' 'Fraud on the Market' theory on class certification, the Court finds that the evidence provided by Plaintiffs' expert is adequate for certification on the basis of an efficient market although much of the evidence is disputed by Defendants' expert.").

## E. Appeal of Class Certification Rulings under Federal Rule of Civil Procedure 23(f)

### 1. Standards for appeal of certification rulings

Before 1998, the only way to appeal a class certification decision was by interlocutory appeal through 18 U.S.C. §1292(b) or by *mandamus* review pursuant to 18 U.S.C. §1651. Effective December 1, 1998, Federal Rule of Civil Procedure 23 was amended "to expand the ways for taking an interlocutory appeal." *Panache Broad. of Penn., Inc. v. Richardson Elecs., Ltd.*, No. 90-C-6400, 1999 WL 1024560 (N.D. Ill. Oct. 29, 1999); *see* Fed. R. Civ. P. 23(f).

Rule 23(f) provides a means to automatically petition the circuit court of appeals for permission to appeal from an order granting or denying certification of a class. Under Rule 23(f), a federal court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. Unlike 28 U.S.C. §1292(b), Rule 23(f) does not require that the district court certify that the ruling "involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." *See* 28 U.S.C. §1292(b); Fed. R. Civ. P. 23(f) advisory committee's notes (1998).

The court of appeals has unfettered discretion to grant an appeal under Rule 23(f) and "[p]ermission to appeal may be granted or denied on the basis of any consideration that the court of appeals finds persuasive." Fed. R. Civ. P. 23(f) advisory committee's note (1998). Although the language of Rule 23(f) does not provide standards for granting review of a class certification decision, the Advisory Committee's Note emphasizes that "[p]ermission is most likely to be granted when the certification decision turns on a novel or unsettled question of law, or when, as a practical matter, the decision on class certification is likely dispositive of the litigation." Fed. R. Civ. P. 23(f) advisory committee's note (1998). In the past few years, several circuits have adopted standards to use when determining whether to accept a petition for appeal under Rule 23(f). See, *e.g.*, *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98 (D.C. Cir. 2002); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154 (3d Cir. 2001); *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138 (4th Cir. 2001); *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266 (11th Cir. 2000); *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288 (1st Cir. 2000); *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832 (7th Cir. 1999).

### 2. Appeal of certification decisions in director and officer liability cases

If a district court fails to consider expert testimony offered by defendants on complex issues concerning fact of injury (and perhaps calculation of damages), for fear of addressing the merits, *West v. Prudential Securities, Inc.*, 282 F.3d 935 (7th Cir. 2002), and *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672 (7th Cir. 2001), *cert. denied*, 534 U.S. 951 (2001), suggest there might be an appealable issue. In that situation, a party should consider whether the filing of a petition for permission to appeal the class certification decision under Rule 23(f) is a strategic move worth making. Although many courts have refused to assess the credibility or weight to be given to the methodologies and analysis of plaintiffs' experts where a defendant has offered conflicting expert testimony, the Seventh Circuit has held:

> [Where] some of the considerations under Rule 23(b)(3), such as "the difficulties likely to be encountered in the management of a class action," overlap the merits—as they do in this case, where it is not possible to evaluate impending difficulties without making a choice of law…—then the judge must make a preliminary inquiry into the merits.

*Szabo*, 249 F.3d at 676 (vacating district court's order certifying a class after finding that the district court improperly deferred addressing important issues bearing on class certification on grounds that doing so would require

a merits-based inquiry; concluding that issues concerning merits-based inquiries have "evaded attention of appellate courts").

The Seventh Circuit recently granted a defendant's petition for appeal under Rule 23(f) in a securities class action. See *West v. Prudential Sec., Inc.*, 282 F.3d 935 (7th Cir. 2002). Plaintiff-investors alleged that a stockbroker employed by Prudential falsely told clients that a certain corporation, whose stock he traded, "was certain to be acquired, at a big premium, in the near future," artificially inflating the stock's price. *Id.* at 936. After applying the fraud on the market theory, the district court certified a class of all persons who bought the corporation's stock during the period the alleged misrepresentations were made. *Id.* at 937. The district court applied the fraud on the market theory to a situation where the oral representations were not released to the public; the Seventh Circuit Court of Appeals held that the district court's expansion of the fraud on the market theory raised a novel question of law. *Id.* The Seventh Circuit commented that "very few securities class actions are litigated to conclusion, so review of this novel and important legal issue may be possible only through the Rule 23(f) device." *Id*.

On appeal, the Seventh Circuit held that the district court erred by applying the fraud on the market theory and its corresponding presumption of reliance:

> The district court did not identify any causal link between non-public information and securities prices. . . . Instead the judge observed that each side has the support of a reputable financial economist (Michael J. Barclay for the plaintiffs, Charles C. Cox for the defendant) and thought the clash enough by itself to support class certification and a trial on the merits. That amounts to a delegation of judicial power to the plaintiffs, who can obtain class certification just by hiring a competent expert. A district judge may not duck hard questions by observing that each side has some support, or that considerations relevant to class certification also may affect the decision on the merits. Tough questions must be faced and squarely decided, if necessary by holding evidentiary hearings and choosing between competing perspectives.

*Id.* at 938. The Seventh Circuit concluded that because the record did not demonstrate that the nonpublic information affected the stock's price, the fraud on the market theory could not be extended to the nonpublic statements made by the stockbroker. *Id.* at 938-39.

## V. The Use of Damage Experts at Trial

### A. General Principles

In the right factual circumstances, experts testifying on damages issues can successfully demonstrate a lack of causation or fact of injury, show that plaintiffs have not been damaged, or provide the court and jury with an alternative damage model that results in a damage calculation that is lower than plaintiffs' damage estimate. *See generally* Aronson & Rozwood, *supra*. When strategizing how to refute plaintiffs' damage calculations, one of the most important decisions to make is whether to simply show the flaws of plaintiffs' methodology and analysis through cross-examination, emphasize the deficiencies of plaintiffs' methodology through cross-examination *and* through expert testimony, or whether, in addition to those approaches, use a testifying expert to present an alternative damage model. See *Daubert*, 509 U.S. at 596 ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.").

### B. Attack of Plaintiffs' Damage Methodology through Cross-Examination *versus* Presentation of Expert Testimony: The "*Texaco v. Pennzoil*" Dilemma

In complex commercial litigation such as securities class actions, "the valuation of damages… is not a 'hard science,' and all such reports are singularly susceptible to attack." *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 56 (2d Cir. 2000). Because of the difficulty in estimating damages, it is not unusual for parties to devote a large amount of time, resources, and expert analysis on damage calculation issues. The options available to defendants when rebutting a plaintiff's damage calculations were succinctly summarized by the district court in *Rmed International, Inc. v. Sloan's Supermarkets, Inc.*, No. 94 CIV. 5587 PKL RLE, 2000 WL 420548 (S.D.N.Y. Apr. 18, 2000). In that case, investors brought a class action against a company and its chief executive officer under section 10(b) of the Securities and Exchange Act of 1934, alleging that investors bought stock at artificially high prices. *Id.* at *1. In response to defendants' motion to exclude the testimony of plaintiffs' damages expert, the court responded:

> Surely, every stock pricing model will be subject to some form of statistical criticism or unwanted interpretation…. Nevertheless, to the extent defendants' concern about Preston's analysis are valid, they go to the weight and credibility of her testimony, not its admissibility. Accordingly, *defendants may properly explore any weaknesses in her methodology on cross-examination or by offering their own expert to rebut her assertions.*

*Id.* at *2 [internal citations omitted; emphasis added].

*Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d 768 (Tex. App. 1987), illustrates the risks a defendant takes by not presenting expert testimony on damages. Pennzoil brought an action for Texaco's alleged tortious interference with a contract between Pennzoil and Getty Oil concerning the purchase of Getty Oil Stock. *Id.* at 785. After the jury awarded $7.5 billion in compensatory damages, Texaco appealed and argued that the evidence did not support the jury's damages award. *Id.* at 784-85, 859-63. In overruling Texaco's point of error, the Texas court of appeals commented:

> Our problem in reviewing the validity of these Texaco claims is that Pennzoil necessarily used expert testimony to prove its losses by using three damages models. In the highly specialized field of oil and gas, expert testimony that is free of conjecture and speculation is proper and necessary to determine and estimate damages. *Texaco presented no expert testimony to refute the claims but relied on its cross-examination of Pennzoil's experts to attempt to show that the damages model used by the jury was flawed.* Dr. Barrow testified that each of his three models would constitute an accepted method of proving Pennzoil's damages. It is inevitable that there will be some degree of inexactness when an expert is attempting to make an educated estimate of the damages in a case such as this one…. The law recognizes that a plaintiff may not be able to prove its damages to a certainty. But this uncertainty in calculating damages is tolerated when the difficulty in calculating damages is attributable to the defendant's conduct.

*Id.* at 861 [emphasis added; internal citations omitted]. In response to that decision, several commentators have suggested "that Texaco may have taken a calculated risk by declining to present a counter formulation of damages in its case in chief so as to avoid the appearance of admitting liability or encouraging a compromise verdict." Frank Rothman, William P. Frank & Jay S. Berke, *Presentation of the Case in Chief*, *in* 2 Business & Commercial Litigation in Federal Courts §33.9 (Robert L. Haig, ed. 1998). In hindsight, those authors commented that the dangers Texaco faced with respect to the presentation of an alternative damages model could have been minimized by requesting that the court bifurcate trial on liability and damages issues. See *id.* In reality, by avoiding the appearance of admitting liability or encouraging a compromise verdict, Texaco was susceptible to a huge

damage award if the jury chose to accept plaintiff's damage model, and was ultimately hit with a huge verdict against it.

On a much smaller scale, the Delaware chancery court's judgment award of damages to plaintiffs in *Ryan v. Tad's Enterprises, Inc.*, 709 A.2d 675 (Del. Ch. 1996), *aff'd*, 693 A.2d 1082 (Del. 1997), also emphasizes the risk a defendant takes when it does not offer expert testimony on damages. In *Ryan*, minority shareholders brought a statutory appraisal action and an action for fraud and breach of fiduciary duties concerning an asset sale and "cash-out" merger. The chancery court ruled for plaintiffs and awarded $2 million in damages. 709 A.2d at 678-80. In a motion for reargument, defendants asserted that the court erred in finding that $2 million was the proper measure of damages. In denying the motion, the court stated:

> [Defendants'] contentions are flawed because the defendants failed to develop an adequate record to support them. Hence, reargument on this issue is not merited.
>
> As a purely conceptual matter, the defendants are correct in their view that the value as of the Merger date of the $2 million payments to the Townsends was not $2 million, but an appropriately discounted lesser amount. That is because the $2 million would be paid over five years. However, that argument still does not carry the day, because once the plaintiffs proved (*prima facie*) a $2 million damage amount, the burden shifted to the defendants to prove that the damages award should be less. *That burden required the defendants to establish (presumably through expert testimony) an appropriately discounted figure. At the trial, the defendants never presented any proof of an appropriate discount rate, not did they otherwise attempt to calculate a discounted damaged figure.*

*Id.* at 679 [emphasis added].

Similarly, *dicta* from the District Court for the District of New Jersey in *In re AremisSoft Corp. Securities Litigation*, 210 F.R.D. 109, 125 (D.N.J. 2002), support the argument that defendants should generally offer expert testimony on damages. That case involved a consolidated class action against AremisSoft Corporation, individual executives of the corporation, and numerous other defendants for violations of sections 10 and 20(a) of the Securities and Exchange Act of 1934 and sections 11 and 15 of the Securities Act of 1933. The complaint alleged that defendants "issued false and misleading statements concerning AremisSoft's earnings and streams of revenue." *Id.* at 112. The district court ruled that a proposed class settlement was fair and reasonable; and in assessing the risks of establishing liability and damages, the court stressed the key role that damages experts would play at trial:

> [T]he Class would have to overcome damage defenses that Defendants would assert. As is often the case, the parties would likely engage in a "battle of the experts," the outcome of which would be unpredictable. The Court recognizes the very real possibility that a jury could be swayed by Defendants' experts seeking to minimize Class Members' losses or to show that the losses were attributable to factors other than the alleged misstatements and omissions. *See Robbins v. Koger Properties, Inc.*, 129 F.3d 617 (11th Cir. 1997) (finding no loss causation and overturning $81 million jury verdict).

*Id.* at 125.

The results in these cases suggest that a party and its counsel should carefully evaluate the risk they are willing to undertake before forgoing any expert testimony on damages issues. If a defendant is concerned that testimony on an alternative damage model will encourage a compromise verdict, an expert witness need not present an alternative damage methodology or model. Instead, the expert can simply rebut the analysis of plaintiffs' expert, providing testimony on the flaws and inaccuracies of plaintiffs' damage analysis. "Courts have often allowed expert

testimony for the sole purpose of critiquing and thereby helping to explain the work of an expert witness retained by another party." *In re Blech Sec. Litig.*, No. 94 Civ. 7696(RWS), 2003 WL 1610775, at *20 (S.D.N.Y. Mar. 26, 2003).

## VI. Conclusion

If effective and compelling experts and areas of opinions can be identified and stated, then the expert testimony can be an important ingredient in the defense of many complex commercial cases. Defendants should consider the strategic benefits of using experts as consultants to assist in the development of case strategies, and as testifying experts to provide support for class certification arguments, to strengthen summary judgment positions, and to present complex liability and damages issues at trial. In order to effectively use experts, attorneys should strategize about experts' possible involvement at the onset of litigation, revaluate that assessment throughout the life of the case, and be aware of legal impediments that may prohibit the use of expert testimony.

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