

Daubert and Other Gatekeeping Challenges of Antitrust Experts: Appendix*

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IN OUR ARTICLE PUBLISHED IN THE Summer 2011 issue of ANTITRUST magazine, we analyzed *Daubert* motions challenging evidence submitted by economic experts in antitrust cases between 2000 and March 2011. Our data consisted of court rulings for antitrust and other types of cases listed in the *Daubert* Tracker website for 2000 through early 2008, additional antitrust court rulings for 2007 through early March 2011 identified through our own research, and court rulings in antitrust cases for 2000 through 2010 used in a study published by PricewaterhouseCoopers (PwC).¹ In this Appendix we summarize some of our results and describe our methodology for collecting and analyzing the data.

Summary of Results

The tables and figures below show results for court decisions listed in *Daubert* Tracker and for the supplemented antitrust data. Figure 1 covers *Daubert* Tracker data and shows that, between 2000 and early 2008, courts granted approximately 45 percent of the challenges to economic testimony in whole or in part in a variety of cases covering several different areas of law. Figure 2 shows that 73 percent of these motions were directed at experts testifying for plaintiffs. Figure 3 provides a breakdown of these data for different types of cases and shows that *Daubert* challenges to economists were most frequent in antitrust cases (18 percent of all 412 challenges).

Table 1 compares data from *Daubert* Tracker to data from the Administrative Office of the United States Courts and our mapping of PwC data to different areas of law. The Administrative Office reported that antitrust cases accounted for only 0.3 percent of all civil cases from 2000 to 2008,

but PwC found that approximately 8 percent of all *Daubert* challenges to financial experts were in antitrust cases, compared to 18 percent in *Daubert* Tracker. These data show that the percentage of challenges to economists in antitrust cases appears much greater than the antitrust proportion of all civil cases.

Table 2 shows exclusion rates for the subset of 113 challenges for economists in antitrust cases, including some that are based on non-*Daubert* grounds, and Table 3 shows exclusion rates for the subset of these challenges (97 of 113) that we have identified as based on *Daubert*/Rule 702. Tables 2 and 3 show that 81 to 85 percent of these challenges were against experts testifying for plaintiffs (including experts offering evidence on class certification), resulting in a full or partial exclusion rate of 40 percent for plaintiff's experts based on *Daubert* grounds. The data show no successful *Daubert* challenges to economists testifying for defendants, and a total or partial exclusion of evidence for six defense experts based on non-*Daubert* grounds.

Table 4 provides a breakdown of *Daubert* challenges in antitrust cases with individual parties and for class actions, and separately for the class certification and post-certification phases of class action cases. The data show an overall exclusion rate for all experts of 19 percent for class actions during the post-certification phase, compared to 48 percent in cases with individual parties. Comparable exclusion rates for plaintiff's experts of 19 percent and 59 percent, respectively. Omitting challenges at the class certification stage, the data show that approximately 50 percent of *Daubert* challenges to economists seeking to testify for plaintiffs in antitrust cases have been successful in whole or in part, compared to none for defense experts.

Data Collection and Analysis

Our analysis started with data from *Daubert* Tracker, which states that the website hosts had collected "over 10,000 briefs and other supporting documents from both appellate and trial courts relating to 'gatekeeping' challenges to expert witness testimony." Representatives of the company reported

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that the *Daubert* Tracker database covers both reported and some unreported decisions, and provided upon request a customized database for all gatekeeping challenges to economic experts. The resulting database contains rulings on gatekeeper challenges to economic experts based on *Daubert*/Rule 702 and non-*Daubert* grounds.

The database contains 822 records for challenges to specific economic experts from 1993 to the beginning of 2008.² Each record includes information on the discipline of the expert (as defined by *Daubert* Tracker), the area of law addressed in the case (e.g., intellectual property, antitrust and trade regulation, etc.), the party retaining the expert, a summary 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 did not list the party that retained the expert. We filled in missing “Retained by” information for records dating back to 2000³ and classified the outcome of each challenge as “Excluded,” “Admissible,” “Excluded in Part,” or “NA” based on the case and outcome summary.⁴

We classified records as “NA” if it appeared that the gatekeeper challenge was rendered moot by a ruling on summary judgment (i.e., the case was decided without ruling on the challenge to the expert), was explicitly described as being under a standard other than *Daubert*/Rule 702, or was not decided or otherwise inapplicable. For example, some records state “defense expert not challenged,” “702 challenge mooted,” “*Daubert* motion pending as of this decision,” “testimony not challenged,” and “expert’s reliance on third party source was not improper.”⁵

The *Daubert* Tracker database contains records on a variety of gatekeeper challenges to expert evidence, including some based on non-*Daubert* grounds. We attempted to limit the data for this analysis to gatekeeper challenges that are explicitly based on *Daubert*/Rule 702 or that appear to be based on *Daubert* principles based on a review of information in the disposition and summary fields. We omitted records for which the ground for challenge is expressly identified as non-*Daubert*. Unless the description in the disposition and summary fields stated otherwise, we assumed that the challenge was based on the *Daubert* standard and attempted to verify this assumption by determining whether questions were raised about the relevance and/or reliability of the testimony. This approach may have resulted in the inclusion of some challenges based on non-*Daubert* grounds.

We also attempted to remove duplicate entries in the database for the same challenge to an expert in the same case. For example, if an expert was challenged in the district court and the ruling was appealed, then two or more entries could appear for the same expert in the same case. Multiple entries also occurred because a ruling by the district court referenced a prior ruling in the same case, for which the *Daubert* Tracker data set added a separate record.⁶

For records on challenges decided in 2000 or later that are not classified as “NA,” we refined the “Antitrust and Trade

Regulation” category to include only antitrust cases, and where possible we determined the type of expert testimony that was subject to challenge (e.g., class certification or liability/damages).⁷ For records in antitrust cases, we then isolated explicit *Daubert* challenges from those under other gatekeeper standards.⁸ This research revealed that applying the general filters described above to the entire data set revealed many records of challenges in antitrust cases that were not explicitly based on *Daubert* or Rule 702.⁹ After conducting the above steps to clean and categorize *Daubert* Tracker data, the original database of 822 records was reduced to an adjusted database of 405 records, of which 61 are for challenges to economists in antitrust cases.

After conducting independent searches for *Daubert* challenges as described below, we determined that the *Daubert* Tracker database included several records in a case that addressed multiple experts, but included only a single entry that addressed only one of the experts. We also identified cases where *Daubert* Tracker had not properly classified the record as antitrust. We expanded the records to cover any experts who were omitted and reclassified several cases as antitrust, resulting in an adjusted database of 412 records, of which 73 are for challenges to economists in antitrust cases.

We supplemented the adjusted *Daubert* Tracker database with additional records identified through independent research of court decisions. For this purpose, we used a modified form of the search terms used by Lloyd Dixon and Brian Gill.¹⁰ This search resulted in an additional 127 written opinions, of which 80 were not already in the *Daubert* Tracker database and explicitly referenced Rule 702, *Daubert*, or *Kumho Tire*. We reviewed these opinions and identified 39 that address challenges to economists in antitrust cases. We added these records to the 73 records in the adjusted *Daubert* Tracker database, for a total of 112 records. We also reviewed all challenges to defense experts in antitrust cases identified by PwC, most of which involved non-*Daubert* challenges, and added one additional record, for a final adjusted database of 113 challenges to economists in antitrust cases. ■

¹ See *Daubert* Tracker, <http://www.dauberttracker.com>; LAWRENCE F. RANALLO & DOUGLAS E. BRANCH, PRICEWATERHOUSECOOPERS LLP, *DAUBERT CHALLENGES TO FINANCIAL EXPERTS: AN 11-YEAR STUDY OF TRENDS AND OUTCOMES* (2011) [hereinafter PwC 2011].

² The name of the expert is missing from 16 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 provide accounting/finance testimony as well as economic testimony.

³ The date was determined based on the citation date. Records missing citation information have been omitted as we could not verify the accuracy of the challenge.

⁴ This information is listed in fields of the data set titled “Disposition” and “Summary (if available).”

⁵ This last example is a case where the expert was likely challenged under Rule 703, and thus was recorded as “NA” as it was not a challenge under

Daubert. The database does not explicitly identify all non-*Daubert* challenges as such, so the data used for analysis may include some records for which the challenge was based on grounds other than *Daubert*. An example of an “otherwise inapplicable” record is *Santana Products v. Bobrick Washroom Equipment* (2003), where expert testimony was withdrawn prior to a hearing on the defendant’s *Daubert* motion. Other records required additional research if the outcome was unclear based on the description in the data, or the summary did not clearly specify the type of gatekeeping challenge. For example, the record for *Callaway Golf v. Dunlop Slazenger* (2003) states a disposition of “[m]otion to exclude granted in part and denied in part,” but the summary field states that “[i]t appears the *Daubert* motions are still pending.” Research revealed that the court had excluded expert testimony in part under *Daubert*, and we therefore categorized the outcome as “Excluded in Part.” Some records and court decisions are unclear and may be subject to classification in different ways. For example, in *Sinco, Inc. v. U.S. Chicory, Inc.* (2005), we categorized the record as “NA” because the court ruling appears to state that the court would consider the specific gatekeeper challenge at trial: “I do not believe the entire matter can be properly decided outside the context of the trial as a whole [T]he motion in limine (#64) is denied without prejudice to plaintiff raising specific evidentiary objections at the time of trial.”

⁶ To isolate and remove these duplicates, we identified all records with the same expert name, along with some combination of the same plaintiffs and defendants, courts, docket number, or LEXIS citations. From these possible duplicates, we first dropped all decisions made at a district level in favor of the final decision made upon the appeal. For the remaining records, we then determined the decision date for each record for the same expert on the same case and reviewed the summaries of each record. Unless the summaries explicitly indicated that the two entries refer to different aspects of the opinion/evidence or concern different types of testimony, we eliminated the earlier entry/entries in favor of the record with the most recent decision date. Some experts appeared more than twice in this subset of possible duplicates. It is possible that we have removed additional challenges under new grounds to the same expert with this methodology, and therefore may understate the total number of challenges and the associated decisions.

⁷ These determinations were made through a review of the summary description in the database, or through further research. It was often unclear from

the court decisions whether an expert was testifying only on liability issues or only damages, and therefore we have aggregated both types of testimony. For example, the challenge might be related to the expert’s damages methodology, but the decision might discuss analyses that could have supported liability as well. Moreover, the absence of explicit reference in a court ruling to liability or damages may not guarantee that the expert was not offering evidence on both types of issues.

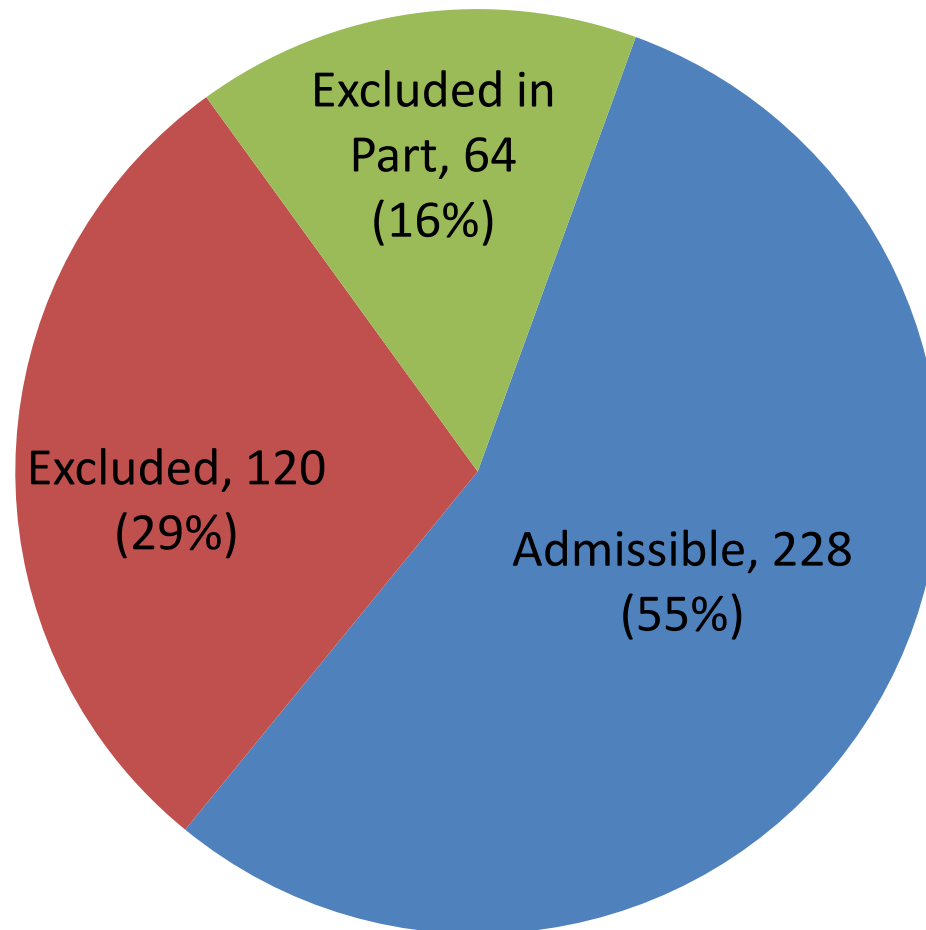
⁸ This detailed review resulted in our exclusion of several additional records prior to analyzing the data because either (1) the court cited to *Daubert* in a ruling, but the expert was not challenged; (2) a final decision was made without ruling on the *Daubert* challenge; (3) research could not confirm the indicated expert name in the database (e.g., a challenge in 2005 (*Abraham v. Intermountain Healthcare*) was researched, but the judge’s decision never mentioned this expert name and we therefore dropped the observation); or (4) the testimony was not excluded but merely found to be insufficient to withstand summary judgment. Other types of challenges were discussed in the text of our article.

⁹ Although it may not be appropriate for an analysis of *Daubert* gatekeeper challenges to include rulings based on Rule 702 prior to December 2000 (the effective date of amendments to the Rule to incorporate *Daubert* principles), all antitrust records in 2000 that contained expert challenges under Rule 702 either explicitly mention *Daubert* or contained an analysis of admissibility that reflects consideration of *Daubert* standards. After December 2000, we have generally assumed that Rule 702 challenges to experts are analogous to a *Daubert* challenge for all antitrust records.

¹⁰ See LLOYD S. DIXON & BRIAN P. GILL, CHANGES IN THE STANDARDS FOR ADMITTING EXPERT EVIDENCE IN FEDERAL CIVIL CASES SINCE THE *DAUBERT* DECISION 16 n.3 (RAND Institute for Civil Justice 2001). Specifically, on March 10, 2011, we queried Westlaw for decisions from 2007 to 2011 using a search similar to that used by Dixon and Gill: (702 703 /6 EXPERT EVID! FRE) (ADMISS! INADMISS! ADMIT! EXCLUD! PRECLUD! STRIK! STRICKEN UNQUALIF! DISQUALIF! QUALIF! BAR! /8 (EXPERT /3 (WITNESS TESTI! AFFIDAVIT))). This results in identifying opinions that mention several keywords related to the exclusion of expert witness testimony. We then identified the subset of those records that contain the terms “Sherman Act,” “Clayton Act,” “Federal Trade Commission Act,” or “FTC Act.”

Figure 1

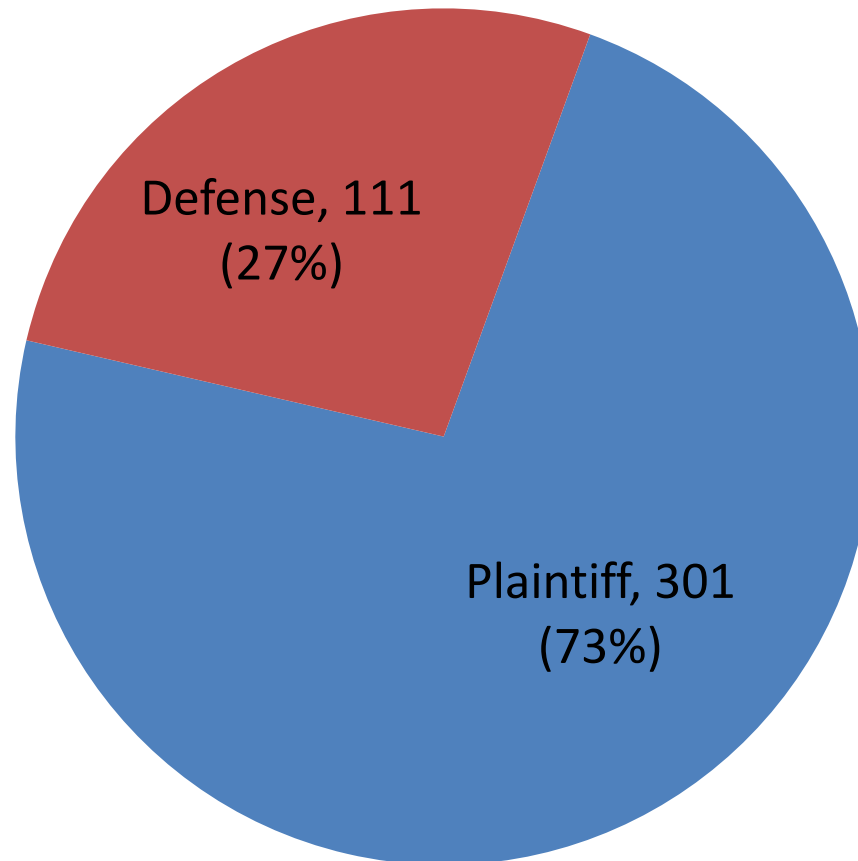
Summary of gatekeeping challenges to economists



Source: Daubert Tracker

Figure 2

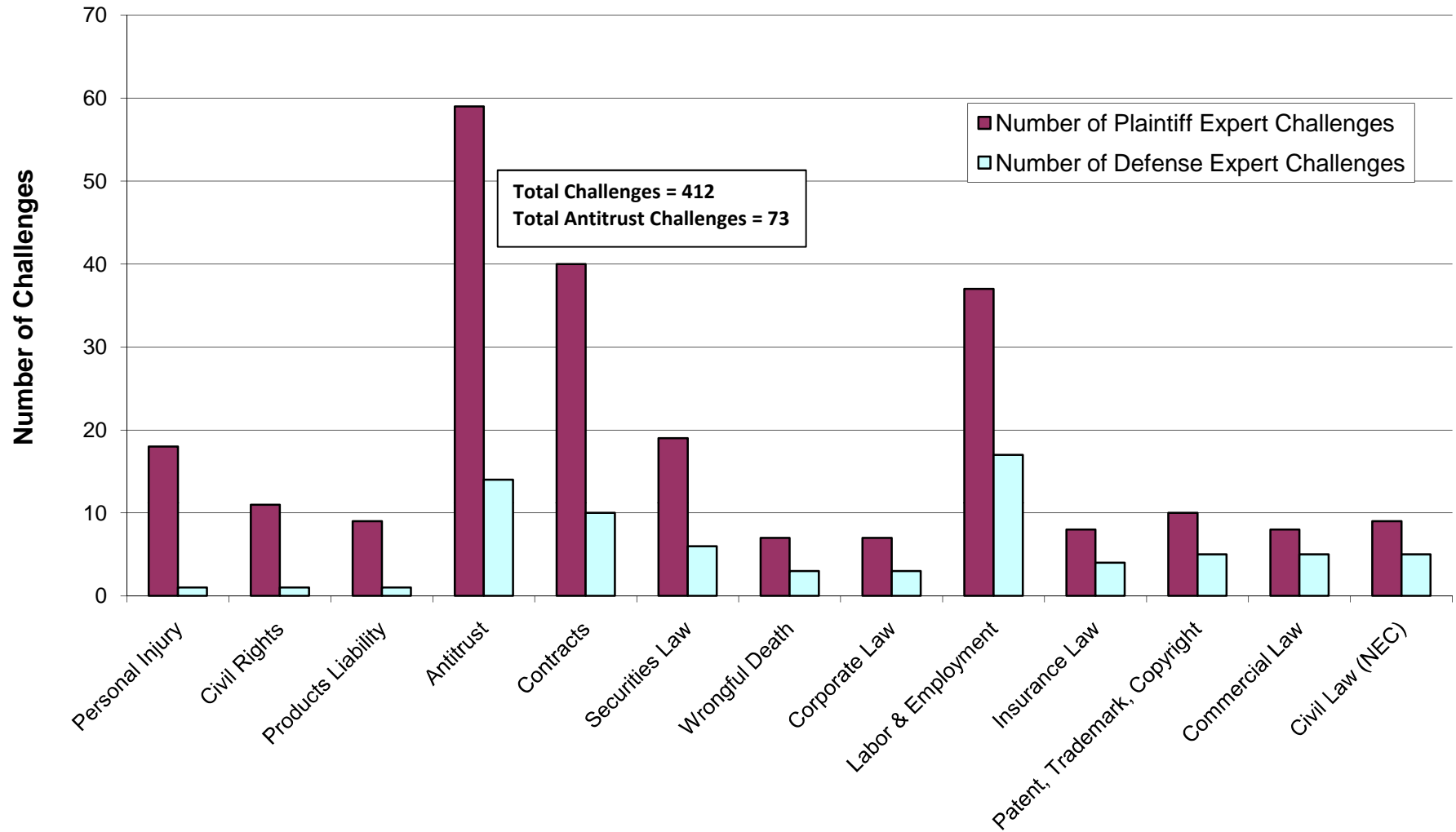
Summary of gatekeeping challenges by party retaining expert



Source: Daubert Tracker

Figure 3

Economist gatekeeping challenges by areas of law with 10 or more challenges



Source: Daubert Tracker

Table 1
Comparison of Areas of Law to Total Civil Actions

Area of Law	Total Challenges	Overall Challenges	Percentage of Total	PwC Percentage of Total	Area of Law Percentage of Total Cases from September 2000-September 2008
Products Liability/Personal Injury/Wrongful Death	39	412	9%		19%
Securities Law	25	412	6%		1%
Patent, Trademark, Copyright	15	412	4%	11%	4%
Contracts	50	412	12%	25%	10%
Civil Rights	12	412	3%		14%
Insurance Law	12	412	3%		4%
Labor & Employment	54	412	13%	6%	7%
Antitrust	73	412	18%	8%	0.3%

Notes

Total *Daubert* Tracker challenges include only those records related to areas of law with 10 or more challenges that we could match to categories tracked by the Administrative Office of the United States Courts. *Daubert* Tracker challenges include challenges from 2000 through partial year 2008 (as determined by the date in the citation). Area of Law Percentage of Total Cases calculated from Table C2-A of the Annual Report of the Administrative Office of the United States Courts from September 2000 through September 2008. PwC include cases from 2000 through 2010. The overlaps between *Daubert* Tracker defined areas of law, PwC case types, and AO recorded civil suits were based on description overlaps.

Sources: Daubert Tracker; LAWRENCE F. RANALLO & DOUGLAS E. BRANCH, PRICEWATERHOUSECOOPERS LLP, DAUBERT CHALLENGES TO FINANCIAL EXPERTS: AN 11-YEAR STUDY OF TRENDS AND OUTCOMES, Figure 15 (2011); Administrative Office of the United States Courts available at <http://www.uscourts.gov/judbususc/judbus.html>.

Table 2
Summary of Exclusion Rates for Antitrust Experts
(includes non-*Daubert* challenges)

Retaining Party	Admissible	Excluded in Part	Excluded	Total Challenges	Full and Partial Exclusion Rates
Defense	15	6	0	21	29%
Plaintiff	54	17	21	92	41%
TOTALS	69	23	21	113	39%
<i>Plaintiff Percentage of Total</i>	<i>78%</i>	<i>74%</i>	<i>100%</i>	<i>81%</i>	
<i>Defense Percentage of Total</i>	<i>22%</i>	<i>26%</i>	<i>0%</i>	<i>19%</i>	

Sources: *Daubert* Tracker and supplementary searches of Westlaw; LAWRENCE F. RANALLO & DOUGLAS E. BRANCH, PRICEWATERHOUSECOOPERS LLP, *DAUBERT* CHALLENGES TO FINANCIAL EXPERTS: AN 11-YEAR STUDY OF TRENDS AND OUTCOMES (2011).

Table 3
Summary of Exclusion Rates for Antitrust Experts by Type of Testimony
(*Daubert* challenges)

Retaining Party	Admissible	Excluded in Part	Excluded	Total Challenges	Full and Partial Exclusion Rates
Defense	15	0	0	15	0%
Plaintiff	49	14	19	82	40%
TOTALS	64	14	19	97	34%
<i>Plaintiff Percentage of Total</i>	<i>77%</i>	<i>100%</i>	<i>100%</i>	<i>85%</i>	
<i>Defense Percentage of Total</i>	<i>23%</i>	<i>0%</i>	<i>0%</i>	<i>15%</i>	

Sources: *Daubert* Tracker and supplementary searches of Westlaw; LAWRENCE F. RANALLO & DOUGLAS E. BRANCH, PRICEWATERHOUSECOOPERS LLP, *DAUBERT* CHALLENGES TO FINANCIAL EXPERTS: AN 11-YEAR STUDY OF TRENDS AND OUTCOMES (2011).

Table 4

**Summary of Exclusion Rates for Antitrust Experts During and Post Class Certification
Individual Compared to Class Litigation
(*Daubert* challenges)**

Retaining Party	Stage/Parties Involved	Admissible	Excluded in Part	Excluded	Total Challenges	Full and Partial Exclusion Rates
Defense	Individuals	12			12	0%
	Class Certification	3			3	0%
Plaintiff	Individuals	20	12	17	49	59%
	Post Class Certification	13	2	1	16	19%
	Class Certification	16		1	17	6%
Total Plaintiff excluding class certification		33	14	18	65	49%
TOTAL Individual		32	12	17	61	48%
TOTAL Post Class Certification		13	2	1	16	19%
TOTAL Class Certification		19	0	1	20	5%

Sources: Daubert Tracker and supplementary searches of Westlaw; LAWRENCE F. RANALLO & DOUGLAS E. BRANCH, PRICEWATERHOUSECOOPERS LLP, DAUBERT CHALLENGES TO FINANCIAL EXPERTS: AN 11-YEAR STUDY OF TRENDS AND OUTCOMES (2011).