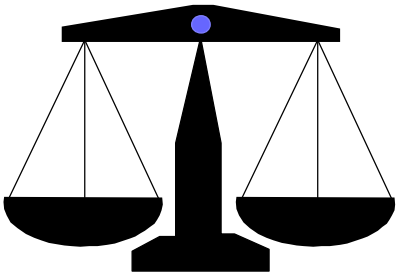

General Counsel Corner

By Peter H. Gunst, Esquire

Expert Testimony — Increasing Complexity In An Already Complex World

The trend in franchise litigation — including the petroleum industry — is towards larger and more complex cases. Reasons for this include the ballooning cost of litigation, which makes it increasingly difficult to bring discreet as opposed to broad-based challenges to franchisor activities, and the courts' increasing reliance on economic theory. The typical antitrust case, for example, will turn on such economics-based issues as the defendant's market power.

The role of economic experts, hired to analyze and explain esoteric economic theories and conclusions to the jury, has become more pivotal to the success of franchise litigation. Meanwhile, the courts have been struggling to develop standards to distinguish valid expert testimony from mere hyperbole and "junk science".

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the Supreme Court took the first step by developing standards for testing *scientific* expert testimony to ensure that it is both relevant and reliable. In *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1997), the Supreme Court expanded its analysis in *Daubert* to include *all* expert witness testimony, including that of economic expert witnesses.

Critical to the *Daubert* line of cases is the Supreme Court's designation of the trial judge as a "gatekeeper", responsible for conducting a preliminary assessment of proffered testimony in order to determine whether it is valid in its reasoning and methodology, and can properly be applied to the facts at issue.

In making its determination the trial court walks a tightrope. On the one hand, the court must be mindful that the Federal Rules of Evidence were intended to *liberalize* the introduction of expert evidence, so long as it helpful to the trier of fact. On the other hand, the court needs to recognize that expert witnesses may possess the power of a prophet to make unsupported judgments, which may overly influence the jury.

In response to the *Daubert* line of cases the federal rule dealing with expert testimony, Federal Rule of Evidence 702, was amended effective December 1, 2000 to provide that expert testimony is permissible "if (1) the testimony is based upon sufficient facts or data, (2) the testimony is a product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."

Most pertinent to this industry, *Daubert* and *Kumho* were applied to the proposed economic expert testimony in the "Discount for Cash" case, *Allapattah Services, Inc. v. Exxon Corp.*, 61 F.Supp. 2d 1335 (S.D. Fla. 1999), which resulted in a dealer-class verdict that may approach one billion dollars.

The significance of the expert witness issue in *Allapattah* is difficult to exaggerate. Exxon sought to prevent the dealers' economic expert from testifying about whether the nationwide class of

dealers had been damaged by Exxon's pricing program, or to the amount of damages that the class suffered. In considering Exxon's motion to preclude the expert from testifying, the trial court recognized that "striking the expert's testimony would effectively end the case" for the dealer class. *Id.* at 1342.

The importance of the issue is also reflected in the substantial effort devoted to it by the parties and the court. Both sides retained well-recognized economists, who traded barrages of learned papers and reports, some of which went on for fifty pages or more. Exxon alone paid its principal economic expert over one million dollars for his services. The court devoted over six days of pretrial hearings to the issue and wrote a nineteen-page opinion, which carefully analyzed the parties' contentions.

When the smoke had cleared, both parties were permitted to present their expert testimony to the jury. The court decided that both experts satisfied at least some of the criteria identified by the Supreme Court in *Daubert*: (1) whether the theory or technique at issue could be or has been tested; (2) whether it has been subjected to peer review and publication; (3) its known or potential rate of error; and (4) the degree to which the theory or technique is accepted as reliable by the relevant scientific community.

Of course, the significance of the *Daubert* issue to a particular case is dependent upon how far the parties' theories "push the envelope," and the complexity of any resultant economic or other expert issues. *Daubert*, for example, has little impact on traditional and well-recognized areas of expert testimony such as estimating future lost profits based upon before-and-after analysis, comparables and the like. Nevertheless, anyone pursuing franchise litigation should carefully consider the expert witness ramifications.

In a recent issue of *Private Antitrust Litigation News*, Diane Gullierman recommends a useful framework to litigators for analyzing expert witness needs and admissibility: "(1) determine whether the expert's testimony relates to scientific, technical, or other specialized knowledge; (2) determine whether the proffered testimony will assist the trier of fact; (3) determine whether the expert is qualified; (4) use the traditional *Daubert* factors as a starting point and decide whether the factors are appropriate; (5) then consider whether other factors, not mentioned in *Daubert*, are relevant; (6) if departing from *Daubert*, the reasons for utilizing an alternative test should be plainly articulated; (7) also consider whether the expert's opinion is (a) based upon facts consistent with the undisputed facts; (b) supported by reliable source data and supportable reasonable assumptions of the type normally relied upon by experts in the field, whether such testimony is based upon professional studies or personal experience; (c) based upon an approach that employs the same level of 'intellectual rigor' that characterizes the practice of the expert in the relevant field…; and (d) if the case involves technical or other specialized knowledge, … ask whether the particular expert has sufficient specialized knowledge in the subject at issue or whether he is, at a minimum, relying upon specific literature directly addressing the particular subject at issue."

If all this seems dry and technical, it is. But that is the direction that franchise litigation is heading, and to ignore it is to invite disaster.

pgunst@aggt.com