

THE BATTLE OF ACCOUNTING EXPERT WITNESSES:

JUDGES CAN BE HARSH

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Thick skin can be an asset for expert witnesses dealing with the harshness of some judges. Judges can make negative comments about an expert in the courtroom, which can hurt an expert's reputation. For example, a judge in Florida's Fourth District Court of Appeal said the following about an expert when a defense attorney asked **why he excluded the expert**:

"Dr. _____ is an insidious perjurer who wouldn't know the truth if it leapt up and bit him on the ***."

The expert had been a doctor since 1963 and had testified for 25 years. On appeal, the appellate court upheld the judge's ruling that the expert's claim lacked merit.

Not being truthful while testifying can be especially harmful. For example, prosecutors said that ink expert Larry F. Stewart committed perjury on the stand during the obstruction-of-justice trial of Martha Stewart. Mr. Stewart, laboratory director for the U.S. Secret Service, was charged with two counts of perjury, facing 5 years in prison if convicted. Prosecutors said that Mr. Stewart lied when he said he participated in the testing of ink on a worksheet supposedly showing a pre-existing agreement with Martha Stewart to sell her shares of Imclone stock. He had said, "I performed a test to determine ...," when in effect, he did not participate in analyzing the critical documents.

Larry Stewart was acquitted on October 5, 2004. One juror said, "He put his foot in his mouth, and he couldn't take it out because of his ego. He did *not* walk into the courtroom intending to lie" (Bary, 2004).

After a discussion of side-taking, this article will cover two business trials where the judges were extremely critical of the experts.



Side-Taking or Result-Oriented Work

Experts must be unbiased advocates for the truth. Expert testimony is not useful when the expert is merely an advocate for the position argued by one of the parties (*Estate of Jameson v. Commissioner*, 1999). A trial judge may dismiss an expert witness who is influenced by side-taking. Hints at a lawyer's line of arguments can influence an accounting expert's opinion about an auditor's compliance with GAAS (Ricchiute, 2004).

Even the most famous of experts can be tarred by a judge. In *Estate of Bessie I. Mueller* (1992), the issue was the valuation of stock of Mueller Company. The IRS produced as its expert on the valuation questions Dr. Shannon Pratt, managing director of Willamette Management Associates and the acknowledged dean of business appraisers. U.S. Tax Court Judge Renato Beghe nevertheless concluded that "Willamette's report was result-oriented and this was reflected in Dr. Pratt's testimony." The Judge noted that appraisers "have third-party responsibilities—just as certified public accountants do—to those who rely on their opinions, and their determinations must be independent and objective. ...

"Dr. Pratt strayed from the standard of objectivity and cast aside his scholar's mantle and became 'a shill' for respondent." In *Mueller*, as a result, Judge Beghe rejected most of both the Willamette report and Dr. Pratt's testimony, but did take into account Dr. Pratt's criticism of the taxpayer's expert's reports and testimony (Raby & Raby, 2003).

The SEC Tries for Fraud

In a bench trial in April 2005, the Securities Exchange Commission (SEC) alleged fraud in violation of §10b and records violations under §13b of the Securities Exchange Act of 1934. The SEC alleged that David C. Guenther (CFO) and Jay Samuelson (Asst. Corporate Controller) committed fraud by causing InaCom Corporation [InaCom] to overstate its 1999 third-quarter earnings in public filings, fraudulently recorded the overstated earnings in its books and records, and lied to auditors to conceal the fraudulent activities.

The SEC's claim of securities fraud violation involved three allegedly improper or erroneous accounting practices that affected InaCom's third-quarter 1999 financial statements and filings: (1) InaCom's reduction of certain reserves; (2) InaCom's adjustment

of certain inventory and accounts payable discrepancies and the posting of those adjustments to third-quarter 1999 financial statements; and (3) InaCom's recognition of "bid price arbitrage" (BPA) receivables in third-quarter 1999. The SEC contended that these accounting practices violated generally accepted accounting principles (GAAP).

Some Basic Facts from this Court Decision

InaCom, a Delaware Corporation headquartered in Omaha, Nebraska, was a provider of information technology products and services. InaCom purchased computer equipment from major manufacturers for resale to end-users. InaCom merged with Vanstar Corporation, another provider of information technology products and services, in February 1999. During the late 1990s, traditional computer manufacturers who had distributed their products through resellers such as InaCom experienced significant price competition from direct sale manufacturers. As a result, the traditional manufacturers established "special bid" rebate programs to effectively compete with the direct sellers for the business of large customers. These traditional manufacturers also established various price protection programs whereby a computer manufacturer would rebate the difference in price for each computer that a reseller held in inventory if it decreased the wholesale price of a computer within a certain time after a computer reseller's purchases. [On June 16, 2000, InaCom filed for Chapter 11 protection, and neither David Guenther nor Jay Samuelson personally profited from the alleged misstatements.]

With respect to the events leading to the third-quarter filing, CFO David Guenther testified that Jay Samuelson and Paul Draheim reported to him. Draheim was responsible for the inventory and had calculated an inventory adjustment in the amount of \$15.6 million for the third quarter of 1999. David Guenther also testified that the company maintained operating reserves set by its operating divisions, inventory reserves in each division, and corporate reserves, including those that were set up in connection with the acquisition of Vanstar Corporation. Guenther said he reviewed total inventory reserves at the end of each quarter, and his understanding of GAAP in connection with reserves was that it was necessary to have a basis or reason for setting the reserves and for reversing them.

David Guenther's original recommendation to the board of directors (BODs) in the third quarter of 1999, was that InaCom's third-quarter earnings should be 25 cents a share. Guenther and Jay Samuelson had met with then CEO Bill Fairfield on October 15, 1999, to discuss the financial statements in preparation for the upcoming BODs meeting. Fairfield agreed with David Guenther's financial analysis, and InaCom's Audit Committee also agreed with his recommendation. The 25-cents-per-share figure was based on a reduction of reserves in the amount of \$14 million. Guenther continued to believe that the 25-cents-per-share figure was appropriate under GAAP.

David Guenther testified that Bill Fairfield, the Audit Committee, the Board of Directors, and InaCom's external auditors, KPMG, were all informed of the proposed reduction of reserves. The evidence showed that the reserves were discussed at the Audit Committee meeting and that representatives of KPMG were present at the meeting. Guenther testified that he believed InaCom had adequate reserves even with a reduction in reserves in the amount of \$14 million. He testified that InaCom had in excess of \$116 million in reserves in the third quarter of 1999. These reserves included NYNEX tax reserves and lease closing reserves. David Guenther testified that the likelihood of needing those reserves had lessened over time.

Posting of BPA as Receivables

Regarding the posting of bid price arbitrage (BPA) amounts as receivables, David Guenther, CFO, testified that bid price arbitrages were agreements that salesmen and others at the district level made with vendors to rebate a portion of the price that InaCom had paid for their product if the price went down before InaCom sold to the ultimate consumer. These special bid contracts were generally oral agreements, which were common in the computer industry. The vendors' incentive to agree to the rebates was InaCom's continued business as a reseller of the vendors' product. David Guenther testified that he believed the BPA amounts were collectible.

InaCom employees John Dugan and Mike Steffan testified as lay witnesses for the defendants. They testified that they expected to collect the bid price arbitrage amounts. Dugan had been assured that the vendors were working to streamline procedures to

validate the amounts, and Mike Steffan received assurances from other executives that the rebates would be paid. Also, the evidence established that InaCom had in fact collected some BPA receivables.

Defendant Jay Samuelson also testified and essentially corroborated David Guenther's version of the events. He added that he had no knowledge regarding the adjustment of inventory beyond the documents that were provided to him by Paul Draheim. There were no allegations that defendant Jay Samuelson was involved in posting the BPA as receivables in the financial statements.

SEC's Star Witness

Paul Anderson, a CPA who was employed by KPMG, and InaCom's external auditor at the time of the incidents at issue, also testified. He testified that InaCom was a KPMG audit client, and that he worked on the InaCom account in various capacities beginning as an assistant accountant in 1990, and ultimately as the supervising senior manager in 1999 and 2000. He performed quarterly and annual audits at InaCom.

Paul Anderson testified that InaCom acquired Vanstar in what he characterized as a "pooling of interests" or "merger of equals" in February of 1999. As a result of the merger, Vanstar's and InaCom's financial statements were combined, and InaCom's revenues doubled. Anderson testified that he was aware of the competitive pressures that occurred within the computer industry in the late 1990s.

Mr. Anderson testified that KPMG performed a quarterly review of InaCom's third-quarter financial statements in 1999, stating that quarterly audits were less detailed than annual audits. As senior manager, he reviewed the work of supervising senior accountant Denise McGill. The KPMG auditors completed its review of InaCom's third-quarter 1999 filings before they were filed. KPMG signed off and approved the filings.

Paul Anderson further testified that he was involved with InaCom's 1999 year-end audit. Thomas Fitzpatrick had become CFO in late November or early December of 1999. Fitzpatrick spoke to Mr. Anderson and to Anderson's supervisor, Pat Jung, about possible restatements or earnings that Fitzpatrick thought should be taken on InaCom's fourth-quarter financial reports. Anderson said that he investigated the issues and made some preliminary findings. His preliminary conclusion was that InaCom's reserve reduction, BPA posting, and adjustment for inventory in InaCom's third-quarter financial statements

did not comply with GAAP. Anderson's initial conclusion was that InaCom should decrease earnings of the third-quarter 1999 by \$25 million. Paul Anderson further testified that his audit was never completed and that his findings remained preliminary.

Paul Anderson also said that the field work for the audit was not performed under normal conditions because the hardware division of InaCom had been sold to Compaq in February of 2000, and many former InaCom employees were no longer working there or were employed by Custom Edge, a company owned by Compaq. In addition, Mr. Anderson was aware that a class-action shareholder suit had been filed against InaCom, and Anderson's working papers could be subpoenaed. Paul Anderson testified that Mr. Guenther had stated that the reserves had been reduced because they were not necessary, but Anderson's superiors did not consider that explanation satisfactory.

Other Important Details

In order to succeed on their claim, the SEC must prove: (1) misrepresentations or omissions of material facts or acts that operated as a fraud or deceit in violation of the rule; (2) causation, often analyzed in terms of materiality and reliance; and (3) scienter on the part of the defendants (*In re K-tel Int'l, Inc.*, 2002). Mere negligence does not violate Rule 10b (*Ernst & Ernst v. Hochfelder*, 1976).

Severe recklessness, however, which is "limited to those highly unreasonable omissions or misrepresentations that involve not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and that present a danger of misleading buyers or sellers which is either known to the defendant or is so obvious that the defendant must have been aware of may [amount to securities fraud]" (*Ernst & Ernst v. Hochfelder*, 1976). "Reckless conduct is conduct that consists of a highly unreasonable act, or omission, that is an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." Such a level of recklessness requires that defendants make statements that they know are materially inaccurate, or that they have access to information that suggests the statements are materially inaccurate (*Ferris, Baker Watts, Inc. v. Ernst & Young*, 2005).

Thus, to result in a Section 10(b) liability for fraud, the mere second-guessing of calcu-

lations will not suffice; the SEC must show that defendants' judgment—at the moment exercised—was sufficiently egregious that a reasonable accountant reviewing the facts and figures should have concluded that the company's financial statements were misstated and that, as a result, the public was likely to be misled (*In re IKON Office Solutions, Inc.*, 2002).

Financial statements to the SEC must be made in accordance with GAAP (*Kinder v. Acceptance Ins. Cos.*, 2005), and financial results reported in violation of GAAP are presumptively misleading or inaccurate (*California Pub. Employee's Ret. Sys. v. Chubb Corp.*, 2004). Violations of GAAP standards also can provide evidence of scienter (*Greebel v. FTP Software, Inc.*, 1999). Scienter is defined as when the fraudster knew that his or her actions were intended to deceive.

Statements of Financial Accounting Standards (SFASs) and the anti-fraud rules promulgated under §10 (b) of the 1934 Act serve similar purposes, and courts have often treated violations of the former as indication that the latter were also violated (*Malone v. Microdyne Corp.*, 1994). Nevertheless, the prohibitions contained in GAAP and in Section 10(b) are not perfectly coextensive (*Malone v. Microdyne Corp.*). In some situations, courts have found defendants liable for securities fraud under §10b despite having complied with GAAP, while in other situations, courts have discharged defendants from §10b liability notwithstanding deliberate violations of GAAP (*Malone v. Microdyne Corp.*). "Even when a company's disclosure is in violation of GAAP, 'some techniques...might prove to be entirely legitimate, depending on the specific facts'" (*Barron v. Smith*, 2004).

"GAAP is a term of art that encompasses a wide range of acceptable procedures" (*In re IKON Office Solutions, Inc.*, 2002). GAAPs "are far from being a canonical set of rules that will ensure identical accounting treatment of identical transactions ... [GAAPs], rather, tolerate a range of 'reasonable' treatments, leaving the choice among alternatives to management" (*Decker v. GlenFed, Inc.*, 1994). Because accounting concepts are flexible, circumstances will give rise to fraud only where differences in calculations are the result of a falsehood, "not merely the difference between two permissible judgments" (*Godchaux v. Conveying Techniques, Inc.*, 1988). A reasonable accountant may choose to apply any of a variety of acceptable procedures when preparing a financial statement. "There are 19 different GAAP sources, any number of

which might present conflicting treatments of a particular accounting question ... when such conflicts arise, the accountant is directed to consult an elaborate hierarchy of GAAP sources to determine which treatment to follow" (*Shalala v. Guernsey Mem'l Hosp.*, 1995). The sources for GAAP include official publications consisting of APB opinions, FASB Statements, and Accounting Research Bulletins (ARB) (*In re K-tel Int'l, Inc.*, 2002).

The Defense Won in *SEC v. Guenther*

Establishing that an accounting practice or method is inconsistent with GAAP requires expert testimony (*In re Burlington Coat Factory*, 1997). The Supreme Court in *Daubert* identified four flexible, nonexclusive variables for determining whether an expert's opinion is sufficiently reliable: (1) whether the theory has been, or can be, tested; (2) whether the theory has been subjected to peer review and publication; (3) when a particular technique is used, whether there is a known or potential rate of error; and (4) the extent of acceptance of the theory in the relevant scientific community (*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 1993). Further, in *Kumho Tire (Kumho Tire Co., Ltd. v. Camichael*, 1999), the Supreme Court held that a trial court is to use its discretion to determine what the reasonable criteria of reliability are and whether the proposed testimony meets those criteria based on the circumstances of that dispute. Finally, as observed by the Supreme Court in 1998, in assessing reliability the court must determine whether the expert testimony has "a traceable, analytical basis in objective fact" (*Bragdon v. Abbott*, 1998). But even *Daubert* stated that "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence" (pp. 595–596).

At the close of the SEC's arguments, defendants moved for judgment as a matter of law, contending that the SEC had failed to prove its case. The judge reserved ruling on the motion, and the defendants proceeded to put on their evidence.

During the prosecution stage, Dr. John Bazley was identified as an expert by the SEC. He is a professor of financial accounting at the University of Denver. He testified that corporations, banks, and auditors follow rules and procedures known as "generally accepted accounting principles" (GAAP) in filing financial statements and reports with the Securities Exchange Commission. These rules are promulgated by the Financial Accounting Standards Board (FASB). He stated that the establishment of a reserve and the release of a reserve are governed by GAAP. He explained that a company creates a reserve when there is an economic event that indicates that the asset value needs to be lowered or a



liability needs to be recognized. Correspondingly, he testified that it is appropriate under GAAP to release a reserve when there is evidence that the estimate that led to the reserve is no longer appropriate. Recording of a reserve is covered under FASB Statement No. 5, "Accounting for Contingencies." Proper recording of a reserve requires that the contingent event must be both probable and reasonably measurable.

Dr. Bazley also testified that under GAAP, a receivable must be booked at the time the revenue is realized, or once the company has either received the cash or has the right to receive the cash from the customer. The valuation of a receivable is the amount the company expects to collect. In order to determine such an amount, a company can rely on the concept of aging of receivables, under which the longer the receivable has been outstanding, the less likely it is to be collected in full. In addition, Dr. Bazley testified that if an accounting error is made, and the accounting in a prior period is later determined to be incorrect, the financial statement for the prior period should be adjusted or corrected. Dr. Bazley did *not* state an opinion on whether InaCom's third-quarter financial statements complied with GAAP.

▲ NEW YORK, NY – Martha Stewart leaves federal court in New York City on March 5, 2004. Stewart was found guilty of one count of conspiracy, two counts of making false statements and one count of obstruction of agency proceedings. The case also proved costly to an expert witness who was accused but acquitted of committing perjury. PHOTOGRAPH BY MAYITA MENDEZ/NEWSDAY (MCT)

The judge said the following about the motion in limine to deny Dr. Bazley: To the extent that a party challenged the probative value of the evidence, such an attack is upon the probative sufficiency of evidence related not to admissibility but to the weight of the evidence and is a matter for the trier of fact to resolve. Also, some evidence "cannot be evaluated accurately or sufficiently by the trial judge" in the procedural environment of a ruling on a motion in limine (*United States v. Beasley*, 1996). Accordingly, the judge admitted the testimony of Dr. Bazley and accorded it appropriate weight.

Defendants presented the expert testimony of Harris Devor. Although the trial transcript says that Mr. Devor is a professor of accounting at Temple University, he is merely a graduate from Temple University. He is a CPA in the Philadelphia Shechtman Marks Devon firm. He has been trained as an auditor and has 32 years of experience in applying GAAP and GAAS standards. He testified that he reviewed documents, exhibits, and deposition testimony in connection with the transactions at issue in this action. He testified that, based on a reasonable degree of accounting and auditing certainty, in his opinion no one following professional standards could conclude that the alleged accounting improprieties at issue in this action violated GAAP. According to the trial transcript, Dr. Harris [sic] explained that there are two ways to establish that a reduction in reserves is inappropriate: (1) establishing that the reserve should not have been established in the first place, or (2) showing that the reserves remaining after the reduction are inadequate to cover certain future liabilities or to reflect impairment of certain assets.

Mr. Devor further testified, based upon the record evidence in this dispute, that he saw no evidence that InaCom's reserves were inadequate. He also testified that it is appropriate to record an asset if it is reasonably expected to produce an economic benefit at the time it is posted. He thus concluded that it had been proper for InaCom to record the bid price arbitrage (BPA) amounts as receivables if InaCom reasonably expected to collect those receivables at the time they were recorded. He further concluded, based on the record evidence, that InaCom had a reasonable belief that the BPA amounts were collectible, and thus it was proper to record them.

Professor Kenneth Lehn, professor of Finance at the University of Pittsburgh, also testified on behalf of the defendants. He stated that the alleged misrepresentations or misstatements,

either singly or in combination, by InaCom would not have been material to the average investor. He testified that investors are generally forward-looking and that the extremely negative fourth-quarter prospects reported in the press release would have negated the impact of any 15-cent-per-share earnings.

Defendants renewed their motion for judgment as a matter of law at the close of the evidence phase, and the judge found that the defendants' motions for judgment as a matter of law should be sustained. The judge said that there had been a complete and utter failure of proof by the SEC. The SEC failed to prove any of the elements of its securities fraud claims. Most notably, the SEC had not shown that David Guenther or Jay Samuelson made any misstatements or misrepresentations in InaCom's third-quarter 1999 filings. The SEC's claim was based on its contention that defendants had misstated or "managed" earnings in the third-quarter 1999 report. The alleged misstatements of earnings were premised on three allegedly improper, false, or erroneous accounting procedures.

The SEC presented no evidence that InaCom's accounting procedures did not comply with GAAP. The SEC's only designated expert witness, Dr. Bazley, testified generally about GAAP and about basic principles of accounting, but he offered no opinion on whether the defendants' conduct in connection with the third-quarter 1999 financial reports complied with GAAP. Whether the defendants' actions as professional and certified public accountants in preparing InaCom's third-quarter 1999 financial reports complied with GAAP is a question that requires technical and specialized knowledge. The standards of conduct of a professional under these circumstances are not within the court's general knowledge and experience. The need for expert testimony in this dispute is analogous to the need for expert testimony on the standard of care in a professional malpractice dispute. With respect to the reduction of reserves, Dr. John Bazley testified only that the creation or reduction of a reserve must be based on a reason. Jay Guenther testified that he had a reason for the creation and the reduction of the reserves and that InaCom was adequately reserved. The SEC made no showing that Guenther's reason for releasing the reserve was in any way inadequate or suspect.

Moreover, according to the judge, Paul Anderson (the KPMG auditor) testified only as a fact witness and not as an expert. Even if he were qualified, and had been disclosed, as an expert, his preliminary conclusions

that the three accounting procedures at issue did not comply with GAAP do not amount to proof of those conclusions because they were admittedly preliminary and tentatively. Moreover, any testimony by KPMG employees is suspect and cannot be afforded much weight in view of the fact that KPMG had considerable exposure to liability for the fraud, if it were shown to have occurred. The evidence showed that KPMG was aware of, and approved, the accounting procedures that it later professed, in hindsight, to have been erroneous and improper.

The Daubert Tracker

The Daubert Tracker (www.dauberttracker.com) is an online repository of Daubert documents including more than 14,000 court decisions from 1993. A lawyer can check the gatekeeping history of any expert before retention or deposition. In mid-July of 2006, there were 570 accounting decisions involving Daubert actions. Of the 570 accounting disputes, 314 experts were admitted (55%), 203 were denied (36%), and 53 were admitted/denied in part (9.3%). A check of John Bazley found no other Daubert action. Likewise, no Daubert history was found on June 29, 2006, for Kenneth Lehn and Paul Anderson.

Negative Daubert history, however, was found for Harris Devor. In 1996, Mr. Devor did not survive a motion in limine in *L & M Beverage Co. v. Guinness Import Co.* (*Jonasson v. Lutheran Child and Family Servs.*, 1997), where he calculated the annual net profit of L & M that could have been expected to earn on the brands of beer it sold to C & M, and then multiplied this figure by a term of years ranging from 15 to 35 years. The District Court determined that the proper measure of compensatory damages here was "diminution in value." "Thus, without addressing Guinness' many criticisms of Mr. Devor's qualifications and accounting methodology, the court "granted the motion to deny Devor's testimony."

In a 2004 District Court dispute (*U.S. Dist.*, 1996), Mr. Devor was retained to give his expert opinion on whether AIC's financial statements were prepared in accordance with Financial Accounting Standard No. 5. Judge Laurie Smith Camp said that Devor did not explain how he reached his ultimate opinions, nor did he describe the analytical processes he went through to reach his opinion. The judge did not believe that Mr. Devor's testimony had been subjected to peer review.

On appeal, the Eighth Circuit upheld the inadmissibility of Mr. Devor's affidavit

because it was not supported by any methodology and was not particularly helpful to the court (*In re Acceptance Ins. Cos.*, 2004). Harris Devor took the shareholders' statements as true and did not review the record to see if the statements were supported. The appellate court felt that his opinions were, more or less, legal conclusions about the facts of the dispute as presented to the experts by the shareholders. When an expert's opinions are little more than legal conclusions, a district court should not be held to have abused its discretion by excluding such statements (*Kinder v. Acceptance Ins. Cos.*, 2005).

There is another searchable database of *Daubert* decisions called "Daubert on the Web," found at www.daubertontheweb.com. This online free tracking service is, of course, not as extensive as the Daubert Tracker. On January 9, 2007, 87 cases were under the field "Accountants and Economists" with an admissibility rate of .595. Most of the decisions involved economists.

There are a total of 25 fields on this online database with various "admissibility rates," such as

Appraisers	0.800
Computer experts	0.667
Criminologists	0.847
Marketing experts	0.333
Polygraphers	0.121
Statisticians	0.647

In Louisiana, there have been at least 33 *Daubert* challenges with a 60% admission rate.

Another Rejection

In another dispute involving accounts receivable and a professor, a bankruptcy judge rejected the professor. The judge said that Dr. James A. Knoblett, CPA, had no education or experience in insolvency or bankruptcy accounting. His report is even more conclusory and contains even less explanation than Ms. Faulkner's report [another expert], and his deposition testimony is even more damning (*United States v. Ingle*, 1998). For example, Dr. Knoblett testified that he was not aware of any difference in the treatment of contingent liabilities under the Bankruptcy Code vis-a-vis under generally accepted accounting principles. He also accepted WBI's valuation of an account receivable owed by a related party, without investigating to determine the collectibility of the receivable (or even determining the identity of the related party to evaluate whether the receivable should be included in a consolidated balance sheet at all).

In addition, Dr. Knoblett did not investigate Mr. Wilkinson's solvency, but he based his

conclusions regarding the values of the receivable owed by Mr. Wilkinson and of the liability represented by WBI's guaranty of indebtedness owed by Mr. Wilkinson solely on information indicating that he had historically paid his debts. Dr. Knoblett also acknowledged having no information regarding the source of the funds used to pay debts to WBI, so he could not confirm that the debts were paid rather than refinanced. Also, in deciding that there was a zero probability that WBI would be called upon to honor its guaranties of Mr. Wilkinson's debts, Dr. Knoblett gave no consideration to whether the debts were in fact called around the times of the transfers.

Thus, the court likewise concluded that the defendant had not provided sufficient evidence of the reliability of Dr. Knoblett's testimony to pass the *Daubert/Kumho* "gatekeeper" test. Accordingly, Dr. Knoblett's report was excluded and did not, therefore, rebut the presumption of insolvency in this dispute.

Conclusion

An expert witness must be truthful in the courtroom as well as careful when preparing his or her report. If an expert does not survive a *Daubert* or *Frye* challenge, the other side can use the *Daubert Tracker* to learn about the expert's history easily. Any negative comments about an expert can be harmful to the career of an expert witness. For example, in a 2002 Tenth Circuit decision, the court said that the expert used unreliable data, did not understand computers or the computer market, changed his opinion from an earlier expert report, and that his testimony was non-technical (*Lantec, Inc. v. Novell, Inc.*, 2002).

On January 6, 2005, Andrea Yates' capital murder conviction for drowning her children was overturned by an appeals court because of Dr. Park Dietz's erroneous testimony about a nonexistent TV episode on *Law & Order*. His photo was shown on Fox News, and the talking heads called him a "hired gun." One talking head said that "he's dead."

References

Barron v. Smith, 380 F.3d 49, 55-56 (1st Cir. 2004).
 Bary, C. (2004, September 24). Stewart ink-test trial starts. *Wall Street Journal*, C-4.
 Bragdon v. Abbott, 524 U.S. 624, 653, 141 L. Ed. 2d 540, 118 S. Ct. 2196 (1998).
 California Pub. Employee's Ret. Sys. v. Chubb Corp., 394 F.3d 127, 153 (3d Cir. 2004).
 Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786 (1993).
 Decker v. GlenFed, Inc. (In re GlenFed, Inc. Sec. Litig.), 42 F.3d 1541, 1549 (9th Cir. 1994).
 Ernst & Ernst v. Hochfelder, 425 U.S. 185, 214, 96 S. Ct. 1375, 47 L. Ed. 2d 668 (1976).
 Estate of Bessie I. Mueller v. Commissioner, T.C. Memo. 1992-284.
 Estate of Jameson v. Commissioner, T.C. Memo. 1999-43.
 Ferris, Baker Watts, Inc. v. Ernst & Young, LLP, 395 F.3d 851, 854 (8th Cir. 2005).
 Godchaux v. Conveying Techniques, Inc., 846 F.2d 306, 315 (5th Cir. 1988).
 Greebel v. FTP Software, Inc., 194 F.3d 185, 203 (1st Cir. 1999).
 In re Acceptance Ins. Cos., Sec Litig., 2004 U.S. Dist. LEXIS 26609.
 In re Burlington Coat Factory Securities Litigation, 114 F.3d 1410, 1421 (3d Cir. 1997).
 In re IKON Office Solutions, Inc., 277 F.3d 658, 673 (3d Cir. 2002).
 In re K-tel Int'l, Inc. Sec. Litig., 300 F.3d 881, 888 (8th Cir. 2002).
 Jonasson v. Lutheran Child and Family Servs., 115 F.3d 436, 439 (8th Cir. 1997).
 Kinder v. Acceptance Ins. Cos., 423 F.3d 899 (CA-8, 2005).
 Kumho Tire Co., Ltd. v. Camichael, 526 U.S. 158, 119 S.Ct. 1167 (1999).
 Lantec, Inc. v. Novell, Inc., 306 F.3d 1003 (10th Cir., 2002).
 Malone v. Microdyne Corp., 26 F.3d 471, 478 (4th Cir. 1994).
 Raby, B.J.W., & Raby, W.L. (2003). Reasonable compensation, expert witnesses, and the tax practitioner. *Tax Notes*, 100(11), 1415.
 Ricchiute, D.N. (2004). Effects of an attorney's line of argument on accountants' expert witness testimony. *Accounting Review*, 79(1), 221-245.
 Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 101, 115 S. Ct. 1232, 131 L. Ed. 2s 106 (1995).
 U.S. v. Beasley, 102 F.3d 1440, 1451 (8th Cir. 1996).
 U.S. Dist., 1996, LEXIS 9025.
 U.S. v. Ingle, 157 F.3d 1152 (CA-8, 1998). ■

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