

**IMPROVING OBJECTIVITY OF
ECONOMIC EXPERT TESTIMONY
IN LIABILITY LITIGATION**

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TABLE OF CONTENTS

ABOUT WLF'S LEGAL STUDIES DIVISION	ii
ABOUT THE AUTHOR	iii
INTRODUCTION	1
I. THE ROLE OF AN ECONOMIC EXPERT IN DAMAGE CALCULATIONS	4
II. ADMISSIBILITY OF ECONOMIC DAMAGE TESTIMONY UNDER RULE 702 OF THE FEDERAL RULES OF EVIDENCE	6
III. THE STRUCTURE OF AN ECONOMIC DAMAGE ANALYSIS UNDER <i>PFEIFER</i> AND OTHER LEGAL RULES	13
IV. THE PROBLEM OF PLAINTIFF- OR DEFENSE-ORIENTED DAMAGE ANALYSIS	18
V. PROPOSALS FOR IMPROVING THE QUALITY OF ECONOMIC EXPERT TESTIMONY	21

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INTRODUCTION

The primary role of economic experts in litigation is one of determining the amount of economic damages that have resulted from some kind of harm. All trials in which damages are awarded consist of two parts: A determination that liability exists on the part of the defendant to make restitution to the plaintiff, and a determination of the amount of damages that will accomplish that restitution. Although economic experts become involved in some types of liability determination,¹ the primary social impact of testimony by economic experts is in the area of valuation of damages. The costs of litigation depend

¹In legal actions based on claims of discrimination, economists may be called upon to determine the statistical probability that discrimination has occurred. In antitrust actions, an economist may be called upon to determine whether a given business practice does or does not conform with antitrust rules. Both of these types of analysis are involved with issues of liability.

almost as much on proof of damages as on proof of liability. Damage awards represent the final payoff for bringing litigation. A proof of liability is meaningless unless the amount of demonstrated damages (and the existence of assets or insurance coverage sufficient to pay those damages) is large enough to warrant the expenses for proving that liability.

Relatively little consideration has been paid to the unique role played by economic experts in personal injury damage calculations.² To address that problem, this WORKING PAPER provides an analysis of the role played by economic experts in personal injury and wrongful death damage assessments. It then considers the legal framework within which economic experts must

²The issue of the admissibility of "hedonic damages" is a notable exception to this statement. "Hedonic Damages" is a term that was applied to an economist's estimates of "lost enjoyment of life" and "loss of society" in *Sherrod v. Berry*, 856 F.2d 802 (7th Cir. 1988). This was an element of damages that had not been the subject of expert testimony by economists before *Sherrod*. Whether economists have any ability to measure such losses has been a subject of continuing controversy, with the courts generally ruling that the testimony does not meet the scientific requirements of Federal Rule of Evidence 702. Most economic experts, even plaintiff-oriented experts, have avoided presenting hedonic damage testimony. However, this is one area in which considerable attention, both in forensic economics journals and in case law, has been devoted to one special type of damage analysis by economists in personal injury and wrongful death litigation. For general coverage of this controversy, see John O. Ward and Thomas R. Ireland, ed., *The New Hedonics Primer for Economists and Attorneys*, Lawyers & Judges Publishing Co., Tucson, AZ (1996). For coverage of court cases, see Thomas R. Ireland, Walter D. Johnson and Paul C. Taylor, *Economic Science and Hedonic Damage Analysis in Light of Daubert v. Merrell Dow*, J. OF FORENSIC ECON., 10(2):139-156. Many statements made in this WORKING PAPER should be qualified by the phrase, "except with respect to hedonic damages." However, since that topic has been adequately developed elsewhere and introduces complex issues not of focus in other aspects of this paper and since hedonic damage testimony is only introduced in a very small percentage of personal injury and wrongful death litigation, this topic will not be discussed further.

operate, which consists of two parts. One part of that legal framework relates to how economic experts in damage analysis fit into the language of Rule 702 of the Federal Rules of Evidence, the provision which determines the admissibility of expert testimony. The second part involves the unique and precise legal restrictions placed on an economic damage analysis. Economic damage calculation is the only area of expertise for which the United States Supreme Court has specifically laid out a framework for analysis. *See Jones & Laughlin Steel Corp. v. Pfeifer*, 103 S. Ct. 2541 (1983). In other jurisdictions, both legislation and case law, varying considerably by legal venue, impose many legal limitations on how proffered expertise must be developed and presented in courts of law.

The paper then considers the problem of plaintiff-defense orientation in economic damage reports. Changes that may improve the reliability of methods economists use and the qualifications that are required before they can be admitted to testify in courts of law are separate issues from the problem of economic experts who are predisposed to favor plaintiffs or defendants in personal injury and wrongful death litigation. Some economic experts testify almost exclusively for plaintiffs and other economic experts testify almost exclusively for defendants. The opinions of such experts may be sincerely held,

but still reflect a consistent lack of neutrality. Since economic experts are hired more frequently by plaintiffs in personal injury and wrongful death litigation, there is some tendency for the body of all economic experts to be somewhat plaintiff-oriented. This is much less true in other areas of damage analysis by economic experts, where defendants hire as many experts as do plaintiffs.

Finally, the paper discusses reforms in legal procedure at the federal level that could dramatically improve the quality of the economic damage testimony. It proposes minor modifications in Rule 26 of the Federal Rules of Civil Procedure and/or minor changes in legal practice that could significantly improve the objectivity and neutrality of testimony by economic experts, particularly in personal injury litigation. These changes would also have beneficial effects on testimony by damage experts of all types and, though to a lesser extent, on experts whose testimony relates to causation and liability as well.

I. THE ROLE OF AN ECONOMIC EXPERT IN DAMAGE CALCULATIONS

Damage calculations by economic experts is inherently based on

comparisons of projected streams of dollar values over time.³ In each comparison, one stream of values is projected on the basis of a hypothetical assumption that no harm occurred. The other stream is projected on the basis that the harm has in fact occurred. The damage assessment based on each comparison is a calculation of the difference in values between those comparative projections of dollar values, reduced to present value by the methods allowed in the relevant legal venue.

Present value in this context refers to a sum of money that a trier of fact could award to the plaintiff to replace the differences between the pre-harm flow and the post-harm flow. A damage analysis can involve more than one assessment of damage. An economic expert may prepare damage assessments for multiple scenarios. Each scenario would be based on a different set of assumptions for at least one of the projections of dollar values, before or after the harm has occurred.

³In a strict sense, a damage calculation is not the only type of damage analysis an economic expert might provide. In some types of cases, the role of an economic expert may be to determine whether, in fact, any damage has occurred. This is clearly a different matter from proving liability for the damage, if the damage exists, so such determinations are part of damage analysis and yet not part of the types of damage calculation methods being considered in this paper. Damage analysis of this type may occur in antitrust cases and in commercial damages litigation. In most personal injury and wrongful death cases, however, the economic expert begins with the assumption that damage has occurred and the economist's analysis is focused on measuring the amount of the damage, rather than determining whether damage exists.

For example, if it were possible that a given worker might have been promoted to a higher position before he was injured, one pre-injury earnings flow could be based on the assumption that the promotion would have occurred, while another could be based on the assumption that the promotion would not have occurred. Likewise, several different assumptions could be made about the earnings of the worker in his future employment after an injury. Each comparison would result in a different damage assessment, allowing the trier of fact to determine which comparison is most reasonable.

In this sense, a damage analysis is a working out of the implications of one or more set of assumptions about one stream of future dollar values that are precluded from happening because of the harm that has occurred and another set of assumptions about what will happen in the future, given that the harm has in fact occurred.⁴

II. ADMISSIBILITY OF ECONOMIC DAMAGE TESTIMONY UNDER RULE 702 OF THE FEDERAL RULES OF EVIDENCE

At the federal level, the most important decision concerning the admissibility of expert testimony is *Daubert v. Merrell Dow*, 113 S. Ct. 2786

⁴In wrongful death litigation, the post-harm scenario can be known with certainty. A dead person will earn no future income and provide no services. In litigation involving a comatose or severely brain damaged person, the post-harm scenario can also be known with near certainty.

(1993). *Daubert* enumerated four tests for the admissibility of "scientific expert testimony" under Rule 702⁵ of the Federal Rules of Evidence:

1. Whether the theory or technique employed is generally accepted in the scientific community.
2. Whether the theory has been subject to peer review and publication.
3. Whether the theory can be and has been tested.
4. Whether the known or potential rate of error is acceptable.

Daubert was concerned with analysis of the causation of harms, but not with the value of the harms themselves. The existence of the birth defects alleged to have been caused by the drug Bendectin were not at issue in *Daubert*. The question was whether the Bendectin caused birth defects. If an economic expert had performed a damage analysis in *Daubert*, the analysis would have focused on the extra costs to parents occasioned by the birth defects and the loss of earning capacity of the children born with birth defects.

⁵The current Rule 702 is worded as follows in regular text, with changes proposed in the *Report of the Advisory Committee on Evidence Rules*, May 1, 1998, added in italics::

If scientific, technical or other specialized knowledge will assist the trier of fact to understand 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, *provided that (1) the testimony is sufficiently based upon reliable 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.*

The resulting damage analysis would have been the same whether Bendectin caused the birth defects or the birth defects simply reflected normally expected random outcomes. As a result, only one of the four tests in *Daubert* can easily apply to damage analysis by an economist. The theory and technique that is used in damage analysis is generally, indeed universally, accepted in the scientific community.

But the theory and technique is axiomatic in character, meaning that it is never subject to peer review since it is taken for granted. Publications discuss how the theory and technique is used, but not its legitimacy. The theory can be tested, but only in the sense that axiomatic truths can be tested. There is no known error rate since the errors can only occur if mathematical mistakes in calculation are made. And knowing how often a group of economic experts might make mathematical mistakes would not provide information that would be useful to a court in a current instance. Mathematical mistakes by an economic expert on one side of a case can easily be discovered and revealed to the court if adequate disclosure of all assumptions by economic experts on both sides takes place.

Ultimately, *Daubert* relates primarily to decisions about liability, and is much harder to apply to proffered expertise that relates to damages. Damage

experts may include medical doctors, vocational experts, psychologists, life care planners, business valuation experts, and many other areas of expertise. In each case, the expert's role is to examine the cause of a harm, rather than to determine the source of the harm, though the two types of determination may in some cases be concurrent.

In a pure damage context, regardless of what may have caused a person's medical condition, medical doctors may testify about the prognosis for further deterioration or improvement in the person's condition. Psychologists may provide testimony about the impact of an injury on an individual's life style regardless of who was responsible for that injury. Vocational experts may testify about the potential for an individual with a given set of educational characteristics, aptitude test scores and physical deficits to gain employment in the labor market and at what rates. This evaluation would not depend on what may have caused the physical deficits. Likewise, life care planning experts may testify as to the costs of treatments recommended for life care and rehabilitation of an injured person regardless of the cause of the injury requiring treatments. Special experts might testify about market conditions that a given business will face in trying to recover from an alleged contract violation, and so forth.

However, economic experts are different from other damage experts in four key respects. First, most other damage experts evaluate impacts only on a post-harm basis, whereas economic experts must consider what would have happened both before a harm has occurred and after a harm has occurred. Second, economic experts play the role of combining the impacts assessed by all other damage experts into bottom line assessments of loss. Third, economic experts develop bottom line estimates by employing techniques of calculation that are general to all damage analysis and which can be systematically checked for accuracy, whereas other types of damage experts provide testimony that is typically more subjective and more difficult to check. Finally, damage analysis by an economic expert is constrained by legal limitations that have enormous significance in terms of the amounts of damages that will be testified to by an economic expert, whereas other types of expertise are constrained only by general issues of reliability, relevance, and scientific accuracy that would apply to any type of expert analysis.

Economics is commonly thought of as a science, but three of the four tests for admissibility of scientific evidence enumerated in the landmark *Daubert* decision cannot be directly applied to damage analysis of the sort that is

provided by economic experts.⁶ A damage analysis is the working out of a set of hypothetical results based on currently untestable assumptions about what may happen in the future, but it must be done in a way that is consistent with the theory of economics. In that sense, economic damage analysis is "scientific" in one sense and not "scientific" in another. Because other economic experts could easily check the calculations made by an economic expert if they used the same set of assumptions, one can describe this working of hypothetical results as "technical" in the sense of Rule 702. But most technical expertise inherently involves the making of subjective judgements based on practical experience.

Most other types of damage analysis involve subjective interpretations of existing knowledge, as in the case of a medical doctor's opinion about the prognosis for a patient's improvement. Economic expertise is based on an

⁶This is not a problem with causation analysis that economists might also perform. *Daubert* tests can be applied to the work of economists that relates to liability in a way that is similar to other sciences that are involved in liability determination and pose no special issues of the sort considered in this paper. For example, if an economist has performed a statistical test to determine the probability that age discrimination has occurred, there is a literature that can be reviewed to determine if the test is generally accepted by other economists doing similar statistical work. The test used is likely to have been based on theory that has been subject to peer review and publication. The theory that it is a good test will have been tested. And there will be a known error rate whose acceptability can be determined. For this type of work there is little difference between statistical tests that would be used to determine whether age discrimination has occurred and epidemiological tests that would be performed to see if the drug Bendectin was the cause of birth defects, as in the *Daubert* decision.

axiomatically true core theory of the time value of dollar sums, and mathematical calculations leading to an expert economic opinion can be checked for accuracy, unlike most other types of technical expertise. Thus, one could also argue that economic damage analysis belongs in the "other" category of Rule 702.

The Supreme Court's ruling in *General Electric v. Joiner*, 118 S. Ct. 512 (1997) strongly reaffirmed the *Daubert* decision, though not primarily in ways that affect an economic damage analysis. Pending proposals for changes in the Federal Rules of Civil Procedure and the Federal Rules of Evidence are contained in the *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and Evidence*,⁷ and the pending matter of *Kumho Tire Co. v. Carmichael, sub nom Carmichael v. Samyang Tire, Inc.*, 131 F.3d 1433 (11th Cir. 1997), *rev. granted* June 22, 1998, will have potentially more important impacts on economic damage testimony. *Kumho* is likely to define new standards that would apply to economic damage analysis. At issue in *Kumho* is whether and how the standards of *Daubert*, which are specific to "scientific"

⁷Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and Evidence, August 1998, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Secretary of the Committee on Rules of Practice and Procedure, Administrative Office of U.S. Courts, Washington, D.C. 20544. This document can be downloaded at www.uscourts.gov.

testimony, also apply to "technical" and "other" expert testimony. It seems likely that standards for reliability of information being used in economic damage reports will become subject to stricter scrutiny. Closer scrutiny of qualifications of economic damage experts may also result from *Kumho*. These changes are likely to have positive impacts on the quality of economic testimony, but are not the central focus of this paper. Instead, this paper focuses on two changes that are not likely to become part of the *Kumho* decision. The first is a suggestion for minor changes in Rule 26 of the Federal Rules of Civil Procedure. The second is a suggestion that economic damage testimony would be significantly improved if judicial notice is taken of the fact that a reasonable distribution between testimony for plaintiffs and for defendants is a reasonable indication of lack of bias in the analysis of an expert. These suggestions will be discussed in the last section of the paper.

III. THE STRUCTURE OF AN ECONOMIC DAMAGE ANALYSIS UNDER *PFEIFER* AND OTHER LEGAL RULES

Separate from the types of concerns that were addressed by *Daubert*, *Joiner*, and that will be addressed by *Kumho* and by proposed changes in the Federal Rules of Civil Procedure and the Federal Rules of Evidence, economic damage analysis is also subject to a variety of legal restrictions that profoundly

affect the "scientific" merit of damage calculations. Michigan requires that future damages be reduced to present value at five percent simple interest. of Pennsylvania and New York both prohibit discounting to present value. Florida, Washington, and a number of other states allow parents of a minor child to claim lost accumulations to the child's estate in spite of the fact that normal life expectancies would have ended long before the end of the child's normal life expectancy, when the estates would have become available. Almost all states prohibit the introduction of pre-trial interest in calculations of past damages, and so forth. In no other area of expert testimony are similar restraints placed on the development of an expert's testimonial analysis.

This places an economic expert in the position of requiring a great deal of legal instruction into how a damage analysis must be prepared in each different legal jurisdiction. Further, many of these legal rules that economic experts are expected to follow violate the "scientific" or "technical" requirements of economic science. In other words, an economic expert is required by law to make certain types of errors in his or her calculations. The true nature of a damage calculation under such circumstances is a calculation that uses the standards of economic science and practice except where legally required to do otherwise. To the extent that the *Daubert* standards of testing

apply to an economic damage analysis, the primary response of an expert would have to be that legal requirements prohibited him or her from arriving at truly scientific or technically accurate opinions.

At best, an economic expert's opinions can only be accurate and reliable within the bounds allowed by law. Even the law may be uncertain in its application to the case at hand. Different attorneys in the same jurisdictions might give their economic experts different legal instructions, which said expert must accept based on the superior legal expertise of an employing attorney. Thus, the relevance and reliability of all calculations must be judged within the constraints of the legal instruction under which the economic expert prepared his damage analysis, which can vary even within the same legal jurisdiction.

Fortunately, from the standpoint of economic experts, one court decision at the federal level, *Jones & Laughlin Steel Corp. v. Pfeifer*, 103 S. Ct. 2541 (1983), provides a great deal of the legal structure under which personal injury and, by implication, wrongful death damage analysis must proceed. The case contains a passage of immense judicial wisdom. Justice Stevens, speaking for the Supreme Court said the following:

The litigants and the *amici* in this case urge us to select one of the many rules that have been proposed and establish it for all time as the exclusive method in all federal trials for calculating an award of lost

earnings in an inflationary economy. We are not persuaded, however, that such an approach is warranted . . . For our review of the foregoing cases leads us to draw three conclusions. First, by its very nature the calculation of an award for damages must be a rough approximation. Because the lost stream can never be predicted with complete confidence, any lump sum represents only a "rough and ready" effort to put the plaintiff in the position he would have been in had he not been injured. Second, sustained price inflation can make the award substantially less precise. Inflation's current magnitude and unpredictability create a substantial risk that the damages award will prove to have little relation to the lost wages it purports to replace. Third, the question of lost earnings can arise in many different contexts. In some sectors of the economy, it is far easier to assemble evidence of an individual's most likely career path than in others.

These conclusions all counsel hesitation. Having surveyed the multitude of opinions available, we will do no more than is necessary to resolve the case before us . . . Congress has provided generally for an award of damages but has not given specific guidance regarding how they are to be calculated. Within that narrow context, we shall define the general boundaries within which a particular award will be considered legally acceptable.

Pfeifer, 103 S. Ct. at 2555.

The *Pfeifer* decision proceeded to evaluate all of the elements that must be considered in projection of the present value of the lost past and future earnings that result from a personal injury. The court establishes, in the case

of "below market" discount rates, ranges within which the court will have a lower standard of scrutiny, but carefully does not prohibit values outside the range upon a showing of reliable proof. The decision allows economic damage reports to be developed in actual market value terms or in "below market" discount terms, but expresses a preference for the "below market" approach. It repeats from an earlier Supreme Court decision⁸ the requirement that income taxes should be deducted from lost earnings (but does not indicate clearly whether Social Security and Medicare payroll taxes are "income taxes"). Finally, on a step-by-step basis, the decision goes through the procedure that an expert should follow to prepare a damages report.

Ultimately, it remains to be seen how much the application of *Daubert* or *Kumho* or proposed changes in Rule 702 will apply to economic damage analysis in light of *Pfeifer* and other legal restrictions that apply to damage analysis. Certainly, being able to claim compliance with the law is an ultimate defense against unscientific or technically incorrect calculations. However, it is not likely that *Pfeifer* will constitute an all purpose "pass" for economic testimony at the federal level. While economic damage experts will probably continue to have more latitude in developing assumptions than other types of

⁸*Norfolk & Western R. Co. v. Liepelt*, 444 U.S. 490 (1980).

"scientific" or "technical" experts, the reliability and relevance of data used in developing reports will come under greater scrutiny as the *Daubert* era unfolds. Moreover, the qualifications of economic experts themselves are also likely to be scrutinized more closely before testimony is admitted.

IV. THE PROBLEM OF PLAINTIFF- OR DEFENSE-ORIENTED DAMAGE ANALYSIS

There are unethical experts in all areas of litigation. These are experts who can be hired to say whatever an attorney wants to have said under the umbrella of an "expert" opinion. This is a serious problem in a few instances, but an even larger problem in the area of economic expertise may be economic experts who have opinions that are oriented in favor of larger calculations of damages than would be found by fully neutral experts. This predomination is based on a market condition that is absent in other types of litigation such as business damage analysis or commercial damages calculations.

The problem in the area of personal injury and wrongful death analysis is that there are many more opportunities for economic experts to testify on behalf of plaintiffs than for defendants. In many other areas of damage analysis, opportunities to testify for plaintiffs and defendants are more equal and experts, as a whole, do not seem to be oriented toward opinions that favor

either plaintiffs or defendants. However, even in those other areas, the best market test of an economic expert's objectivity and neutrality is a reasonable balance in the expert's testimonies between plaintiffs and defendants.

Reliable data about the number of available opportunities for an expert to be employed by plaintiffs' attorneys and defense attorneys do not exist. However, defense attorneys are often hesitant to employ economic experts as testimonial experts for fear of placing a bottom line on damages.⁹ Thus the number of opportunities to testify on behalf of plaintiffs, whether at deposition or at trial, will be greater on the plaintiff side than on the defense side in personal injury/wrongful death litigation.

It is important to recognize, however, that economists are often hired purely as consultants to assist in the development of questions for the economic expert retained by plaintiffs so that some economic experts will have more experience working for defendants than will be obvious from looking at a Rule 26 list of witnesses. This is less true in instances of business valuation and commercial damage calculations, where both plaintiffs' and defense attorneys are likely to retain and proffer their own experts in testimonial roles.

⁹See Thomas R. Ireland, *The Role of a Defense Economist in Personal Injury/Wrongful Death Litigation*, J. OF LEGAL ECON., 1992, at 2(2):19-30; Lawrence M. Spizman, *The Defense Economist's Role in Litigation Settlement Negotiations*, J. OF LEGAL ECON., 1995, at 5(2):57-66.

For this reason, even an economic expert who testifies fifteen to twenty percent of the time for defendants in the personal injury/wrongful death area may be demonstrating reasonable balance.

Attorneys will want to hire experts with an orientation that favors their clients. Thus, plaintiffs' attorneys will tend to favor economic experts whose opinions lead to more liberal estimates of economic damages, while defense attorneys will tend to favor economic experts whose opinions lead to more conservative estimates. This can result in circumstances in which some experts with very liberal methods for projecting damages will be employed almost exclusively by attorneys representing plaintiffs. Other experts with very conservative methods will be employed almost exclusively by attorneys representing defendants. Experts with more neutral and objective opinions will be more likely to have reasonable numbers of employments for both defendants and plaintiffs. Experts with balance between plaintiff employments and defense employments will not produce results as favorable for their sides as plaintiff- and defense-oriented economic experts, but they tend to have more credibility with the other side of the bar and with juries. This means that they produce estimates that may be less favorable, but are more credible.

This is only true, however, to the extent that attorneys are able to

demonstrate that their experts have reasonable plaintiff-defense balance in their testimonies. The suggestions for reform that are offered below are designed to facilitate the roles of attorneys in taking advantage of the greater credibility inherent in balance between testimonies for plaintiffs and testimonies for defendants.

V. PROPOSALS FOR IMPROVING THE QUALITY OF ECONOMIC EXPERT TESTIMONY

Because economic testimony on damages is so central to the costs of litigation, it is critical that such testimony be both neutral and objective in the methods that are used for calculation.

In the area of damage analysis, the best potential test for objectivity is the demonstration by an economic expert of substantial *testimonial* work on both sides of the bar.¹⁰ In effect, this is a true market test for objectivity. If

¹⁰This author would regard at least twenty-five percent as being a substantial part of an expert's practice. Emphasis should be placed on the testimonial aspect of a consultant's practice. An expert who always testifies for plaintiffs might be very helpful as a unnamed consultant for the defense. Since the expert regularly testifies for plaintiffs, the expert would have been able to observe what kinds of challenges work and do not work. Providing that knowledge to a defense attorney in a case would be very helpful, but only if the expert is not named as an opposing expert. If a plaintiff oriented expert is named by a defendant, that expert's previous opinions could be discovered and presented in court by the plaintiff in such a way as to support the testimony of the plaintiff's own economic expert. If, however, the expert is named and presented for testimony by both sides of the bar, both sides would be able to check the expert's record in previous cases to insure that the expert uses the same methods on both sides of the bar.

an expert's methods are very biased toward plaintiffs, the defense bar will not hire that expert as a testimonial expert, and vice versa.

What is critical for this market test to work, however, is that economists on both sides of the bar need to have the necessary information to check the work of a particular expert when he or she was working on the opposite side of the bar in previous cases. Because attorneys recognize the importance of evidence of an expert's predominantly working for one side or the other, they are regularly asked about the plaintiff-defense distribution of their work. However, since experts are not required to maintain records of the plaintiff-defense distribution of their work, they are free to claim percentages that make them look more neutral and objective than they actually are. Experts who might not have worked in a defense case in ten years might, for example, claim that fifteen percent of their work is for defendants. Since unnamed involvements are privileged information, such claims cannot be checked. What can be checked, however, is the plaintiff-defense distribution of testimonial cases because experts in federal cases are now required under Rule 26 of the Federal Rules of Civil Procedure to maintain lists of all testimonies at deposition or at trial.

Unfortunately, the rule change that required experts to maintain lists of

testimonies did not require that the list indicate whether the testimonies were for plaintiff or defense. While an attorney could theoretically hire someone to go through a case list to obtain case records and review those records for plaintiff or defense involvement, doing so in any one case would be an expensive and cumbersome proposition. If experts were required to maintain records on that basis, attorneys could determine plaintiff-defense percentages very easily and could also limit themselves to obtaining a reasonable sample of the expert's cases when on the opposite side of the bar. This suggested change in Rule 26 would, by itself, provide significant improvement because attorneys would have incentives to take advantage of the better information that would be provided at lower cost. A closely related change, one that is easier to implement, would be for judges to include as part of their standing orders for expert disclosure a requirement that experts list cases for defendants and plaintiffs. This would have the same impact as changing Rule 26, which seems unlikely to occur for the next several years.

Still another small, but effective reform would be for judges to take judicial notice of the fact that balance between plaintiffs and defendants speaks to the objectivity of an economic expert. This author is not aware of formal judicial statements that reflect the importance of plaintiff-defense distribution

as a consideration, but such a criterion is quite consistent with other extensions of the *Daubert* criteria that exist in the record. In the 1995 rehearing in *Daubert v. Merrell Dow*,¹¹ the U.S. Court of Appeals for the Ninth Circuit held that another criterion for admissibility of proffered testimony would be whether experts are "proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying." Likewise, in *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 942 (7th Cir. 1997) and *Braun v. Lorillard Inc.*, 84 F.3d 230,234 (7th Cir. 1996), the U.S. Court of Appeals for the Seventh Circuit considered whether an expert "is being as careful as he would be in his regular professional work outside his paid litigation consulting" (in *Sheehan*) and that an expert "adheres to the same standards of intellectual rigor that are demanded in his professional activities" (in *Braun*).

In these cases, the work of an expert in non-litigative contexts becomes a standard for the qualities that should apply in his work as an expert. If that standard is relevant, it would seem only a minor extension to argue that the

¹¹43 F.3d 1311, 1317 (9th Cir. 1995). The 1993 U.S. Supreme Court decision sent the *Daubert* case back to the 9th Circuit for rehearing. This was the decision that was reached on rehearing.

qualities of the expert's methods and assumptions should be the same when the expert testified for the defense as for the plaintiff. It also seems reasonable to be able to infer from a demonstration that the expert does a significant percentage of his or her work for both sides of the bar, using the same methods when working for each side, that the methods themselves are judged as both objective and fair by both sides of the bar. Changing Rule 26 to require plaintiff or defense designation for each testimony, however, might be sufficient in itself. Attorneys would have incentives to make the argument that a balance between sides of the bar is a reasonable indication of objectivity and neutrality on the part of experts they have employed. At some point, judicial notice would be made of the reasonableness of that argument.

Economic experts derive their expertise from an understanding of the role of markets. Markets work best when information is readily available and produced by the persons in a position to produce that information at least cost. Simply requiring that economic experts list their testimonies as being for plaintiffs or for defendants would be a relatively minor change in Rule 26, but it could significantly improve the ability of attorneys, acting in the interests of their clients, to detect an orientation in favor of the opposite side of the bar.

Juries could then be provided with that information in a way that should

improve the objectivity of the damage valuation process. A jury that knew, for example, that the economic expert for the plaintiff testified for plaintiffs one hundred percent of the time over the past four years while the economic expert for the defense testified sixty percent of the time for plaintiffs and forty percent of the time for defendants might think that the defendant's expert was more credible. Likewise, a jury that knew that the plaintiff's economic expert testified thirty percent of the time for defendants, while the defense's economic expert testified ninety percent of the time for defendants might conclude that the plaintiff's expert was more credible. But that could only happen if it was cost effective for attorneys to demonstrate those percentages, which would be the purpose of adding "side of case" listings to the requirements of the Rule 26 list of testimonies that are already required under the Federal Rules of Civil Procedure.

These minor changes could lead to significant improvements in the objectivity of economic testimony.