

AAI Working Paper #08-06 (revised)
Title: *Daubert* and Other Gatekeeping Challenges of Antitrust Economists
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Abstract

This paper examines the affect of *Daubert v. Merrell Dow Pharms* and related gatekeeping decisions on expert testimony since January 2000, focusing primarily on economic testimony in antitrust cases. An analysis of gatekeeping motions on economic testimony taken from two data sets that attempt to track these motions suggests that the courts' gatekeeping may have created additional barriers to plaintiff antitrust cases, and so may discourage well-qualified economists from taking these cases. These data show that economists appear to be most frequently challenged when providing economic opinions on behalf of the plaintiff in antitrust cases, while defense experts are often unchallenged. Moreover, plaintiff exclusions are much higher than defense expert exclusions. . These results suggest further research should be done to test the reliability of the data, determine the causes of the apparent imbalance, and see what actions -- if any -- should be taken to address any imbalance.

Keywords: Daubert, Antitrust, Expert Witnesses, Gatekeeping

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I. Overview

In general, recent Supreme Court decisions have made it more difficult for plaintiffs to win antitrust cases. For example, *Trinko*² not only raised the bar for plaintiffs to bring a refusal to deal claim under Section 2, some scholars have suggested that the decision indicates a major retrenchment in antitrust law.³ In *Twombly*, the Supreme Court increased the evidentiary standard necessary to support a complaint before discovery is allowed.⁴

Other court decisions have had more subtle effects on the plaintiff's ability to bring antitrust cases. In the 1993 *Daubert v. Merrell Dow Pharms.* decision, the Supreme Court developed a two pronged standard for admitting the testimony of an expert witness into evidence: the testimony must be *relevant* and *reliable*.⁵ Over time, the *Daubert* standard that applied initially to the hard sciences was expanded to cover other fields, such as the social sciences in decisions such as *Kumho Tire*.⁶ The decision reinforced judges' "gatekeeping role" to ensure the methodology of the expert witness is scientifically valid and the opinion is sufficiently tied to the facts of the case to be relevant. This was recognized in December 2000 when Rule 702 of the Federal Rules of Evidence ("FRE 702") was revised to incorporate *Daubert* and subsequent case law. In addition to requiring the witness be qualified to offer testimony, this revision resulted in courts applying three general rules to determine the admissibility of expert testimony including:

² 540 U.S. 398 (2004).

³ Michael A. Carrier, "Of *Trinko*, Tea Leaves, and Intellectual Property," *The Journal of Comparative Law* 31, no. 2 (Winter 2006), pp. 357, 373 ("[The Court's] thinly veiled swipes at antitrust – with its 'considerable disadvantages,' false positives, negative investment effects, and meddlesome courts – threaten to apply far beyond the facts of *Trinko*."); Adam Candeub, "*Trinko* and Re-Grounding the Refusal to Deal Doctrine," *University of Pittsburgh Law Review* 66, no. 4 (Summer 2005), pp. 821, 823 ("The *Trinko* opinion could potentially immunize from antitrust scrutiny whole swathes of anticompetitive behavior.").

⁴ 550 U.S. 544 (2007)

⁵ *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). *Daubert* affected other facets of expert admissibility as well, such as finding that the "general acceptance" criteria required in the *Frye* standard was superseded by the Federal Rules of Evidence. Prior to *Daubert*, there were two competing standards: relevance and general acceptance by the scientific community. The relevance standard required only that expert evidence be relevant to the issues of the case, and that the expert be qualified and unbiased, whereas the general acceptance standard (i.e., the *Frye* standard) also required "general acceptance in the particular field in which it [the evidence] belongs" (see *Frye v. United States*, 293 F. 1013, at 1014 (D.C. Cir. 1923)). For a discussion of the evolution of expert testimony standards, see Lloyd Dixon and Brian Gill, "*Changes in the Standards for Admitting Expert Evidence in Federal Civil Cases Since the Daubert Decision*," (Santa Monica, California: RAND Institute for Civil Justice, 2001), pp. 1-4. (hereafter *Dixon and Gill*). For a more recent discussion of *Daubert* and expert testimony, see Gregory J. Werden, "The Admissibility of Expert Testimony," *Issues in Competition Law and Policy*, Volume I (2008), pp. 801-817. For additional discussion of *Daubert* and its affect on game theory analysis of mergers and merger modeling, see Malcolm B. Coate and Jeffrey H. Fischer, "Daubert, Science and Modern Game Theory: Implications for Merger Analysis," 2008, available at SSRN: <http://ssrn.com/abstract=1268386>.

⁶ *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1997).

- (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.

These standards presumably apply equally to plaintiff and defense experts, and are not specific to any single area of law.

Previous inquiries on the *Daubert* standard appear to focus on the change in admissibility rates pre and post *Daubert*, *Daubert's* impact on the judge's role as gatekeeper, and the quality of expert testimony. For example, to analyze whether *Daubert* had tangibly altered the standards for expert reliability, Michael Risinger compared challenges to expert reliability in the six years and one month before the *Daubert* decision to challenges six years and one month post-*Daubert*. Risinger used *Frye v. United States* as "a good proxy to get a fair idea of pre-*Daubert* judicial activity in this regard."⁷ Risinger found a large change, stating "[c]learly *Daubert* triggered a deluge, especially in regard to civil cases."⁸ In the period before *Daubert*, Risinger found 21 federal appellate court cases citing *Frye*, of which 7 were non-criminal, and 29 federal district court decisions citing *Frye*, of which 17 were non-criminal.⁹ Between July 1, 1993 and August 2, 1999, Mr. Risinger found 416 opinions citing *Daubert* in federal appellate courts (287 of which were in non-criminal cases), and 649 opinions citing *Daubert* in federal district court (584 were non criminal).¹⁰ Risinger also noticed that in federal civil cases during the post-*Daubert* period the majority of challenges were against plaintiff experts and that "when civil defendants proffers are challenged by plaintiffs, those defendants usually win."¹¹ Risinger also noticed that the *Kumho Tire* decision was likely to alter the application of *Daubert*.¹² In the first full year after the *Kumho Tire* decision, another 449 cases cited *Daubert*.¹³ Risinger compared data on expert challenges from August 2, 1999 through August 2, 2000 (a full year of data following *Kumho Tire*) to his larger data set of post-*Daubert* expert challenges. Risinger noted the following with respect to civil cases during the August 2, 1999 to August 2, 2000 period:

The majority of the reliability challenges in a trial context were in civil cases. Of those, more than 90% involve challenges to plaintiff proffered expertise, and 90% of those were tort cases. Defendants

⁷ Mr. Risinger observes for the purpose of identifying cases where expert reliability was at issue that "[g]iven *Frye's* iconic status, it is unlikely that many opinions rejecting expertise on reliability grounds would have failed to cite *Frye*, especially in federal courts." Risinger, D. Michael, "Navigating Expert Reliability: are Criminal Standards of Certainty Being Left on the Dock?" *Albany Law Review*, Vol. 64, No. 1, (2000), p. 103, available at SSRN: <http://ssrn.com/abstract=251033>. (hereafter *Risinger*).

⁸ *Risinger*, p. 104.

⁹ *Risinger*, p. 104.

¹⁰ *Risinger*, p. 104.

¹¹ *Risinger*, p. 110.

¹² As noted above, *Kumho Tire* expanded the applicability of *Daubert* to experts in other fields, such as economic experts.

¹³ *Risinger*, p. 143.

prevailed two-thirds of the time. If there is any change, it is that, in the three challenges to defense expertise in the new set, the defendants won all three, whereas, in the main set, plaintiffs won about half of their challenges. However, the universe is too small to yield significant information.¹⁴

Other research on the effects of *Daubert* concur with Risinger's finding that *Daubert* had a substantial effect upon the assessment of expert testimony in civil cases. Lloyd Dixon and Brian Gill of the RAND Institute for Civil Justice conducted a sizeable study in 2001 on 399 federal district court opinions between January 1980 and June 1999 (addressing 569 different experts), finding that the proportion of rulings on challenges in which the judge discussed reliability began to rise after *Daubert* (holding case type, substantive area of evidence, and appellate circuit constant), and that judges have expanded their gatekeeping roles as a result of *Daubert*.¹⁵ Dixon and Gill considered the relative impact of *Daubert* across the different case types and substantive areas of evidence (i.e., different kinds of expert testimony), and found that "[a]ll substantive areas of evidence showed increases in the proportion of evidence in which reliability was addressed and the proportion found unreliable."¹⁶ Dixon and Gill indicate that "the rise that took place in both the proportion of evidence found unreliable and the proportion of challenged evidence excluded suggests that the standards for admitting evidence have tightened."¹⁷ In particular, Dixon and Gill found no significant declines in the challenges to relevance and qualifications, but concluded that "there was an increase in judicial scrutiny of reliability, not merely a shift in terminology from relevance, qualifications, and other considerations to reliability."¹⁸

Additional findings in the study are interesting when considered in the context of the findings we present below. Dixon and Gill state:

...the frequency with which summary judgment was requested rose substantially after *Daubert*, as did the frequency with which summary judgment was granted. This latter rise tailed off at the end of the period, whereas the former continued, implying that the success rate of summary judgment requests fell at the end of the period.... [W]e think it likely that challenges to plaintiffs' evidence have increasingly resulted in case dismissals.¹⁹

Furthermore, Dixon and Gill considered the relative impact of *Daubert* across plaintiff experts and defense experts. They found that challenges to plaintiffs' evidence accounted for 80% of the total challenges in their data set, but that both plaintiff and defense challenges on grounds of reliability showed similar trends. However, they could

¹⁴ Risinger, p. 145

¹⁵ Dixon and Gill, pp. xiii – xv.

¹⁶ Dixon and Gill, p. 33.

¹⁷ Dixon and Gill, p. xiii

¹⁸ Dixon and Gill, p. 52

¹⁹ Dixon and Gill, p. 56.

not determine whether the increase in reliability challenges post-*Daubert* was significant due to the modest size of challenges to defendants' evidence, despite the magnitude of challenges increasing.²⁰

The general motivation for *Daubert* challenges is obviously entirely appropriate. Baseless testimony by unqualified witnesses should not be presented to a jury. However, even rules with quite reasonable goals may have some unintended consequences. This paper seeks to extend upon this earlier research, particularly examining challenges to economist expert testimony, and investigate what continuing effects of *Daubert* rulings may have been since the principles of *Daubert* were incorporated into the Federal Rules of Evidence in 2000. This article analyzes two data sets of *Daubert*-related subsequent court decisions, focusing on economist expert testimony. These data do not constitute a complete set of such rulings, and are not entirely accurate in the information they contain. In particular, in addition to *Daubert* challenges the more extensive data set includes other "gatekeeping" challenges under the Federal Rules of Evidence and various state standards. Nevertheless, these data do provide more information on the potential impact of *Daubert* and other gatekeeping decisions, and are suggestive of how these decisions may have affected antitrust enforcement.

In general, we find that *Daubert* may have created additional barriers to plaintiff antitrust cases. The data collected by tracking services suggest that economists are more frequently challenged in antitrust cases than any other of the types of laws tracked in the data. Moreover, any *Daubert* challenge of an economic expert has a fair chance of succeeding, and some data suggest economists are more likely to have testimony excluded than other types of experts. Finally, there appears to be a much greater chance of excluding plaintiffs' economic experts from providing testimony in antitrust cases compared to defense experts.

These conclusions should be seen as tentative for several reasons. First, closer analyses of each of the relevant cases should be done to ensure the accuracy of the data sets, and the data sets should be expanded or tested for being representative. In addition, more should be done to test whether antitrust and plaintiff experts are doing work of systematically lower quality than other experts. Third, there should be an examination of whether there is an asymmetry in the litigation process not related to *Daubert* that has created the incentive for defendants to more frequently challenge plaintiff experts. Only after additional research into these other potential influences on *Daubert* challenges can one conclude the increased gatekeeping standards have systematically created a barrier to plaintiff antitrust challenges.

II. "daubertontheweb" Appellate Court Decisions

The web site "daubertontheweb" attempts to track appellate decisions involving *Daubert* since January 2000.²¹ According to that site the "batting average" of

²⁰ *Dixon and Gill*, pp. 26-27.

²¹ http://www.daubertontheweb.com/leader_board.htm. The data from that source is not complete, since it only includes a review of appellate cases and the last revision of this website was September 2006. It was

successfully challenging an expert economist or accountant in any litigation is about 40 percent. As shown in Table 1, economists and accountants are less likely to be successfully challenged than attorneys (67 percent) and more likely to be successfully challenged than appraisers (20 percent). Moreover, the data on this site seems to indicate that challenges to economists in antitrust cases have had an even better “batting average.” Table 2 shows the 10 antitrust cases that are included in the 40 percent economist exclusion rate. Of the ten antitrust cases listed when the site was recently visited, seven experts were excluded.²² The excluded experts included well respected economists such as Professors Robert Hall and Frank Fisher, and all ten challenges listed were of experts engaged by the plaintiffs. This very limited data set suggests that *Daubert* challenges in antitrust cases have generally gone against plaintiffs’ experts.

III. “*Daubert* Tracker” Decisions

A. *Description of Data*

To analyze the likelihood of an economist’s testimony being excluded, particularly in antitrust matters, we obtained a data source that contained a consolidated list of *Daubert* motions and expert exclusions. “*Daubert* Tracker” had collected “over 10,000 briefs and other supporting documents from both appellate and trial courts relating to ‘gatekeeping’ challenges to expert witness testimony.”²³ Discussions with the company indicate that the database they maintain contains an aggregation of reported and some unreported gatekeeping decisions from multiple jurisdictions in a unified and integrated database.²⁴ We obtained a customized database from *Daubert* Tracker, requesting that they provide all gatekeeping challenges to economists in their database. Accordingly, the resulting database contains challenges to economists under a variety of gatekeeping standards, and not just *Daubert* based challenges.

The database contains 822 records for challenges to specific economic experts from 1993 to 2008.²⁵ Each record includes information on the discipline of the expert (as defined by *Daubert* Tracker), the area of law addressed in the case (e.g., Intellectual Property, Antitrust and Trade Regulation, etc.), the party retaining the expert, a summary

created by attorney Peter Norberg, and states on the FAQ page that it “aspires to cover every federal appellate decision involving the admissibility of expert evidence, published or unpublished, since January 1, 2000.”

²² *TFWS, Inc. v. Schaefer*, 325 F.3d 234 (4th Cir. 2003), is another antitrust case on the site that appears to have been included in the overall economist exclusion statistic. We have not counted this case in the antitrust subset because the summary on the website indicates that “[t]his is not a true *Daubert* challenge, but rather goes to weight.” See <http://www.daubertontheweb.com/accountants.htm>.

²³ <http://www.dauberttracker.com/>.

²⁴ For a list of all “gatekeeping” challenges that tracked, see <http://www.dauberttracker.com/gatekeepingstandards.cfm>.

²⁵ The name of the expert is missing from 16 of these records. The database appears to have been filtered by *Daubert* Tracker to challenges of individuals that *Daubert* Tracker has classified with a discipline of “Economist,” and as such contains a variety of experts who do accounting/finance testimony as well as economic testimony.

of the case, a brief summary of the outcome of the challenge, and information on the parties in the litigation. Prior to 2003 many of the records were missing the information regarding the party that retained the expert. We filled in the “Retained by” information back to 2000²⁶ for records missing these data and classified the outcome of each challenge as “Excluded,” “Admissible,” “Excluded in Part,” or “NA” based on the case and outcome summary.²⁷

We classified decisions as “NA” when they appeared to be rendered moot by summary judgment (i.e., the case was decided without ruling on the challenge to the expert), were pending decisions, were challenges explicitly described as being under a standard other than *Daubert*, or were otherwise inapplicable. For example, some records had dispositions for defense experts in the data set of “Defense expert not challenged,” “702 challenge mooted,” “Daubert motion pending as of this decision,” “Testimony not challenged,” or “Expert's reliance on third party source was not improper.”²⁸

Daubert Tracker contained challenges to experts under a variety of gatekeeping standards. We have attempted to limit the data in general to *Daubert* challenges or gatekeeping challenges based on *Daubert* principles by reviewing the disposition and summary fields in the data for an indication of the type of challenge that was made. We have assumed that unless the description in either column indicates otherwise, the challenge was made under the *Daubert* standard, and attempted to verify this assumption by determining whether questions were raised about the relevance or the reliability of the testimony. All challenges identified as explicitly non-*Daubert* related were removed. However, this methodology has resulted in some challenges under other gatekeeping standards being included, which we discuss below.

²⁶ The date was determined based upon the citation date. Records missing citation information have been omitted.

²⁷ In the data set, these are indicated in the “Disposition” and “Summary (if available)” fields.

²⁸ This last example is a case where the expert was challenged under FRE 703, and thus was recorded as “NA” as it was clearly not a challenge under *Daubert*. An example of an “otherwise inapplicable” record is one case where an expert’s testimony was withdrawn in response to a defense motion for a *Daubert* hearing, prior to the hearing itself (*Santana Products v. Bobrick Washroom Equipment*, 249 F. Supp. 2d 463 (2003)). Other records required additional research using the cites reported in the data set if the outcome was unclear based on the description in the data or the summaries did not clearly indicate the specific type of gatekeeping challenge. For example, one record for Dr. Lewis Koppel in 2003 indicated a disposition of “[m]otion to exclude granted in part and denied in part” while at the same time the summary column indicated that “[i]t appears the *Daubert* motions are still pending.” Researching this in LexisNexis showed that the opinion was excluded in part under *Daubert*, and we therefore categorized the outcome as “Excluded in Part.” The summary for a record related to Dr. Robert Hamlin in 2005 indicates that, “[p]laintiff contended that Mr. Hamlin was not qualified to give expert testimony, and that Hamlin’s opinions and reports were irrelevant to the case and would unfairly prejudice the jury. The court did not believe the entire matter could be properly decided outside the context of the trial as a whole...The court denied the motion without prejudice and would rule on admissibility on an issue by issue basis at trial.” The disposition did not elaborate, stating “Ruling reserved.” We therefore consulted the opinion on LexisNexis, and categorized the record as “NA” because the judge’s opinion clarified the summary, indicating “I do not believe the entire matter can be properly decided outside the context of the trial as a whole. Furthermore, since Mr. Hamlin does appear to possess specialized knowledge that may help the jury to understand the evidence or to determine relevant facts at issue in this case, he should not be completely precluded from testifying. IT THEREFORE IS ORDERED that the motion in limine (#64) is denied without prejudice to plaintiff raising specific evidentiary objections at the time of trial.”

We also found that the database contained duplicate entries for the same challenge to an expert on the same case, which we have attempted to remove. This appears to occur for several of reasons. For example, if an expert was challenged in a district court, the ruling was sometimes appealed, in which case two or more entries could appear for the same expert on the same opinion. There were other cases where multiple entries occurred because rulings by the district court referenced prior rulings and a new entry was recorded in the data set.²⁹

For those records that were not “NA” and were decided in or after 2000, we further refined the “Antitrust and Trade Regulation” category of data to those records that were antitrust cases, and where possible we have determined the type of testimony of each expert challenged in this area of law (i.e., class certification or liability/damages).³⁰ Within the antitrust subset of the data, we then isolated those challenges that were explicitly *Daubert* related challenges versus those that were made under other gatekeeping standards.³¹ This research revealed that the general filters discussed above that were applied to the entire data set had resulted in antitrust observations that were not explicitly *Daubert* or FRE 702 challenges.³² Within the antitrust data, these non-*Daubert* records generally included:

²⁹ To isolate and remove these duplicates, we identified all records with the same expert name, along with some combination of the same plaintiffs and defendants, courts, docket number, or Lexis citations. From these possible duplicates, we first dropped all decisions made at a district level in favor of the final decision made upon the appeal. For the remaining records, we then determined the decision date for each record for the same expert on the same case and reviewed the summaries of each record. Unless the summaries explicitly indicated that the two entries refer to different aspects of the opinion/evidence or concern different types of testimony, we eliminated the earlier entry/entries in favor of the record with the most recent decision date. Some experts appeared more than twice in this subset of possible duplicates. It is possible that we have removed additional challenges under new grounds to the same expert with this methodology, and have therefore understated the total number of challenges and the associated decisions.

³⁰ These determinations were made through a review of the summary description in the database, or through further research. It was often unclear from the court decisions in LexisNexis whether an expert was testifying on only liability or only damages, and therefore we have aggregated these two types of testimony. For example, the expert challenge might be related to the expert’s damages methodology, but the decision reported in LexisNexis might discuss analyses that could have supported liability as well. Moreover, the absence of discussion in a judge’s decision of liability or damages does not guarantee that the expert was not also opining on damages or liability.

³¹ This detailed review resulted in our exclusion of several additional records prior to analyzing the data because either (1) the court cited to *Daubert* in a ruling, but the expert was not challenged; (2) a final decision was made without ruling on the *Daubert* challenge; (3) the documents could not confirm the indicated expert name in the database (e.g., a challenge to Dr. John Short in 2004 was researched on LexisNexis, but the judge’s decision never mentioned this expert name and we therefore dropped the observation); or (4) the testimony was not excluded but merely found to be insufficient to withstand summary judgment.

³² While it may not be appropriate to include FRE 702 challenges prior to December 2000 in an analysis of *Daubert*’s effect on antitrust, all antitrust records in 2000 that contained expert challenges under FRE 702 either explicitly mention *Daubert* or contained an analysis of admissibility that we judged to be based on *Daubert* standards. After December 2000, we have assumed that FRE 702 challenges to experts are analogous to a *Daubert* challenge for all antitrust records.

- (1) Observations where the expert was challenged under FRE 703, which typically concern the type of evidence relied upon by the expert.³³
- (2) Class certification cases where the expert was not necessarily held to *Daubert* standards.
- (3) A handful of challenges that are not specific to a standard. These decisions did not reference *Daubert* or FRE 702, despite clear challenges to the expert's admissibility for a variety of reasons.

Our data set of antitrust cases included 12 records where the expert was testifying at the class certification stage. A review of the antitrust class certification cases revealed that the judge often stated that the *Daubert* standard was not applicable at the class certification stage, even if the expert were challenged under *Daubert*. For example, typical language that was given in one opinion regarding a challenge to Dr. Beyer states:

The parties agree that Fed. R. Evid. 702 and the gloss the Supreme Court made on it in *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993), apply to our determination of whether to accept Dr. Beyer's views in our class action consideration. We will, therefore, structure our resolution of defendants' motion in light of our present procedural need. *Because the evidence is here offered for the limited purpose of class certification, our inquiry is perhaps less exacting than it might be for evidence to be presented at trial.*³⁴

In these cases, experts were usually only reviewed to determine if their opinions met the requirements under Fed.R.Civ.P. 23 ("Rule 23"), and not reviewed under the full light of *Daubert*. However, the decision quoted above regarding Dr. Beyer's testimony was recently reversed and class certification was vacated, and so may change the future of expert testimony in class certification motions. As stated in the decision by Chief Judge Scirica, "opinion testimony should not be uncritically accepted as establishing a Rule 23 requirement merely because the court holds the testimony should not be excluded, under *Daubert* or for any other reason." "Weighing conflicting expert testimony at the certification stage is not only permissible; it may be integral to the rigorous analysis Rule 23 demands."³⁵ Given the implications of this decision, it is useful to consider if the findings we present below related to *Daubert* challenges may extend in the future to the class certification stage of antitrust cases as well.

In the sections below, we first present our analysis of overall exclusion rates that reflects the removal of "NA" records, records prior to 2000, and duplicate records. After

³³ In the cases we reviewed, these challenges typically took the form of expert reliance on statements made out of court, or the reliability of data used by the experts in their analyses. We remove 703 challenges from the analysis below when analyzing *Daubert* challenges.

³⁴ See *In Re Hydrogen Peroxide Antitrust Litigation*, 240 F.R.D. 163 (E.D. Pa. 2007) (emphasis added).

³⁵ *In Re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305 (M.D. Pa. 2008).

these adjustments, the original 822 observations are reduced to 405 observations.³⁶ We present these aggregate level results to make comparisons between the antitrust challenges and the other areas of law using the same set of data filters. We then analyze the gatekeeping challenges within the antitrust records, and further refine our analysis by examining only those challenges that appear to be made under *Daubert* or FRE 702.³⁷ To do this more detailed analysis within the antitrust cases, we also drop challenges of types 1-3 identified above. Therefore, the general comparisons between antitrust cases and other types of cases reflect general gatekeeping decisions, not merely those specific to *Daubert* and FRE 702, while our subsequent analysis of antitrust cases focuses on *Daubert* and FRE 702.

B. Analysis of Overall Exclusion Rates

As shown in Figure 1 and Table 3, the *Daubert Tracker* data show roughly similar rates of exclusion for economists overall as the 40 percent rate shown by *Daubertontheweb.com*. The 405 *Daubert Tracker* records from 2000 forward show that while economists were completely excluded only 30 percent of the time under gatekeeping motions, full and partial exclusions occurred 44 percent of the time.³⁸ The *Daubert Tracker* data also suggest that plaintiffs' experts are more likely to be challenged than defendants' experts. Figure 2 and Table 4 show that within the 405 challenges analyzed, plaintiffs' experts account for 74 percent of all challenges. This is also consistent with the earlier findings of Risinger, as well as Dixon and Gill.

Economists were challenged in many different types of cases. Of the 405 records considered, the challenges span 52 areas of law.³⁹ Figure 3 and Table 5 show the breakdown of challenges between plaintiff and defense experts in the areas of law where there were 10 or more challenges, accounting for 308 of the 405 total challenges. Within these 13 different areas of law, none appear to have more defense experts being challenged than plaintiff experts. Antitrust plaintiff experts accounted for 87 percent of

³⁶ In addition to the records discussed above, we also dropped: (1) 2 observations with no "Disposition" after 2000, (2) 6 records in or after 2000 where the retaining party was unclear, and (3) 13 observations where the citation was missing because *Daubert Tracker* indicated it was an "unreported decision" and so no date could be determined. In addition, we have made a variety of adjustments to the data where there appeared to be a data entry error, such as cases where the area of law contained the party name, or the disposition summary was incomplete based on further research.

³⁷ We have kept one class certification case in this more refined analysis categorized as liability and/or damages testimony as discussed more fully below. This case had an unusual case history that resulted in the judge evaluating the Dr. Economides expert report explicitly using *Daubert* standards. The opinion stated that the testimony was found to be "inadmissible under Federal Rules of Evidence 401 and 702." See *Freeland v. AT&T Corp.*, 238 F.R.D. 130, 2006 U.S. Dist. LEXIS 57394, 2006-2 Trade Cas. (CCH) P75404 (S.D.N.Y. 2006).

³⁸ A review of some of the exclusions counted in *Daubertontheweb.com* appear to have been partial exclusions, so comparing these two statistics is appropriate.

³⁹ This total includes our adjustment to break Antitrust out of Antitrust and Trade Regulation, and does not include those challenges that had areas of law categorized as "None Assigned".

the challenges to antitrust experts, which is exceeded only by plaintiffs' experts opining in cases of personal injury, civil rights, and products liability.

Antitrust expert challenges account for the single largest number of challenges to economists in *Daubert* Tracker data. Antitrust experts account for 20 percent of the 308 challenges in the 13 areas of law (61 challenges) and 15 percent of all 405 challenges. Could the relatively large number of challenges for antitrust experts be explained by a large number of antitrust cases relative to the other areas of law? According to data from the Administrative Office of the United State Courts, antitrust cases account for only 0.3 percent of all civil cases,⁴⁰ as shown in Table 6. Although the U.S. Courts and *Daubert* Tracker data are not exactly comparable, it appears that antitrust economists are subject to a disproportionately high rate of challenges.

The high proportion of antitrust economist challenges in *Daubert* Tracker data is not consistent with Dixon and Gill's research on challenges to expert testimony across many disciplines. Dixon and Gill found that over their entire data set (*i.e.*, January 1980 to June 1999), bodily injury and property damage torts accounted for 47% of the cases in which expert evidence was challenged, while contract cases and business torts accounted for 15% and antitrust cases accounted for only 4%.⁴¹ After comparing their results to federal civil filings, they concluded that challenges to expert evidence occur more frequently in product liability, medical malpractice, and intellectual property cases.⁴² Dixon and Gill's finding that experts in these other fields were more frequently challenged than antitrust economists is likely due to Dixon and Gill's data ending in mid 1999. *Daubert* was not decided until 1993. The 1997 decisions of *Gen. Elec. Co. v. Joiner* and *Kumho Tire Co. v. Carmichael* led to the expansion of *Daubert* principles from a focus on experts in the hard sciences to include experts in the social sciences, and the impact of this expansion appears to have occurred over several years. As such, it is not surprising that economists would be more frequently challenged since 2000.

In the context of the apparently high rate of challenges to antitrust economists, we next analyzed whether antitrust experts were more likely to be excluded than other types of economic testimony. For this analysis, we compared antitrust exclusion rates to other areas of the law based on the *Daubert* Tracker data. Table 7 shows the total number of challenges and exclusion rates for areas of law where there were more than 10 challenges. Full exclusion rates for economists go from 42 percent for personal injury cases to 16 percent for securities law. Full or partial exclusion rates range from 30 to 70 percent in wrongful death and corporate law cases, respectively. Antitrust experts have lower exclusion rates than most other areas of law. Unlike the 70 percent exclusion ratio from the appellate antitrust case review of *Daubertontheweb* data, antitrust testimony was fully or partially excluded approximately 34 percent of the time in the broader set of gatekeeping challenges of *Daubert* Tracker.

⁴⁰ <http://www.uscourts.gov/judbususc/judbus.html>.

⁴¹ *Dixon and Gill*, pg. 21. However, Dixon and Gill did not limit their data to economist testimony, and therefore it is still possible that due to higher rates of economist testimony in antitrust matters, our data will be skewed toward antitrust challenges.

⁴² *Dixon and Gill*, pg. 21.

We also considered whether the appellate decisions in the *Daubert* Tracker data acted as a check on district court decisions to exclude expert witnesses, and also compared the outcomes from these appellate decisions between plaintiffs' experts and defendants' experts. Of the 405 records we analyzed, 73 were appellate decisions reviewing other cases. Sixty-two of these appellate cases involved plaintiff experts, and 11 involved defense experts. Of the 62 appellate reviews of district court decisions regarding plaintiff witnesses, 25 of the cases were attempts to have previously excluded testimony made admissible. Of these 25, four lower court decisions were reversed and the testimony was held to be admissible (or 16 percent). Of the 37 appellate reviews where the defense sought to reverse lower court decisions admitting plaintiff's expert testimony, four lower court decisions were reversed and these experts were excluded (or 11 percent). Of the 11 appellate reviews of defense expert testimony, six were appeals of lower court decisions to admit the testimony of the defense's expert, and none resulted in the expert's exclusion. For the other five motions to overturn the district court's decision to exclude the defense testimony, only one was overturned and the testimony found admissible. According to these data, it appears there is a low probability that an appeals court will overturn a district court's ruling, regardless of whether the motion is against the defendant's or plaintiff's expert, which is consistent with the high deference afforded to lower court decisions on evidentiary matters.

C. Analysis of Daubert Related Exclusion Rates

The *Daubert* Tracker data on overall exclusion rates suggest that gatekeeping challenges may be a barrier to plaintiff expert testimony in antitrust cases. Antitrust cases involve a disproportionately high number of challenges compared to other areas of the law, and almost nine out of ten antitrust challenges are against plaintiffs' experts. However, these results could be misleading with regard to *Daubert* related challenges, since the data filters identifying the overall exclusion rates likely include decisions on non-*Daubert* grounds. For example, as discussed above, challenges to economist class certification testimony has historically been held to a less stringent standard than a *Daubert* or FRE 702 challenge at later stages of the case. Therefore, we reviewed the 61 antitrust economist challenges in detail and show the breakdown of the types of gatekeeping challenges for defense and plaintiff experts in Figure 4.

As shown in Figure 4, *Daubert* and FRE 702 are the most common basis for challenges for defense and plaintiff antitrust experts, accounting for 41 of the challenges. All but two of the defense expert observations are challenges are under *Daubert*. Plaintiff economists were frequently challenged at the class certification stage, even though historically the standards of testimony were not held to the same scrutiny as they are at later stages of antitrust cases. As discussed below, the other challenges to plaintiff and defense experts are based on either FRE 703 or other grounds (which we grouped in the "Other" category).

Table 8 presents the number of challenges, exclusions, and the exclusion rates in the antitrust challenges data, divided into liability/damages or class certification, retaining

party, and the grounds for the challenge being FRE 703, Daubert/702, or other. The plaintiff and defense exclusion rates for the 61 cases are 36 and 25 percent, respectively. However, the exclusion rates vary widely depending upon the grounds for the challenge and testimony type.

Class certification testimony was almost always admitted due to the historically lower standards for expert review. In the only exclusion of the 12 cases of the class certification testimony in the data, the judge explicitly indicated that the expert opinion was considered unreliable under *Daubert* standards. As such, that case might be grouped with the liability/damages testimony reviewed under the *Daubert* criteria.⁴³

The data also indicate that *Daubert* or FRE 702 challenges are more successful against plaintiff expert witnesses. Figure 5 presents the percentage of challenges to plaintiff antitrust experts under *Daubert* that have resulted in partial or full exclusion. Eighty-six percent of the 42 *Daubert* challenges in the data were challenges to plaintiff experts. Moreover, within these 36 challenges to plaintiff expert witnesses, almost half of them resulted in testimony being excluded in whole or in part.⁴⁴ These results are starkly different from the defense expert experience, where only six challenges under *Daubert* appear in the data, and none were successful. Despite the small number of defense decisions, the difference in admissibility ratios is significantly different at the 10% level.⁴⁵

IV. Implications and Limitations

The results of the data from these two sources suggest a number of interesting conclusions. First, an economist attempting to testify in an antitrust case for the plaintiff is far more likely to be challenged than an economist testifying as an expert for the defense. Moreover, antitrust plaintiff experts appear among the most likely to be challenged, and are more likely than defense experts to be successfully challenged. The data suggest that economists testifying on liability and/or damages for the plaintiff have approximately a 1 in 2 chance of some or all of their opinion being excluded once challenged, while economists testifying for the defense in antitrust cases have not been successfully challenged under *Daubert*.

⁴³ See footnote 37 above. For the analysis shown in Figure 5 below, we include this class certification exclusion.

⁴⁴ Seventeen of the 36 plaintiff expert witnesses that were challenged on *Daubert* or FRE 702 grounds (including the class certification exclusion), or forty-seven percent, had some or all of their testimony excluded.

⁴⁵ We tested whether there is a difference in the ratio of admissibility using a 2 x 2 contingency table under a χ^2 distribution. See, e.g., George W. Snedecor and William G. Cochran, *Statistical Methods*, Sixth ed. (Ames Iowa: Iowa State University Press, 1967), pp. 215-218. This test measures whether the observed admissibility rates differ from the expected admissibility rate, assuming the null hypothesis that the admissibility rates are actually the same. Calculating $\chi_c^2 = (|f - F| - 0.5)^2 \sum 1/F_i$ we determined a critical value of 2.78, which is significant at the 10% level. However, this significance is sensitive to changes in the admissibility rate for defense experts and the test does not control for other factors that might explain the difference.

There are several considerations that may limit how much one can generalize from these results. First, these challenges are not the universe of *Daubert* challenges during this period. For example, one of the authors (Langenfeld) was engaged by the plaintiff as an expert in a predatory pricing case to estimate damages in 2006.⁴⁶ The defense filed *Daubert* motions to exclude his testimony, as well as the testimony of two experts on liability. The plaintiff similarly challenged the defendant's experts. In that case, Langenfeld and one of the other experts challenged by the defendants were admitted, but the plaintiff's third expert was excluded. The court did not rule on the admissibility of the defense experts. This case does not appear in the database, which indicates that the data source does not contain all relevant decisions. As such, we cannot be sure how representative this sample is of the universe of *Daubert* challenges.

Second, the results could be influenced by an asymmetry in the way burdens are allocated in litigation. For example, motions by the defense for summary judgment are often a defendant's last chance to win before trial. In opposing summary judgment, plaintiffs typically rely upon economists, so judges often limit or exclude the plaintiff economist's testimony when granting defense summary judgment motions. If a court grants defense summary judgment motions, or if it is denied and the case settles, then there would be little reason for it to address plaintiffs' *Daubert* motions. Moreover, discussions with plaintiff-oriented attorneys indicate they often do not challenge defendant's experts because of the expense and because they believe there is relatively little to gain. If the plaintiff's experts get through challenges, then the case goes to the jury or settles, and either outcome is often acceptable to plaintiff attorneys. There is also the belief that a judge will seldom allow a plaintiff's expert to go forward without also allowing the defendant's expert to testify. If these observations are true, even if the economists were equally qualified and did equally good work, then there would be a tendency for more challenges of plaintiff economists in the data.

Third, the quality of the experts or the amount of work that is done may be systematically lower for plaintiff economists, leading to more of them being challenged and excluded. For example, it is possible that more qualified experts self select as defense witnesses, and defense experts may have larger budgets so they can do more thorough work. However, the data indicate that notable economists are also likely to be challenged when acting as plaintiff witnesses. For example, Drs. Fisher, Hall, and Ordover all appear to have been challenged under *Daubert* when acting as plaintiff witnesses, with Fisher and Hall being excluded at least in part when engaged by plaintiffs. Unfortunately, quality-adjusting the work done by the experts in each case in the data would be a formidable task, and beyond the scope of this article.

Fourth, discussions with attorneys suggest plaintiffs' attorneys may encourage their economists to stray outside economics more than defense lawyers. If this is true, then the higher exclusion rates for plaintiff economists would simply reflect that the court

⁴⁶ Thales Avionics, Inc., v. Matsushita Avionics Systems Corporation, Matsushita Electric Industrial Co. Ltd., and DOES 2-100, in the United States District Court Central District of California Southern Division, Case No. SACV 04-454-JVS.

is accurately limiting these forays outside of economic knowledge, and there is no bias in the courts' gatekeeping decisions.

Finally, there are adjustments in categorizing each case as either admissible or excluded, and whether a record should be counted as a *Daubert* challenge. It is possible that some cases could be categorized differently, and this could alter the percentage of successful exclusion rates. Moreover, while we have carefully attempted to identify *Daubert*-specific challenges for antitrust cases, some of the challenges in the non-antitrust cases include challenges on other grounds. However, it is unlikely that more detailed analysis of the records would substantially change the plaintiff/defense challenge ratios, and it appears that plaintiff economic experts are more likely to be challenged and to have their testimony excluded in antitrust matters.

V. Implications for Antitrust Enforcement and Future Research

If the data we analyze in this article are representative, a substantial number of antitrust experts have been excluded since the *Daubert* criteria have been applied to them. It is entirely possible that the vast majority of these decisions were correctly decided on the appropriate legal and economic principles. However, even renowned economists, including Franklin Fisher and Robert Hall, have had at least part of their testimony in certain cases excluded.

In the data sets we have analyzed, antitrust has been the most active area of these challenges, and a plaintiff's expert was more likely to be excluded than a defendant's expert. As such, antitrust plaintiffs appear to have a substantial likelihood of having their cases thrown out on *Daubert* grounds, since virtually all antitrust cases need experts to articulate the theory, provide evidence and data on liability, and estimate damages.

The apparent bias against experts engaged by the plaintiff in antitrust cases not only makes bringing an antitrust case more difficult, it has the potential for discouraging even well-qualified economists from taking good antitrust cases and does encourage those who continue to take such cases to do much more work. Indeed, well-qualified economists can find their analyses scrutinized by courts that may not in a position to accurately evaluate the methods and data used by an expert, and cannot provide a peer review of the work (unless they engage their own expert). Moreover, the courts' implementation of the *Daubert* criteria in antitrust cases encourages more work for plaintiff economists, and these increased costs may discourage plaintiffs from bringing even good cases.

There does not appear to be an obvious simple solution to the possible bias in the courts' implementation of the *Daubert* criteria in antitrust cases. Legislation in theory could address the issue, but probably would need to address *Daubert* issues generally. Changing the judiciary to be less hostile to antitrust cases would presumably be a long run project. It may be that antitrust agencies or advocacy groups could file *amicus* briefs

in major cases where apparently qualified experts may have been held to a standard beyond what was actually envisioned under *Daubert*.

In any event, more research into the representativeness of the data we have analyzed and the specifics of the challenges should be done before implementing any substantial policy changes. These potential research topics could include more detailed review of cases we have identified, and systematically attempting to expand the data sets to include more decisions. These efforts could potentially give a better understanding of how to treat partial exclusions in the data, and provide some control for the quality of the expert's work in each case. In addition, one might want to survey economists, attorneys, and judges to see (1) if the increased the likelihood of *Daubert* challenges affects an economist's decision to work on a cases and spend more time on each case, (2) the extent that the exclusion of plaintiff's expert has been case-determinative, (3) how much delay and additional expense is attributable to *Daubert* challenges, and (4) if there any systematic way to separate the impact of the expert's quality of work and the other influences that affect the number of *Daubert* challenges and how they are resolved.

Table 1

Summary of Exclusion Rates by Discipline of Expert

Testifying Expert's Discipline	Exclusion Rates for Testifying Experts
Criminologists/Forensics	15.3%
Appraisers	20.0%
Chemists	27.8%
Hydrologists	33.3%
Statisticians	35.3%
Metallurgists	40.0%
Accountants/Economists	40.2%
Admiralty Experts	44.4%
Aviation Experts	50.0%
Fire Experts	52.2%
Physicians	53.7%
Engineers	61.0%
Accident Reconstructionists	61.3%
Psychologists/Psychiatrists	62.9%
Attorneys	66.7%
Marketing Experts	66.7%
Nurses	66.7%
Toxicologists	69.2%
Polygraphers	87.9%

Notes:

Exclusion Rates for Testifying Experts is calculated from the Admissibility Rates found at Daubert on the Web:

$$\text{Admissibility Rate} = T/N,$$

where N is the number of experts attempting to testify (in decisions subsequently reviewed on appeal) and T is the number of such experts whose testimony was ultimately ruled admissible (after appeal).

$$\text{Exclusion Rate for Testifying Experts} = 1 - (\text{Admissibility Rate}).$$

Sources:

http://www.daubertontheweb.com/leader_board.htm;

<http://www.daubertontheweb.com/statistics1.htm>.

Table 2

Admissibility of Accountants/Economists in Antitrust Cases

Case (Final Decisions)	Admissibility
Concord Boat Corp. v. Brunswick Corp. (2000)	Admissibility reversed
Wal-Mart Stores, Inc. v. Visa U.S.A., Inc. (2002)	Appeal Granted, class certification affirmed
Lantec, Inc. v. Novell, Inc. (2002)	Exclusion affirmed
Berlyn, Inc. v. Gazette Newspapers, Inc. (2003)	Exclusion affirmed
Williamson Oil Co. v. Philip Morris USA (2003)	Exclusion affirmed
Conwood Co., L.P. v. U.S. Tobacco Co. (2003)	Admissibility affirmed
Craftsmen Limousine, Inc. v. Ford Motor Co. (2004)	Admissibility reversed
LePage's, Inc. v. 3M (2004)	Admissibility affirmed
El Aguila Food Prods., Inc. v. Gruma Corp. (2005)	Exclusions affirmed
Champagne Metals v. Ken-Mac Metals, Inc. (2006)	Exclusion affirmed
Exclusion Rate	70%

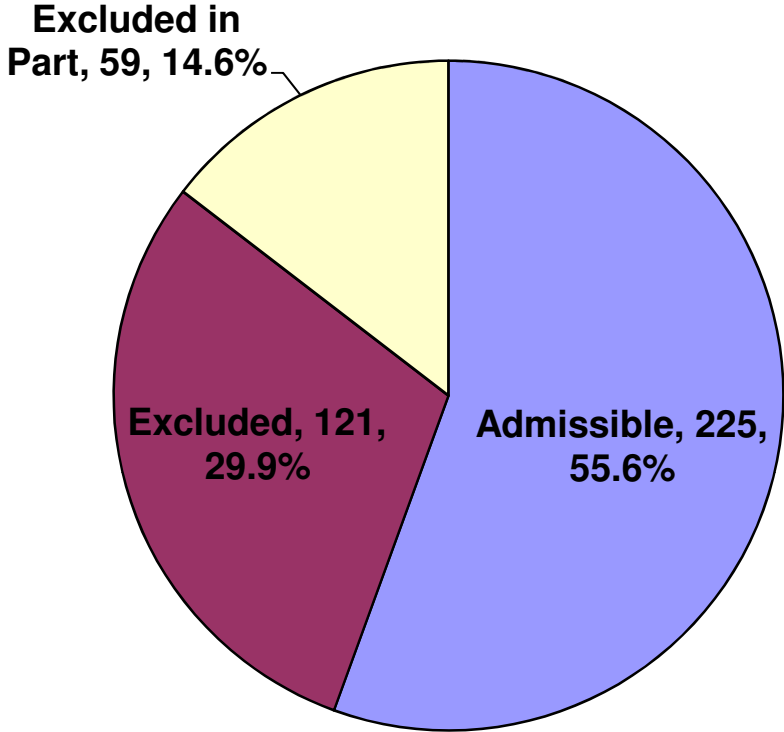
Notes

These cases were included in the overall exclusion ratio of Accountants/Economists from Daubert on the web, and specifically address antitrust testimony.

Source: <http://www.daubertontheweb.com/accountants.htm>

Figure 1

Summary of Gatekeeping Challenges to Economists



Notes
See Table 3 for notes on data analysis.

Source: *Daubert Tracker*

Table 3

Summary of Successful Economist Challenges

Number of Full Exclusions	Number of Partial Exclusions	Total Number of Challenges	Fully Excluded Percentage of Total Challenges	Full and Partial Exclusions as Percentage of Total Challenges
121	59	405	30%	44%

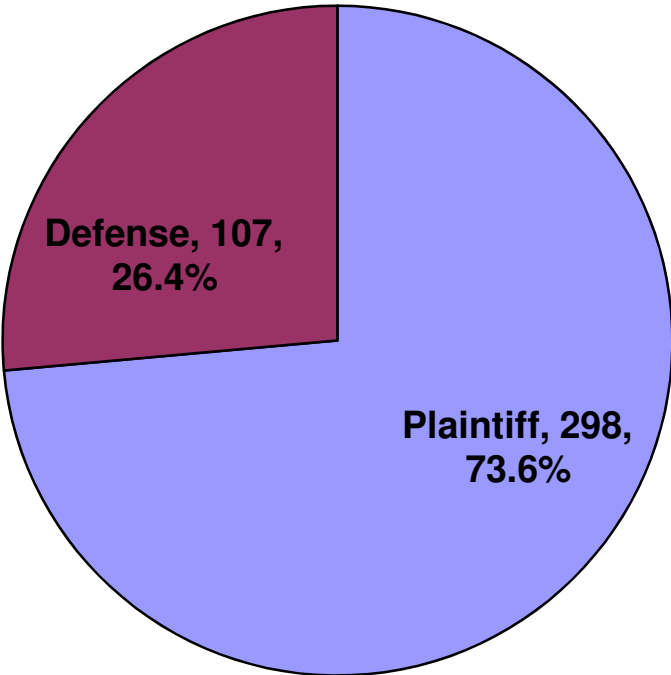
Notes

Analysis includes only those records from the data from 2000 and later (as determined by the date in the citation). Many records were n on the party that retained the expert prior to 2003; data have been obtained for the missing records back to 2000. Records where the D not considered, such as decisions rendered moot due to summary judgment, or decisions determined to be inapplicable have not been above analyses.

Source: Daubert Tracker

Figure 2

Summary of Gatekeeping Challenges by Party Retaining Expert



Notes

See Table 4 for notes on data analysis.

Source: *Daubert Tracker*

Table 4
Summary of Challenges by Party Retaining Expert

Number of Plaintiff Expert Challenges	Number of Defense Expert Challenges	Total Challenges	Plaintiff Percentage of Challenges
298	107	405	74%

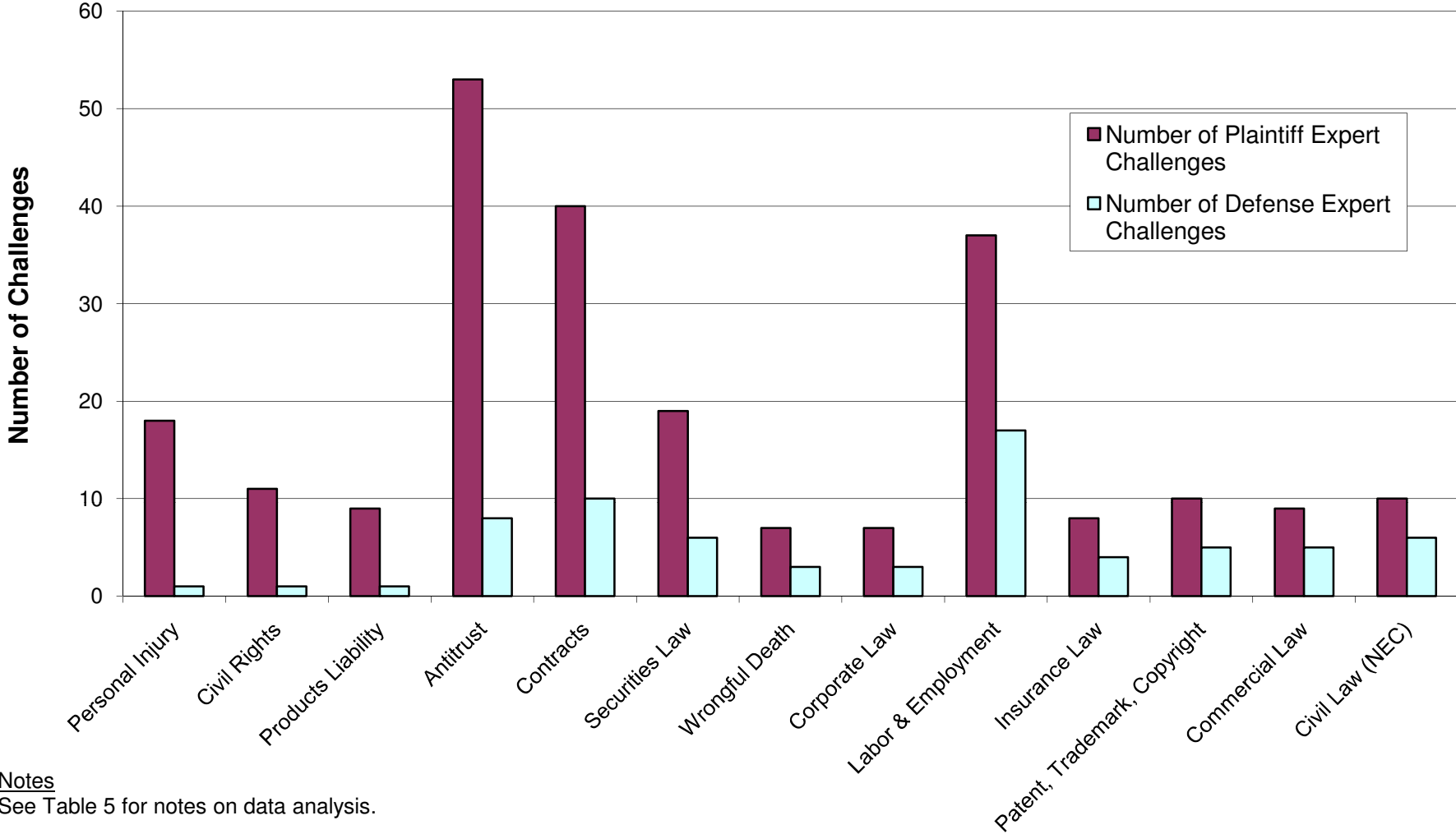
Notes

Analysis includes only those records from the data from 2000 and later (as determined by the date in the citation). Many records were missing information on the party that retained the expert prior to 2003; data have been obtained for the missing records back to 2000. Records where the Daubert motion was not considered, such as decisions rendered moot due to summary judgment, or decisions determined to be inapplicable have not been included in the above analyses.

Source: Daubert Tracker

Figure 3

Economist Gatekeeping Challenges by Areas of Law with 10 or More Challenges



Notes
See Table 5 for notes on data analysis.

Source: Daubert Tracker

Table 5**Summary of Challenges by Party Retaining Expert,
for Areas of Law With 10 or More Challenges**

Area of Law	Number of Plaintiff Expert Challenges	Number of Defense Expert Challenges	Total Challenges	Plaintiff Percentage of Challenges
Personal Injury	18	1	19	95%
Civil Rights	11	1	12	92%
Products Liability	9	1	10	90%
Antitrust	53	8	61	87%
Contracts	40	10	50	80%
Securities Law	19	6	25	76%
Wrongful Death	7	3	10	70%
Corporate Law	7	3	10	70%
Labor & Employment	37	17	54	69%
Insurance Law	8	4	12	67%
Patent, Trademark, Copyrig	10	5	15	67%
Commercial Law	9	5	14	64%
Civil Law (NEC)	10	6	16	63%

Notes

Analysis includes only those records from the data from 2000 and later (as determined by the date in the citation). Many records were missing information on the party that retained the expert prior to 2003; data have been obtained for the missing records back to 2000. Records where the Daubert motion was not considered, such as decisions rendered moot due to summary judgment, or decisions determined to be inapplicable have not been included in the above analyses.

Source: *Daubert Tracker*

Table 6
Comparison of Areas of Law to Total Civil Actions

Area of Law	Total Challenges	Overall Challenges	Percentage of Total	Area of Law Percentage of Total Cases from September 2000-September 2008
Products Liability/Personal Injury/Wrongful Death	39	405	10%	19%
Securities Law	25	405	6%	1%
Patent, Trademark, Copyright	15	405	4%	4%
Contracts	50	405	12%	10%
Civil Rights	12	405	3%	14%
Insurance Law	12	405	3%	4%
Labor & Employment	54	405	13%	7%
Antitrust	61	405	15%	0.3%

Notes

Total challenges include only those records from the data from 2000 through partial year 2008 (as determined by the date in the citation). Area of Law Percentage of Total Cases calculated from Table C2-A of the Annual Report of the Administrative Office of the United States Courts from September 2000 through September 2008. The overlap between Daubert Tracker defined areas of law and AO recorded civil suits were based upon description overlaps.

Source: *Daubert Tracker and Administrative Office of the United States Courts* at <http://www.uscourts.gov/judbususc/judbus.html>

Table 7

**Summary of Exclusion Rates,
for Areas of Law With 10 or More Challenges**

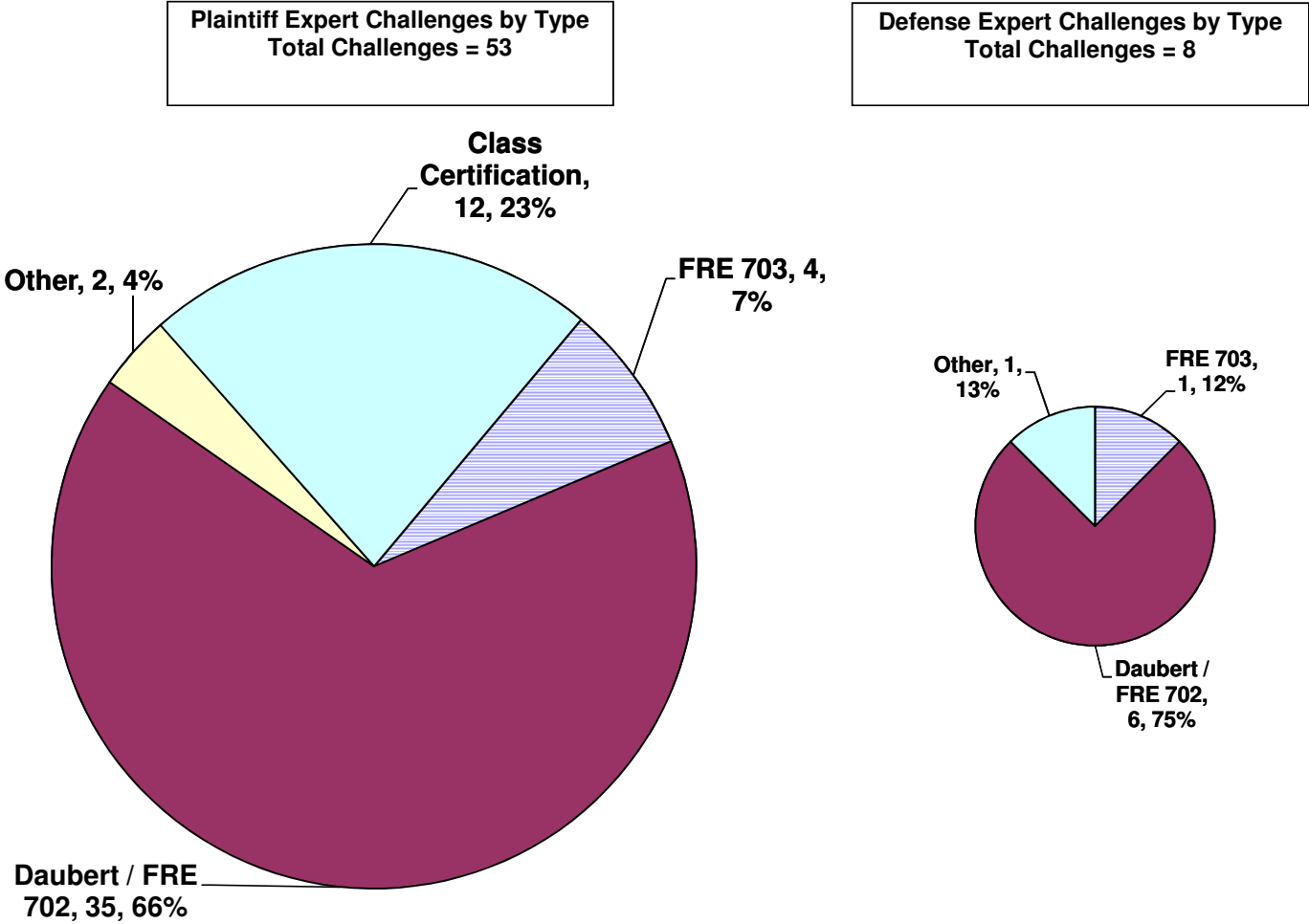
Area of Law	Total Full Exclusions	Total Partial Exclusions	Total Challenges	Successful Full Exclusion Ratio	Successful Full and Partial Exclusion Ratio
Corporate Law	3	4	10	30%	70%
Civil Law (NEC)	6	4	16	38%	63%
Products Liability	4	2	10	40%	60%
Commercial Law	5	3	14	36%	57%
Securities Law	4	9	25	16%	52%
Patent, Trademark, Copyright	5	2	15	33%	47%
Personal Injury	8	0	19	42%	42%
Contracts	15	6	50	30%	42%
Civil Rights	3	2	12	25%	42%
Insurance Law	4	1	12	33%	42%
Labor & Employment	17	5	54	31%	41%
Antitrust	11	10	61	18%	34%
Wrongful Death	2	1	10	20%	30%
			Mean	30%	48%
			Median	31%	42%

Notes

Analysis includes only those records from the data from 2000 and later (as determined by the date in the citation). Many records were missing information on the party that retained the expert prior to 2003; data have been obtained for the missing records back to 2000. Records where the Daubert motion was not considered, such as decisions rendered moot due to summary judgment, or decisions determined to be inapplicable have not been included in the above analyses.

Source: Daubert Tracker

Figure 4



Notes
See Table 8 for notes on data analysis. Daubert/FRE 702 challenges that also challenged the expert under FRE 703 have been combined with Daubert/FRE 702 challenges. Class certification challenges have been broken out because they are often held to a different standard than a Daubert challenge at a later stage of the case.

Source: *Daubert Tracker*

Table 8**Summary of Exclusion Rates for Antitrust Experts by Type of Testimony and Grounds for Challenge**

Retaining Party	Testimony Type	Grounds for Expert Challenge	Admissible	Excluded in Part	Excluded	Full and Partial Exclusion Rates
Defense	Liability and/or Damages	FRE 703	0	1	0	100%
		<i>Daubert/702</i>	6	0	0	0%
		Other	0	1	0	100%
Plaintiff	Liability and/or Damages	FRE 703	2	2	0	50%
		<i>Daubert/702</i>	19	6	10	46%
		Other	2	0	0	0%
Plaintiff	Class Certification	<i>Daubert/702</i>	11	0	1	8%
DEFENSE TOTALS			6	2	0	25%
PLAINTIFF TOTALS			34	8	11	36%

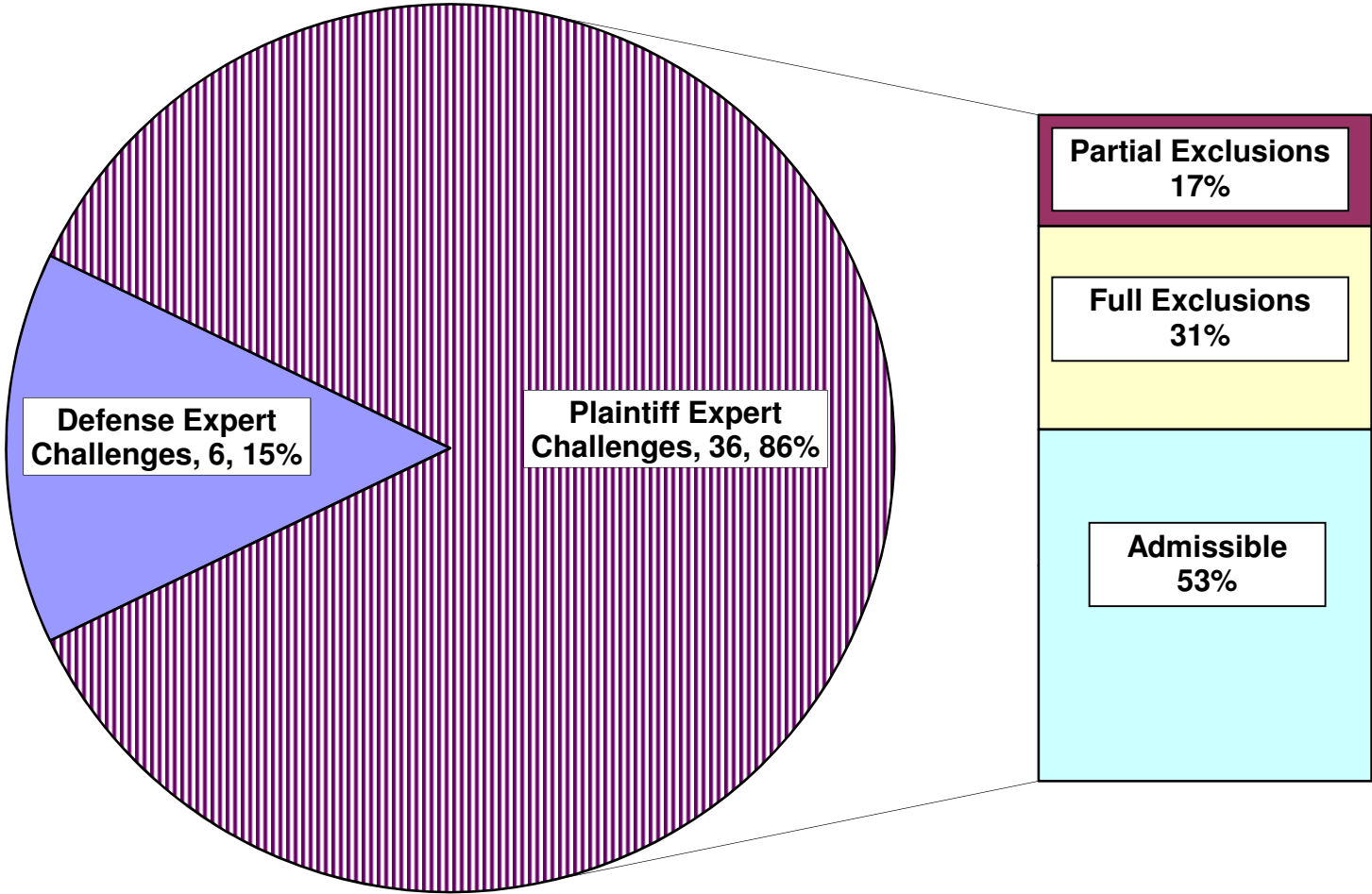
Notes

Daubert/702 challenges also included a challenge to the expert under FRE 703 in 5 of the antitrust cases. In each of these cases, it appeared that the resulting grounds for exclusion rested with the *Daubert* or FRE 702 challenge, and we have therefore combined these with challenges that rested solely on *Daubert* or FRE 702 bases.

Source: *Daubert Tracker*

Figure 5

Antitrust *Daubert* Challenges for Liability and/or Damages Testimony, 2000-2008



Note: The plaintiff expert challenges include one challenge at the class certification stage.
Source: *Daubert Tracker*