

Daubert Challenges of Antitrust Experts

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I. Overview

In general, recent court decisions have made it more difficult for plaintiffs to win antitrust cases. For example, *Verizon Communications v. Trinko*² may have closed many doors for Section 2 plaintiffs.³ For refusals to deal to be found anticompetitive, the plaintiff now has to show both an anticompetitive purpose and the lack of a legitimate business justification. Accordingly, many scholars have suggested that the *Trinko* decision indicates a major retrenchment in antitrust law.⁴ In another recent Supreme Court decision *Bell Atlantic Corp. v. Twombly*⁵, the Court found that allegations of conspiracy primarily premised on parallel conduct are insufficient to survive a motion to dismiss at the complaint stage, effectively eliminating the possibility that discovery would provide evidence in support of the conspiracy allegations.

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*.⁶ These standards presumably apply equally to plaintiff and defense experts, and are not specific to any single area of law. Over time, the *Daubert* standard that applied initially to the hard sciences was expanded to cover other scientific fields, such as the social sciences.⁷

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. To see what the effects of *Daubert* rulings have been, this paper analyzes two data sets of *Daubert*-related subsequent court decisions. These data do not constitute a complete set

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² 540 U.S. 398 (2004).

³ Michael A. Carrier, "Of *Trinko*, Tea Leaves, and Intellectual Property," *The Journal of Corporation Law* 31, no. 2 (Winter 2006), pp. 357-373; Adam Candeub, "*Trinko* and Re-Grounding the Refusal to Deal Doctrine," *University of Pittsburgh Law Review* 66, no. 4 (Summer 2005), pp. 821-870.

⁴ Michael A. Carrier, "Of *Trinko*, Tea Leaves, and Intellectual Property," *Journal of Comparative Law* (Winter 2006) 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," 66 *University of Pittsburgh Law Review* (2005) 821, 823. ("The *Trinko* opinion could potentially immunize from antitrust scrutiny whole swathes of anticompetitive behavior.")

⁵ ___ U.S. ___, 127 S.Ct. 1955, 2007 WL 1461066 (May 21, 2007).

⁶ *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993);

⁷ *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1997).

of such rulings, and are not entirely accurate in the information they contain. Nevertheless, these data do provide a starting point for analyzing the impact of the *Daubert* decisions and are suggestive of how *Daubert* may have affected private antitrust enforcement.

In general, we find that *Daubert* may have created additional barriers to plaintiff antitrust cases, and may even be discouraging well qualified economists from taking these cases. The data collected by tracking services suggest that any *Daubert* challenge of an economic expert has a fair chance of succeeding, and economists are more likely to be successfully challenged than other types of experts. Moreover, economists are most frequently challenged in antitrust cases than any other of the types of laws tracked in the data. Finally, there appears to be a bias against allowing plaintiffs' economic experts to provide testimony in antitrust cases compared to defense experts.

These conclusions should be seen as tentative for several reasons. Closer analyses of each of the relevant cases should be done to ensure accuracy, and the data sets should be expanded or tested for being representative. Moreover, more needs to be done to test whether antitrust and plaintiff experts are not systematically of lower quality than that other experts, which in theory could explain some of our results.

II. “daubertontheweb” Appellate Court Decisions

One web site attempts to track appellate decisions.⁸ According to that site the “batting average” of successfully challenging an expert economist or accountant in any litigation is about 40 percent. As shown in Exhibit 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 chance). Moreover, the data on this site seems to indicate that challenges to economists in antitrust cases have had an even better “batting average.” Exhibit 2 shows the 10 cases included in the 40 percent exclusion rate that relate to antitrust cases. Of the ten cases listed when the site was recently visited, seven experts were excluded.⁹ 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 limited data set suggests that *Daubert* challenges have generally gone against plaintiffs' experts.

⁸ http://www.daubertontheweb.com/leader_board.htm. The data from that source is not complete, it only includes a review of appellate cases, but it presents a picture that is generally consistent with what we observe.

⁹ *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.”

III. “*Daubert* Tracker” Decisions

A. Description of Data

To analyze the likelihood of an economist’s testimony being excluded, particularly in antitrust matters, we sought and 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.”¹⁰ 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.¹¹ We therefore obtained a customized database from *Daubert* Tracker, requesting that they provide all gatekeeping challenges to economists in their database.

The database that we obtained contained 822 records for challenges to specific economic experts from 1993 to 2008.¹² Each record contains 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 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 have filled in the “Retained by” information back to 2000¹³ for records missing these data¹⁴ and have classified the outcome of each *Daubert* challenge as “Excluded,” “Admissible,” “Excluded in Part,” or “NA” based on the case and outcome summary.¹⁵ For those

¹⁰ <http://www.dauberttracker.com/>.

¹¹ For a list of all “gatekeeping” challenges that tracked, see <http://www.dauberttracker.com/gatekeepingstandards.cfm>.

¹² 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.

¹³ The date was determined based upon the Lexis Citation date. Records missing the Lexis Citation number and have been omitted.

¹⁴ We also changed the retained by information for the partial exclusion of Dr. Langenfeld’s testimony for Iams/Nutro to Plaintiff.

¹⁵ “NA” records include decisions that were rendered moot by summary judgment, pending decisions, challenges that were described as being under a standard other than *Daubert*, or otherwise inapplicable. *Daubert* Tracker contained challenges to experts under a variety of standards. We have attempted to limit the data to *Daubert* challenges by reviewing the “disposition” and “summary” column for an indication of the 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 reviewing whether questions regarding the relevance or the reliability of the testimony were raised. Moreover, there were many descriptions that did not appear relevant to the analysis. For example, a few records had an outcome of “Defense expert not challenged.” These records, and other dispositions that did not appear relevant, were recorded as “NA”. Also, the outcome was sometimes unclear based on the description in the data, and required further research. LexisNexis cites were provided for most of the records in the database, and were used to obtain further information on the outcomes that were not clear based on the “Disposition” field in the data.

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 are Antitrust versus Trade cases, and where possible we have determined the type of testimony of each expert challenged in this area of law (e.g., class certification versus liability and/or damages).¹⁶

Finally, we also found that the database contained duplicate entries for the same challenge to an expert on the same case. This appears to occur for a number of reasons. For example, if an expert was challenged in a district court, the ruling was often appealed, in which case two 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. 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. We identified 109 records that were possible duplicates. 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. This process led us to remove an additional 57 of the records as duplicates.¹⁷

After adjusting all of the above, we have limited the original 822 observations to 460 observations, reflecting the removal of “NA” records, records prior to 2000, and duplicate records.¹⁸

B. Analysis of Exclusion Rates

These data reveal a number of interesting results. First, as shown in Exhibits 3A-3B, these data show similar rates of exclusion for economists as a whole compared to the results shown in Exhibit 1 from the overall exclusion rate reported at Daubertontheweb.com. The 460 records from 2000 forward show that while economists were completely excluded only 30 percent of the time, full and partial exclusions

¹⁶ These determinations were made through a review of the summary description in the database, or through further research. It was often unclear whether an expert was testifying on only liability or only damages, and therefore we have aggregated these two types of testimony.

¹⁷ Some experts appeared more than twice in this subset of possible duplicates. It is possible that we have removed additional challenges to the same expert under new grounds with this methodology, and have therefore understated the total number of challenges and the associated decisions.

¹⁸ In addition to the records discussed above, we also dropped: (1) 3 observations with no “Disposition”, (2) 4 decisions after 2000 where the retaining party was unclear, and (3) 13 observations where the Lexis 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.

occurred 43 percent of the time (consistent with the average presented at Daubertontheweb.com).¹⁹

These data also suggest that plaintiffs' experts are more likely to be challenged than defendants' experts. As shown in Exhibits 4A-4B, within the 460 challenges analyzed, plaintiffs' experts account for 71 percent of all challenges.

Cutting the data more finely, we determined whether the distribution of plaintiff challenges remained similar for the antitrust subset of expert testimony. Economists were challenged in a variety of matters. Of the 460 records considered, the challenges span 52 areas of law.²⁰ Exhibits 5A-5B show the breakdown of challenges between plaintiff and defense experts in the areas of law where there were 10 or more challenges, accounting for 368 of the 460 total challenges. Exhibit 5B shows that antitrust plaintiffs' experts accounted for 84 percent of the challenges to antitrust experts, and were exceeded only by plaintiffs' experts opining in cases of personal injury, products liability, and civil rights. Notably, within this subset only Taxation cases appear to have more defense experts being challenged than plaintiff experts.

We then looked at antitrust exclusion rates to determine if antitrust experts were more likely to be excluded than other types of economic testimony. Exhibits 6A-6B show exclusion rates for areas of law where there were more than 10 challenges. The first item of note in this table is that antitrust challenges account for the single largest number of challenges. Of the 460 challenges, antitrust experts account for 16 percent of the total (or 73 challenges). Second, unlike the 70 percent exclusion ratio from the appellate antitrust case review of Daubertontheweb data, antitrust testimony in *Daubert* Tracker data was fully or partially excluded approximately 40 percent of the time. Exclusion rates for economists range from 27 to 70 percent for testimony in wrongful death and corporate law cases, respectively.

We also analyzed whether these antitrust challenges were being influenced by the type of opinion offered, because the standards for a *Daubert* challenge vary for class certification opinions versus liability or damages analyses. A further breakdown of these antitrust challenges is shown in Exhibit 7A.²¹ The majority of the challenges occur when the expert is opining on liability and/or damages, with 60 of the 73 challenges related to these types of testimony. Moreover, Exhibit 7B reveals that 47 percent of all plaintiff expert challenges for liability and/or damages opinions are excluded in some form, while only 27 percent of the defense experts that were challenged are fully or partially excluded. This spread is even larger when considering only opinions that are fully excluded, with 33 percent of plaintiffs' experts being excluded, and only 9 percent of defense experts being fully excluded.

¹⁹ This percentage includes two challenges to experts retained by the courts. A review of some of the exclusions counted in Daubertontheweb.com appear to have been partial exclusions, so comparing these two statistics is appropriate.

²⁰ 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".

²¹ The underlying data were often unclear whether an expert was opining on liability alone, liability and damages, or just damages. Therefore, we have grouped these opinions together.

Finally, we also considered whether the appellate decisions were have acted as a check on district court decisions to exclude expert witnesses, and whether there is any apparent bias against plaintiff experts compared to defendants' experts. We found that of the 460 records we analyzed, 86 were appellate decisions reviewing other cases. Seventy-four of these appellate cases involved plaintiff experts, and 12 involved defense experts. Of the 74 appellate reviews of district court decisions regarding plaintiff witnesses, 29 of the cases were attempts to have previously excluded testimony made admissible. Of these 29, five were then found to be admissible (or 17 percent). Of the 45 appellate reviews where the defense sought to have the plaintiff's expert excluded upon appeal, 5 of these experts were excluded (or 11 percent). Of the 12 appellate reviews of defense expert testimony, 6 were plaintiff motions to exclude the defense's expert, and none were overturned. For the other 6 motions to overturn the district court's decision to exclude the defense testimony, only one was overturned and found admissible. According to these data, it appears unlikely that an appeals court will overturn a district court's ruling, but the odds are much better for overturning a district court ruling on a plaintiff's than a defendant's expert.

IV. Considerations and Limitations

The results of the data from these two sources suggest a number of interesting conclusions. First, it would seem that economists are more likely to be challenged than many other experts, and that an economist testifying as an expert for the plaintiff is far more likely to be challenged than an economist testifying as an expert for the defense. Moreover, antitrust plaintiff experts are among the most likely to be challenged, and are more likely than defense experts to be successfully challenged. It appears that economists testifying on liability and/or damages for the plaintiff have close to a 1 in 2 chance of some or all of their opinion being excluded once challenged, while economists testifying for the defense have closer to a 1 in 4 probability of being fully or partially excluded after challenge.

There are some qualifications that could 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 in 2006 to estimate damages. The defense filed *Daubert* motions to exclude his testimony, as well as the testimony of two other experts on liability. The plaintiffs similarly challenged the defendant's experts. In that case, Langenfeld and one of the other experts challenged by the defendants were admitted, but the third expert was excluded. This case does not appear in the database, which suggests that the data source is incomplete, so we cannot be sure how representative this sample is of the universe of *Daubert* challenges.

Second, it is possible that the results are driven by the quality of the experts rather than the party retaining the expert or the area of law. Indeed, it is possible that higher quality experts self select as defense witnesses. However, we see in the data that notable

economists are also likely to be challenged when acting as plaintiff witnesses. For example, Drs. Carlton, Fisher, Hall, and Ordover all appear to have been challenged in the data when acting as plaintiff witnesses, with Fisher and Hall being excluded at least in part when engaged by plaintiffs. Nevertheless, quality adjusting the work done by the experts in each case would be a formidable task.

Finally, there were a number of subjective adjustments that were made to categorize the results of any given case as either admissible or excluded. To the extent that someone would categorize a given disposition differently, this could alter the percentage of successful exclusion rates. While we have endeavored to remove challenges unrelated to *Daubert* from these analyses, it is possible that some of the challenges counted in these statistics include challenges under another standard. However, it is unlikely that the plaintiff/defense challenge ratios would be much altered, so it seems clear that plaintiff experts are more likely to be challenged.

V. Implications for Antitrust Enforcement

If the data we analyze in this article are representative, a substantial number of antitrust experts have been excluded since the *Daubert* criteria has 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 have had at least part of their testimony in certain cases excluded, including Franklin Fisher, Dennis Carlton, and Robert Hall.

Antitrust has been the most active area of these challenges. Moreover, it is clearly more likely that a plaintiff's expert would be excluded than a defendant's expert. As such, plaintiffs appear to have a substantial likelihood of being challenged and having their cases thrown out based 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 can discourage 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 reputation under scrutiny by courts who may not in a position to accurately evaluate the methods and data used by an expert, and are certainly not in a position to provide a peer review of the work. Moreover, since this work is costly, the courts' implementation of the *Daubert* criteria in antitrust cases likely further discourages 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 obviously be a very long run project. It may be that antitrust agencies or advocacy groups such as the American

Antitrust Institute could file *amicus* briefs in major cases where experts are not being challenged on the merits, but simply being challenged to see if a case can be stopped by excluding the plaintiff's expert.

Under any condition, 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 topic could include more detailed review of cases we have identified and systematically attempting to expand the data sets to include more decisions. This could potentially give a better understanding of how to treat partial exclusions in the data and potentially 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) is 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.

Exhibit 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>.

Exhibit 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%

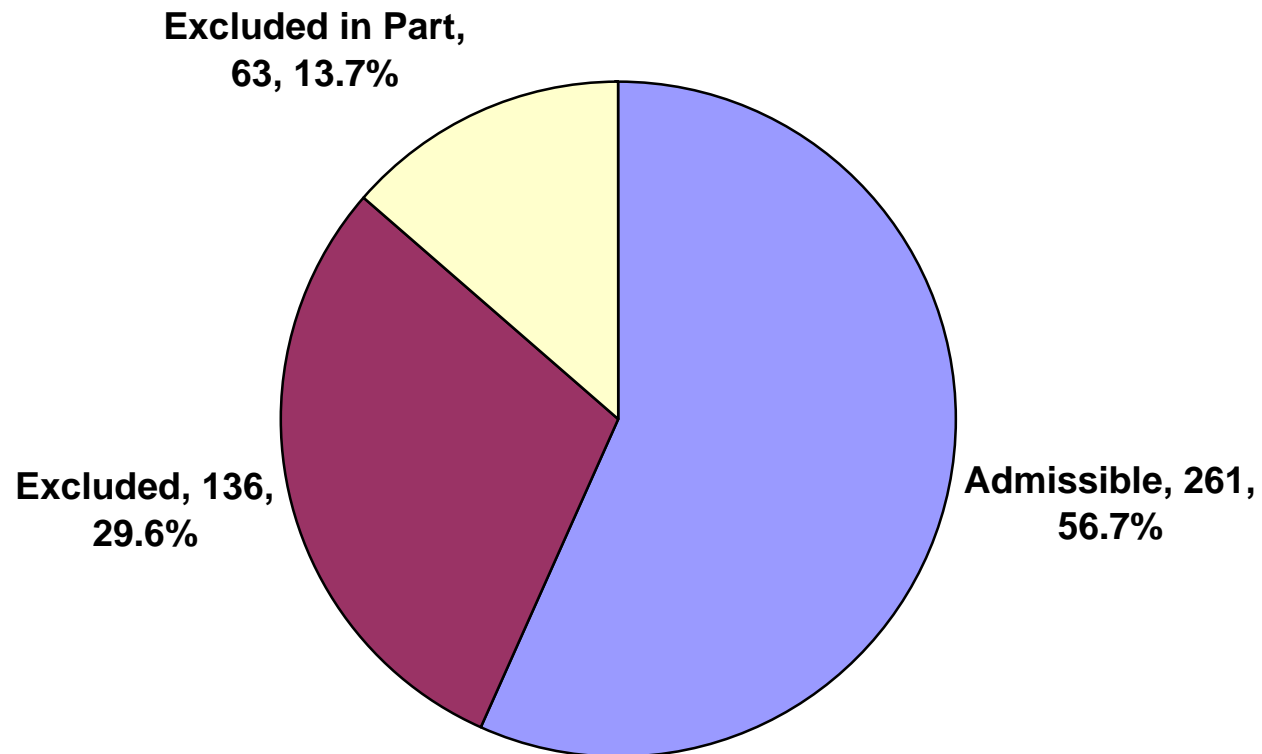
Notes

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>

Exhibit 3A

Summary of *Daubert* Challenges to Economists



Notes

See Exhibit 3B for notes on data analysis.

Source: *Daubert Tracker*

Exhibit 3B

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
136	63	460	30%	43%

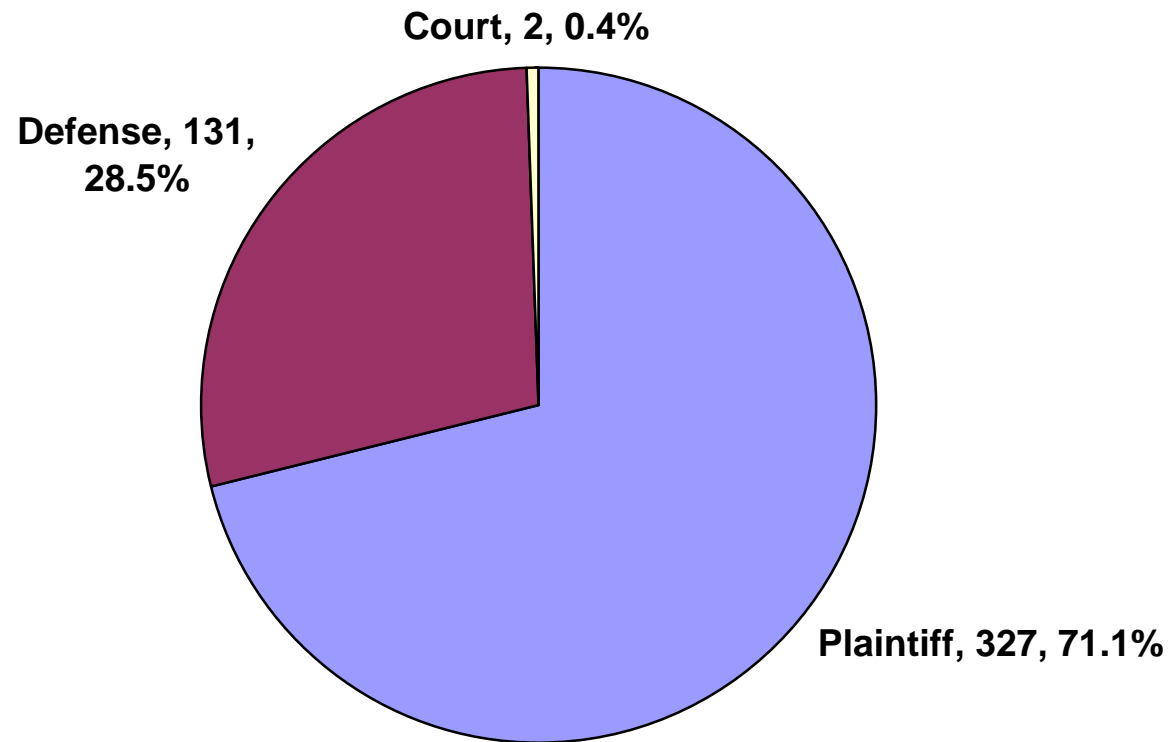
Notes

Analysis includes only those records from the data from 2000 and later (as determined by the date in the Lexis citation) because many records were missing information on the party that retained the expert prior to 2003; data have been obtained for the missing records only 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. Total challenges include 2 challenges of experts retained by the court.

Source: Daubert Tracker

Exhibit 4A

Summary of *Daubert* Challenges by Party Retaining Expert



Notes

See Exhibit 4B for notes on data analysis.

Source: *Daubert Tracker*

Exhibit 4B

Summary of Challenges by Party Retaining Expert

Number of Plaintiff Expert Challenges	Number of Defense Expert Challenges	Total Challenges	Plaintiff Percentage of Challenges
327	131	460	71%

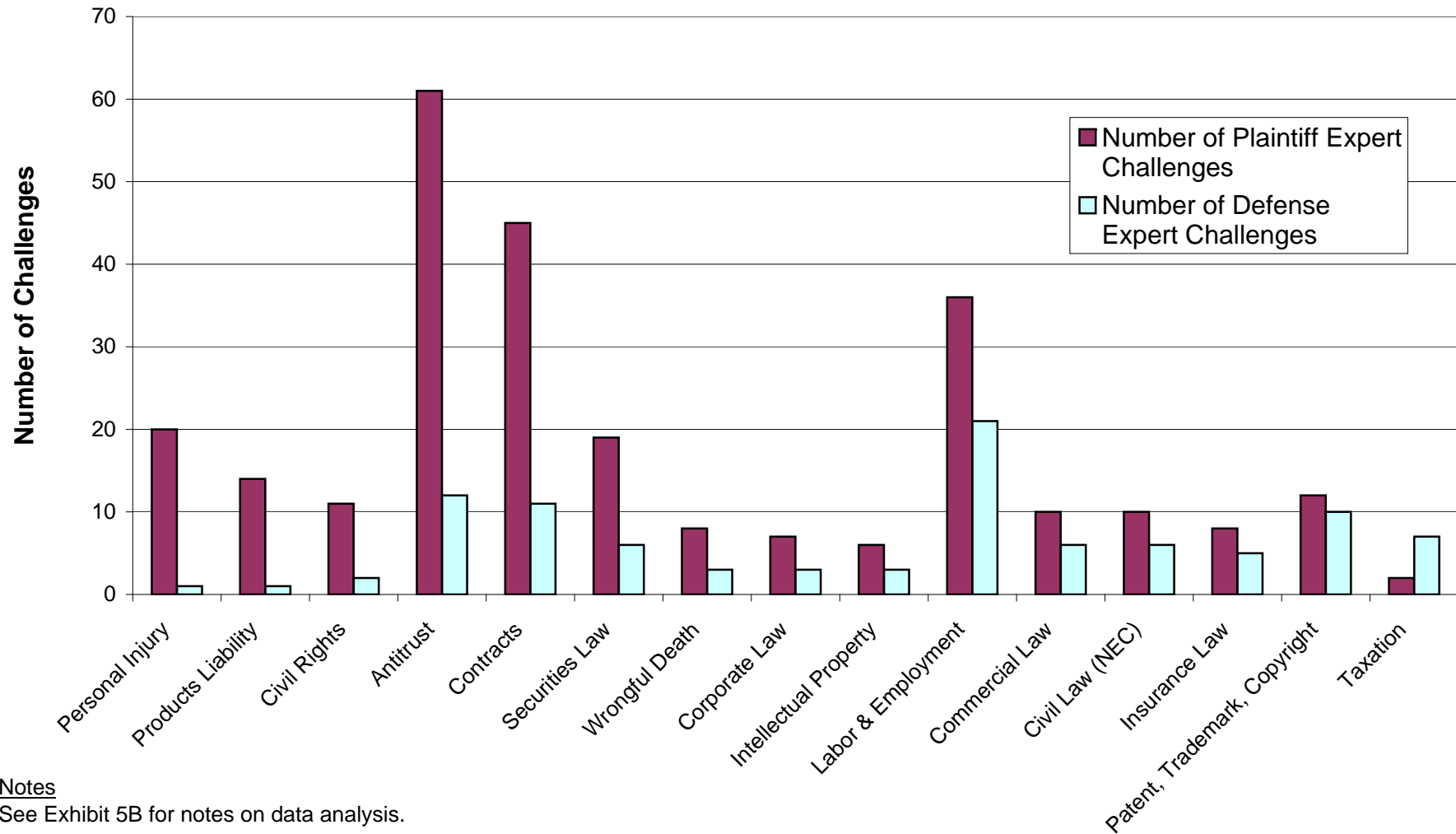
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Source: Daubert Tracker

Exhibit 5A

Economist *Daubert* Challenges by Areas of Law with 10 or More Challenges



Notes

See Exhibit 5B for notes on data analysis.

Source: *Daubert Tracker*

Exhibit 5B
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	20	1	21	95%
Products Liability	14	1	15	93%
Civil Rights	11	2	13	85%
Antitrust	61	12	73	84%
Contracts	45	11	56	80%
Securities Law	19	6	25	76%
Wrongful Death	8	3	11	73%
Corporate Law	7	3	10	70%
Intellectual Property	6	3	9	67%
Labor & Employment	36	21	57	63%
Commercial Law	10	6	16	63%
Civil Law (NEC)	10	6	16	63%
Insurance Law	8	5	13	62%
Patent, Trademark, Copyright	12	10	22	55%
Taxation	2	7	11	18%

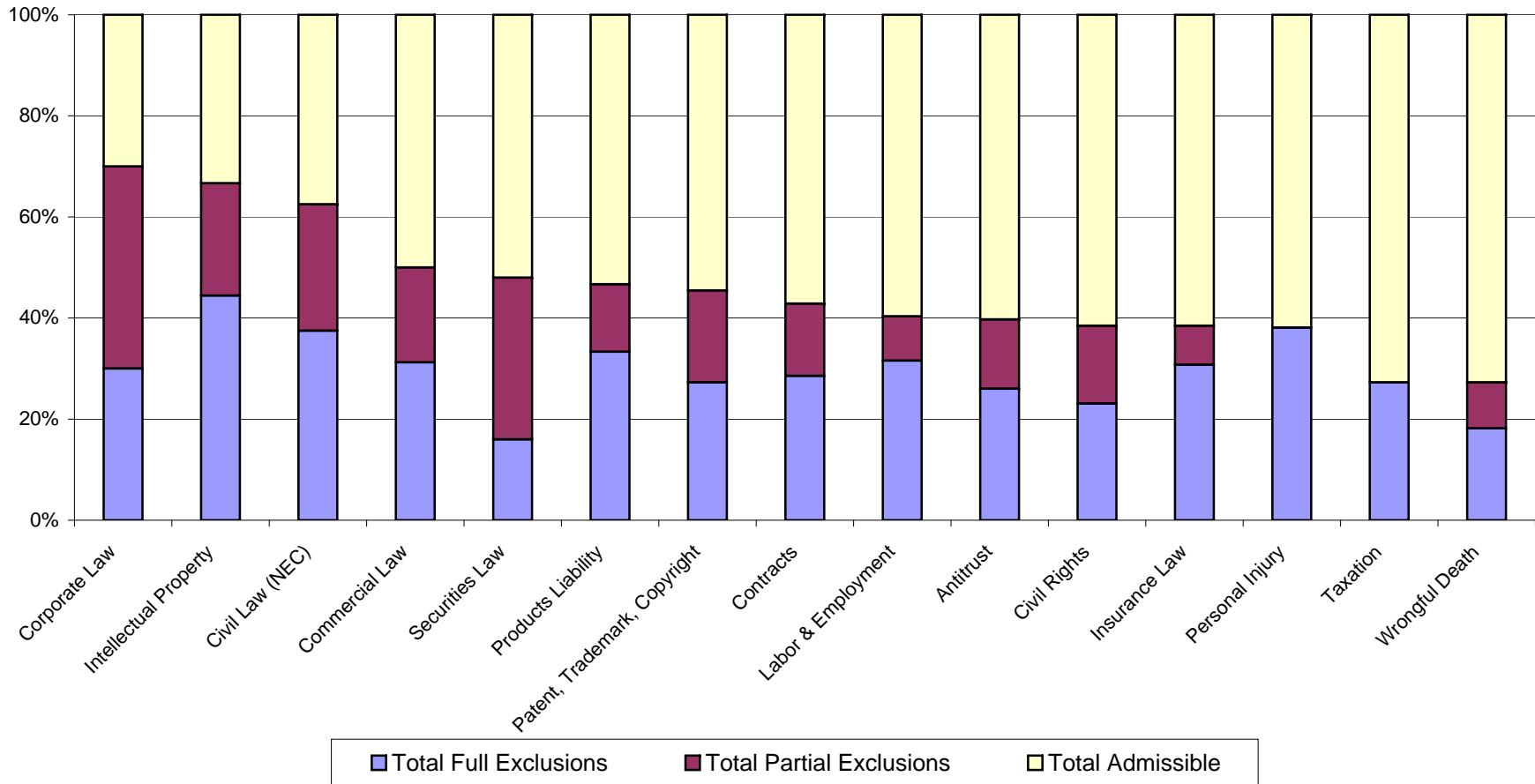
Notes

Analysis includes only those records from the data from 2000 and later (as determined by the date in the Lexis citation) because many records were missing information on the party that retained the expert prior to 2003; data have been obtained for the missing records only 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. Total Taxation challenges include two challenges of experts retained by the court.

Source: Daubert Tracker

Exhibit 6A

Exclusion and Admissible Rates, by Area of Law with 10 or More Challenges



Notes

See Exhibit 6B for notes on data analysis.

Source: *Daubert Tracker*

Exhibit 6B

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%
Intellectual Property	4	2	9	44%	67%
Civil Law (NEC)	6	4	16	38%	63%
Commercial Law	5	3	16	31%	50%
Securities Law	4	8	25	16%	48%
Products Liability	5	2	15	33%	47%
Patent, Trademark, Copyright	6	4	22	27%	45%
Contracts	16	8	56	29%	43%
Labor & Employment	18	5	57	32%	40%
Antitrust	19	10	73	26%	40%
Civil Rights	3	2	13	23%	38%
Insurance Law	4	1	13	31%	38%
Personal Injury	8	0	21	38%	38%
Taxation	3	0	11	27%	27%
Wrongful Death	2	1	11	18%	27%
			Mean	30%	45%
			Median	30%	43%

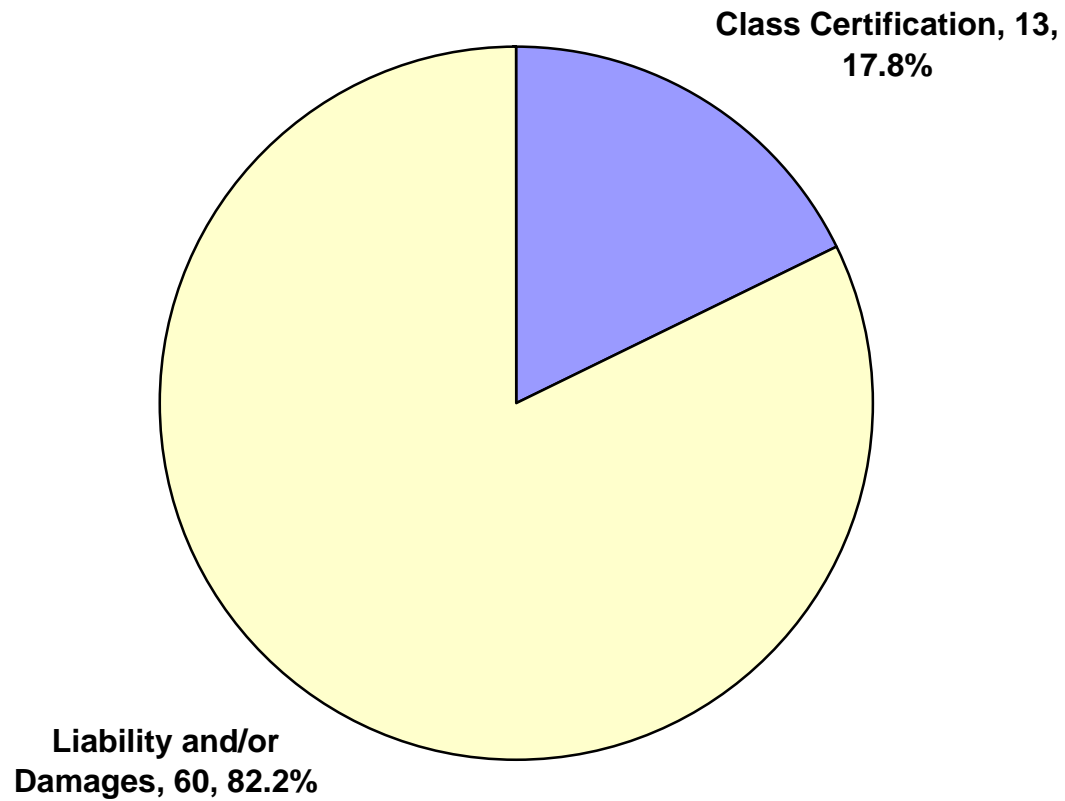
Notes

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Source: *Daubert Tracker*

Exhibit 7A

Antitrust *Daubert* Challenges by Testimony Type, 2000-2008



Notes

See Exhibit 7B for notes on data analysis.

Source: *Daubert Tracker*

Exhibit 7B

Summary of Exclusion Rates for Antitrust Experts

Testimony Type Within Area of Law	Plaintiff Full Exclusions	Plaintiff Partial Exclusions	Total Plaintiff Challenges	Defendant Full Exclusions	Defendant Partial Exclusions	Total Defendant Challenges	Total Challenges	Plaintiff Percent of Total Challenges	Plaintiff Full Exclusion Ratio	Plaintiff Full and Partial Exclusion Ratio	Defendant Full Exclusion Ratio	Defendant Full and Partial Exclusion Ratio
Class Certification	1	1	12	1	0	1	13	92%	8%	17%	100%	100%
Liability and/or Damages	16	7	49	1	2	11	60	82%	33%	47%	9%	27%
Antitrust	17	8	61	2	2	12	73	84%	28%	41%	17%	33%

Notes

Analysis includes only those records from the data from 2000 and later (as determined by the date in the Lexis citation) because many records were missing information on the party that retained the expert prior to 2003; data have been obtained for the missing records only 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*