DAMAGES AND THE USE OF EXPERTS IN A CONTRACTS CASE

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Accountants, economists, and other financial experts are becoming increasingly common in contract litigation.[1] Indeed, some courts have made clear that "expert testimony is highly desirable in cases involving business damages."[2] But as a whole, experts have always presented a conundrum: "At their best, experts are reliable sources of scientific or other specialized knowledge who can assist the jury and the search for the truth. At their worst, experts are 'hired guns' who bend their findings and opinions to suit their patrons or pitch unreliable 'junk science' to unexpecting juries."[3] The proliferation of financial experts in contract and other cases involving damages calculations and valuations raises the specter of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and its progeny, which were promulgated to ensure that juries hear expert testimony at its best and are shielded from it at its worst. However, "[courts] have generally struggled with the mechanics of applying the *Daubert* facts to nonscientific experts."[4] This is especially true in cases involving financial damages experts, who cannot be readily categorized as "scientific" experts and who often present testimony that is not easily understood by judges and jurors alike. Moreover, "[l]ooming over the concerns about expert witnesses is the heavy reliance, faith, and trust that jurors necessarily place in experts."[5]

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1 *See* John W. Hill, et al., *Increasing Complexity and Partisanship in Business Damages Expert Testimony: The Need for a Modified Trial Regime in Quantification of Damages*, 11. U. Pa. J. Bus. L. 297, 316-17 (2009) ("the demand for expert testimony is growing rapidly").

2 *Id.* at 317 (collecting cases). Hill notes that some courts have refused to accept fact witness testimony about damage estimates, the tax implications of certain business decisions, and business valuation, instead suggesting the need for expert testimony and in at least one instance remanding a case for appointment of a damages expert. *Id.*

3 Paul S. Milich, *Georgia Rules of Evidence*, 2017-18 ed., at 500.

4 *See* Sofia Androguè, et al., *Kicking the Tires after* Kumho*: The Bottom Line of Admitting Financial Expert Testimony*, 37 Hous. L. Rev. 431, 453 (2000) (collecting cases).

5 Milich, *supra* note 3, at 500-01.

A. The *Daubert* Standard in Georgia

Georgia has codified the standard set forth in *Daubert* at O.C.G.A. § 24–7–702, which governs the admissibility of expert testimony:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise, if:
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> (1) The testimony is based upon sufficient facts or data;
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> (2) The testimony is the product of reliable principles and methods; and
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> (3) The witness has applied the principles and methods reliably to the facts of the case which have been or will be admitted into evidence before the trier of fact.[6]

See also Cash v. LG Elec., Inc., No. A17A0878, 2017 WL 3929083, at *2 (Ga. App. Sept. 8, 2017). The statute specifically permits Georgia courts to rely on federal jurisprudence applying the "*Daubert* trilogy" to determine the admissibility of expert testimony:

> It is the intent of the legislature that, in all civil proceedings, the courts of the State of Georgia not be viewed as open to expert evidence that would not be admissible in other states. Therefore, in interpreting and applying this Code section, the courts of this state ***may*** draw from the opinions of the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho*

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[6] Georgia's statute is based on, but not identical to, Federal Rule of Evidence 702, which reads as follows:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
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> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
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> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
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> (d) the expert has reliably applied the principles and methods to the facts of the case.

> *Tire Co. Ltd. v. Carmichael*, 526 U.S. 137 (1999); and other cases in federal courts applying the standards announced by the United States Supreme Court in these cases.

Id. (emphasis added) (internal parallel citations omitted) (quoting OCGA § 24–7–702 (f)). The statute makes clear by using the word "may" that reliance on *Daubert* and its progeny as interpreted by other federal courts is permissible, but not mandatory. *Mason v. Home Depot U.S.A., Inc.*, 283 Ga. 271, 276-77 (2008).

Daubert requires that the trial court act as "gatekeeper to ensure the relevance and reliability of expert testimony." *Cash*, 2017 WL 3929083, at *2 (quoting *Scapa Dryer Fabrics, Inc. v. Knight*, 299 Ga. 286, 289 (2016)). In dispensing its gatekeeping function to admit expert testimony under O.C.G.A. § 24–7–702, the trial court must consider:

> (a) the qualifications of the expert;
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> (b) the reliability of the testimony; and
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> (c) the relevance of the testimony.

Scapa Dryer Fabrics, Inc., 299 Ga. at 289.[7] The Court has "considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *Southard v. State Farm Fire & Cas. Co.*, No. 4:11-CV-243, 2013 WL 209224, at *10 (S.D. Ga. Jan. 17, 2013) (quoting *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 152 (1999)). The trial court's decision will only be disturbed for abuse of discretion. *Cash*, 2017 WL 3929083, at *1 (quoting *Mason v. Home Depot U.S.A., Inc.*, 283 Ga. 271, 279 (2008)). The party seeking to rely on the expert bears the burden of proving the expert is sufficiently reliable. *Id.* at *2.

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[7] The court in *Cash* noted, however, that "[t]hese are three distinct factors, and courts should be careful not to conflate them." *Cash*, 2017 WL 3929083 at *2 (citing *Quiet Technology DC–8, Inc. v. Hurel-Dubois UK, Ltd.*, 326 F.3d 1333, 1341 (II) (A) (11th Cir. 2003)).

But "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system." *Southard*, 2013 WL 209224, at *10 (quoting *United States v. 14.38 Acres of Land Situated in Leflore Cnty., Miss.*, 80 F.3d 1074, 1078 (5th Cir.1996)). Rather, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Id.* (quoting *Daubert,* 509 U.S. at 595). Indeed, "[o]ur primary safeguard against the abuse of expert testimony is the adversary process."[8]

Although the hurdles for the admission of expert testimony may seem insurmountable, "the rejection of expert testimony is the exception rather than the rule." *Southard*, 2013 WL 209224, at *10) (quoting Fed. R. Evid. Advisory Committee Note, 2000 amend.). Nevertheless, challenges to expert testimony have increased. Litigants are filing *in limine* motions and demanding *Daubert* hearings almost as a matter of course.[9]

B. Daubert *Applies to Financial Experts*

The *Daubert* analysis applies to financial experts. *See, e.g., Club Car, Inc. v. Club Car (Quebec) Import, Inc.*, 362 F.3d 775 (11th Cir. 2004) (*Daubert* applies to expert testimony by accountants); *Maiz v. Virani*, 253 F.3d 641 (11th Cir. 2001) (*Daubert* applies to expert testimony by economists). Courts will consider and determine whether a financial expert is qualified to render an opinion as required by O.C.G.A. § 24–7–702, but that is not the primary focus of the inquiry. In the context of a financial expert, the focus is on "whether the techniques utilized by the experts are reliable in light of other factors ... identified in *Daubert* and in light of other factors

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[8] Milich, *supra* note 3, at 501.

[9] For example, in a 2002 Federal Judicial Center Study post-*Daubert*, *in limine* motions were successfully used to exclude 41% of experts in 1998, as opposed to only 25% in 1991. Hill, *supra* note 1, at 310 (citations omitted).

bearing on the reliability of the methodologies." *Webster v. Fulton County,* 85 F. Supp. 2d 1375, 1376 (N.D. Ga. 2000) (citations omitted) (noting that "[t]he proper inquiry regarding economic and statistical experts in this context is not whether other experts, faced with substantially similar facts, have repeatedly reached the same conclusions (because there will be few or no cases that have presented substantially similar facts).").

Courts and practitioners alike admittedly have "wrestled with the issue of exactly what background and experience is necessary for a damages professional to be considered an expert in the context of a particular case."[10] Generally, "Georgia courts are quite liberal in allowing a witness to testify as an expert when the witness's background, education, training, or other experience might assist the trier of fact."[11] Financial experts may have various credentials, including:

1) advanced degrees in business or economics;

2) professional licenses and certifications such as bar membership and certified public accountancy (CPA);

3) valuation designations such as ABV (accredited in business valuation by the American Institute of Certified Public Accountants), ASA (accredited senior appraiser by the American Society of Appraisers), and CVA (certified valuation analyst by the National Association of Certified Valuators and Analysts);

4) relevant real-world experience;

5) a knowledge of econometrics and statistics;

6) a knowledge of sampling techniques;

7) specialized course work in business valuation;

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10 Hill, *supra* note 1, at 311.

11 Milich, *supra* note 3, at 505.

8) experience in financial analysis, financial forecasting, and applications of business valuation methods; and

9) relevant publications in leading academic and practice journals.[12]

According the Federal Judicial Center's *Reference Manual on Scientific Evidence* ("*FJC Manual*"), most economists and other damages experts have Ph.D.'s, M.B.A.'s, or C.P.A. credentials.[13] And despite the variety of academic and other formal credentials that financial damages experts may hold, "[b]ecause damages estimation often makes use of accounting records, most damages experts need to be able to interpret materials prepared by professional accountants."[14]

Expert testimony can be helpful, if not necessary, in several contexts where a contract has been breached. Depending on their qualifications and the facts of the case, experts in contract cases can be: (1) experts in the industry or technical space at issue, or (2) experts who identify and/or calculate damages.[15] The most effective presentation at trial likely will involve a combination of both types of experts, one to educate the jury about the industry and another to assist and advise the jury on the amount of damages.

Damages experts may use a variety of techniques in a contract dispute, depending on the industry and the available data gleaned during discovery. For example, an expert can help to define expectation damages by identifying the amount of damages necessary to provide the plaintiff with the economic value she would have received had the defendant fully performed under the contract.

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12 Hill, *supra* note 1, at 321.

13 Mark A. Allen, et al., *Reference Guide on Estimation of Economic Damages*, at 431, *Reference Manual on Scientific Evidence*, 3d ed. (2011) (hereinafter "*FJC Manual*").

14 *Id.* at 431.

15 Hill, *supra* note 1, at 315-16. Experts also may be useful, or even necessary, to prove that a contract has been breached.

Or an expert can opine on valuation by evaluating streams of profit or income. The *FJC Manual* identifies two approaches to determining damages. The "market approach" relies on market prices or values to determine damages:

- Relying on comparables such as a similar business or property;
- Using balance sheet information such as assets and liabilities;
- Using known ratios from valuing comparables to measure losses; and
- Multiplying existing valuations by changes in market values from publicly available information.[16]

The "income approach" analyzes cash flows to calculate damages:

- Projecting revenues and costs with and without the alleged bad act;
- Adjusting profit streams to present value using measures of inflation and the real rate of interest; and
- Projecting profit streams to present value implicitly using capitalization rates.[17]

Note that, "[a]lthough these methods may seem different and may rely on different information …, each should generate similar numbers. If not, then there is usually an underlying difference in assumptions."[18] Which approach is used will depend largely on the type of information available in the case, either from a party's records or from the expert's own analysis of the data, and "[i]n some cases, an expert will use both types of approaches."[19]

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16 *FJC Manual*, *supra* note 13, at 443-44.

17 *Id.* at 444.

18 *Id.*

19 *Id.* at 443.

C. Daubert *Hearings: Challenging Financial Experts*

Daubert hearings have become more routine, with some appellate courts finding "that it is reversible error *not* to hold a *Daubert* hearing" in certain circumstances.[20] Although *Daubert* hearings are not mandatory, they are useful tools for judges and practitioners alike. *City of Tuscaloosa v. Harcros Chemicals,* 158 F.3d 548, 564 n.21 (11th Cir. 1998) ("While *Daubert* hearings are not required by law or by rules of procedure, they are almost always fruitful uses of the court's time and resources in complicated cases."); *see also Padillas v. Stork-Gamco, Inc.,* 186 F.3d 412, 417 (3d Cir. 1999) ("We have long stressed the importance of in limine hearings under Rule 104(a) in making the reliability determination required under Rule 702 and *Daubert*."). More importantly, a *Daubert* hearing is an opportunity to get a pretrial audience with the court that can be used to educate the court on substantive or hotly contested issues, develop and/or expose expert testimony in depth, and present credibility issues for pretrial determination. The judge is the trier of fact for a *Daubert* motion – use that to your client's advantage.

Aside from educating the court on various issues, *Daubert* hearings are the avenue by which parties can challenge their opponent's expert and test or debunk case theories and themes in advance of trial. Use a *Daubert* hearing to 1) explore and challenge the underlying data, assumptions, and other bases for the expert's opinion; 2) explore and test the reliability of the methodology used; 3) determine whether the expert failed to consider information that might affect the opinion or ignored contrary evidence; and 4) expose and foil any attempts to use the expert as an advocate or conduit for the lawyer's arguments.

Underlying data and assumptions: The reliability of an expert's opinion often rests on the strength of the underlying data and the assumptions needed to reach a desired opinion.

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[20] Demosthenes Lorandos, *Expert Evidence Post-*Daubert*: The Good, the Bad, and the Ugly*, 43 A.B.A. Litig. J. 18, 18 (Spring 2017) (collecting cases).

Consider an expert hired to calculate lost profits, an area in which courts, parties, and experts continue to struggle with the same critical issues, including whether an expert's opinion is based on the appropriate underlying data and whether key assumptions used to reach that opinion are supported in the record.[21]

Several types of financial statements can be used to determine lost profits, each with varying indicia of reliability:

> [W]hen CPAs attach their names to financial statements, they give one of three distinct levels of assurance that the statements are accurate.
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> CPA-compiled financial statements carry the lowest level of assurance. In a compilation engagement, the CPA essentially takes the client's raw numbers and compiles them into the customary forms for financial statements. The resulting statement carries a disclaimer that the CPAs involved "have not audited or reviewed the accompanying financial statements and, accordingly, do not express an opinion or any other form of assurance on them."
>
> CPA-reviewed financial statements give more assurance. To prepare them, the CPA firm performs a limited inquiry and limited analytical procedures designed to give some (although far from complete) assurance that the financial statements are accurate. The statement of the CPAs gives essentially negative assurance, stating that the CPAs are "not aware of any material modifications that should be made to the accompanying financial statements in order for them to be in conformity with generally accepted accounting principles." []
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> The gold standard, of course, is audited financial statements, in which the accountants thoroughly and systematically investigate the transactions underlying the numbers.

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[21] Robert M. Lloyd, *Proving Lost Profits after* Daubert*: Five Questions Every Court Should Ask Before Admitting Expert Testimony*, 41 U. Rich. L. Rev. 379, 380-81 (2007).

(internal citations omitted).[22] Experts who rely on and extrapolate from limited or otherwise unverifiable information, like compilation statements for which the CPA included a disclaimer, are far more susceptible to exclusion.

Similarly, data provided by a party also raises indicia of unreliability or may subject an expert to damaging cross examination or exclusion:

> Courts have been particularly concerned (and justly so) when the expert relies on projections and other soft data supplied by a party with a financial interest in the outcome of the litigation. A few courts have said that this is not a cause for excluding the testimony but is something that can be corrected on cross-examination. Other courts, however, have excluded the testimony where the expert failed to take reasonable steps to verify the data provided by the client.[23]

Opinions based on insufficient data will not survive a *Daubert* challenge, especially where other or more pertinent information was available to the expert and not used or where the proponent of the expert's opinion failed to maintain relevant documents.

The same is true of assumptions used by an expert to reach a desired opinion; they too may render the opinion unreliable and therefore excluded. For example, explore whether the expert assumed information about the business, the industry, personnel, competition, market penetration, the discount rate, technological advances, or other economic factors that might affect the expert's opinion. If the expert's assumptions are flawed, then her opinion is not "based on sufficient facts or data" and must be excluded.

Methodology: *Daubert* requires that an expert employ a reliable methodology actually used in the relevant field to reach her opinion, and that the methodology "fits" the case. Stated

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22 *Id.* at 392-93.

23 *Id.* at 397 (internal citations omitted).

differently, "[t]he expert must be faithful to the principles and methods she uses, applying them in the manner that has given those principles and methods consistent results over many applications."[24] Moreover, "[t]he expert's use of the principles and methods must be appropriate to the task at hand."[25] Judges are keenly aware, however, that the particular facts and circumstances of a case may require minor departures from the prescribed methodology; those departures go the weight of the opinion and not to its admissibility.[26]

"The objective of (*Daubert*) is to . . . make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999). Probe the expert on the details of how she reached her final opinion:

- How did you arrive at this particular opinion?
- Have you done this analysis before? How many times?
- Did you employ the exact same analysis here? If not, how did your analysis here differ from previous analyses?
- Did your analysis in this litigation depart from the analysis you use in non-litigation procedures?
- Are there any variables in the data? Are those variables consistent with what you have seen in other similar cases?
- What is the source of the methodology employed – study, article, peer-reviewed material, Generally Acceptable Accounting Principles (GAAP)?
- Is there an error rate?

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24 Milich, *supra* note 3, at 561.

25 *Id.*

26 *Id.*, n.59 (collecting cases).

Beware of the *ipse dixit* opinion – the "because I said so opinion." An expert cannot rely primarily on her experience as a basis for an opinion in the absence of a reliable methodology. "When a witness relies solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts." *United States v. Frazier,* 387 F.3d 1244, 1261 (11th 2004).

Alternative Causes: An expert's failure to rule out reasonable alternative causes of the alleged damages or failure to consider contrary evidence can be used as a basis for excluding the expert's testimony. *Shiver v. Georgia & Florida Railnet, Inc.*, 287 Ga. App. 828, (2007) (expert testimony is admissible only if it is both relevant and reliable; physician failed to rule out all other possible causes of employee's medical condition after considering his complete medical history); *Dukes v. Georgia,* 428 F. Supp. 2d 1298, 1317 (N.D. Ga. 2006) ("This failure to falsify possible factors shows [the expert's] lack of methodology."). Courts should consider "[w]hether the expert has adequately accounted for obvious alternative explanations" when determining the admissibility of her opinion. Fed. R. Evid. 702 (2000 Advisory Comm. Notes) (citations omitted). Failure to do so diminishes the reliability of the methodology and questions the accuracy of expert's ultimate conclusion.

Advocacy: Beware of experts masquerading as advocates. Advocacy is for lawyers. Teaching, simplification, and clarity are for experts. Scholars have recognized increasing partisanship by expert witnesses, noting that "[a]lthough attorneys expect expert witnesses to state that they are unbiased, there is a growing expectation that experts will represent their parties' interest."[27] Advocacy and partisanship are frequent fodder for cross examination and can be used

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[27] Hill, *supra* note 1, at 362.

to disqualify experts in conjunction with other factors. *See, e.g., Frazier,* 387 F.3d at 1262-63 ("Proffered expert testimony generally will not help the trier of fact when it offers nothing more than what lawyers for the parties can argue in closing arguments."); *In re Citric Acid Litig.,* 191 F.3d 1090, 1102 (9th Cir. 1999) ("The law is clear ... that an expert report cannot be used to prove the existence of facts set forth therein."); *Highland Capital Management, L.P. v. Schneider,* 379 F. Supp. 2d 461, 462 (S.D.N.Y. 2005) (excluding expert whose "proposed testimony consists of a summary of the evidence in the case from [plaintiff's] perspective").

D. *Preparing Your Expert for a* Daubert *Hearing*

To overcome a *Daubert* challenge, preparation of your own expert both for deposition and for any subsequent *Daubert* hearing is key. The court in *Samuel v. Ford*, 96 F. Supp. 2d 491, 504 (D. Md. 2000) offers a "*Daubert/Kumho* Worksheet"[28] that serves as a valuable tool to use when preparing to defend your own expert in a *Daubert* hearing:

> 1. Name of Expert Challenged.
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> 2. Brief summary of opinion(s) challenged (if more than one, designate separately), including reference to the source of the opinion (i.e., Rule 26(a)(2)(B) disclosure, deposition transcript references, interrogatory answers). Attach highlighted copy of source materials as exhibit.
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> 3. Briefly describe methodology/reasoning used by expert to reach each opinion which is challenged. Include reference to source of challenged methodology/reasoning, and attach a highlighted copy as an exhibit.
>
> 4. Briefly explain the basis for the challenge to the reasoning/methodology used by the expert (for example, methodology unreliable; methodology reliable, but not valid for application to this case; failure to use standardized or accepted methodology (for example, with a standardized test); etc.) Attach a highlighted copy of affidavit or other

[28] The court in *Samuels* asked the defendant to complete the worksheet before an upcoming *Daubert* hearing on the defendant's motion to exclude the plaintiff's expert "to facilitate review of th[e] motion." *Samuels*, 96 F. Supp. 2d at 492-93.

source material supporting challenge to methodology/reasoning as an exhibit.

5. Is the challenged methodology/reasoning subject to a known or potential error rate? If so, briefly describe it, and attach a highlighted copy of any relevant source material as an exhibit.

6. Summarize relevant peer review materials relating to methodology/reasoning challenged, and attach a highlighted copy of any relevant source material as an exhibit.

7. If the challenge to the opinion is based upon a contention that the methodology/reasoning has not been generally accepted within the relevant scientific or technical community, briefly explain the basis for this contention. Attach highlighted copy of any relevant supporting materials as an exhibit.

Being prepared with the relevant source materials will ensure that your expert is familiar with and prepared to meet the rigors of *Daubert* and that you, as the proponent of the expert testimony, are prepared to create a fulsome record by asking the appropriate questions of your expert on direct examination.

Experts "have become an increasingly common and necessary component" of civil litigation.[29] Financial experts can provide a solid foundation for damages in breach of contract cases, and are becoming the norm. The *Daubert* analysis is not used to critique or otherwise adjudge the expert's final opinion – that is the role of the jury. *Cash*, 2017 WL 3929083, at *2. Rather, courts apply *Daubert* to ensure the expert arrives at her opinion through a reliable methodology and that her opinion assists the trier of fact. *Id.* at *4. Practitioners can and should assist the court in dispensing its role as "gatekeeper" by offering financial expert testimony that passes muster under *Daubert* and by challenging financial expert testimony that is unreliable, unsupported, or otherwise falls short of the *Daubert* standard.

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[29] Milich, *supra* note 3, at 500.

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