

**EXPERT WITNESSES IN BANKRUPTCY COURT: A BATTLE OF
MISCONCEPTION**

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I. INTRODUCTION

Expert witnesses can be useful resources for litigators during the course of a trial. Expert witnesses, unlike normal witnesses, can provide personal opinions or analyses on a certain topic.¹ This can be a useful tool by which the courts can educate the jury without having to train them in the field. In some cases, the subject matter is too difficult or unusual for a jury to have a significant understanding of the facts and, thus, limits their ability to comprehend what they are being told.² Expert witnesses attempt to provide some background information to clarify what has actually occurred in the case in order to prevent an unfair trial.³ Juries are composed of average citizens who are unlikely to know details of a specialized field, so expert testimony offers a relatively quick fix for complicated matters.⁴

With this understanding of expert witnesses, it may seem irregular that expert testimony is used in bankruptcy court. For the majority of cases, bankruptcy courts do not have a jury.⁵ The judge is the sole finder of fact and, when compared to jury members, there is a higher chance that the judge has dealt with a similar matter before, which detracts from the purpose of giving expert testimony.⁶ Since the judges, unlike the jury members, are regularly exposed to the subject matter, expert testimony is less necessary to train the judge.

Another difference between bankruptcy cases and other cases is that the former move at a faster pace.⁷ Expert testimony can be a time-consuming process and by slowing the trial down, it defies the norms of bankruptcy court.⁸ This can throw off the flow of the trial and cause unnecessary problems for the judge.⁹ Additionally, by having less time to spend on creating the expert testimony, it can affect the quality of work done.¹⁰ This lack of adequate time can result in experts leaving some of the submitted testimony incomplete, which can be a burden on the judges.¹¹

Expert testimony does not fit naturally in bankruptcy court. Expert

¹ FED. R. EVID. P. 702.

² *Id.*

³ FED. R. EVID. P. 703.

⁴ *Composition and Functions of Civil Jury*, JUSTIA (Oct. 11, 2016), <http://law.justia.com/constitution/us/amendment-07/02-composition-and-functions-of-civil-jury.html>.

⁵ Christopher Harris & H. Gregory Baker, *Practice Pointers for Working with Expert Witnesses in Bankruptcy Court* N. Y. L. J. (Oct. 11, 2016), <https://www.lw.com/thought-leadership/working-with-expert-witnesses-bankruptcy-court>.

⁶ Harris & Baker, *supra* note 5.

⁷ Harris & Baker, *supra* note 5.

⁸ Harris & Baker, *supra* note 5.

⁹ Harris & Baker, *supra* note 5.

¹⁰ Harris & Baker, *supra* note 5.

¹¹ Harris & Baker, *supra* note 5.

testimony is a useful resource for other courts, but in bankruptcy courts, judges go beyond their role and go against the established standards. Judges have been given the role as gatekeepers of admitting expert testimony.¹² Judges have taken their role in admitting evidence too far, especially when considering what evidence is actually necessary. They should follow the relevancy and reliability standards to admit expert testimony, but these standards are not always fulfilled and this can lead to problems, such as combined expert testimony.¹³ There are many reasons that expert testimony should be a part of bankruptcy court, but they are outweighed by the reasons for exclusion.

Part II of this Note reviews background information, including the use of expert testimony in both the Bankruptcy Court and the New Jersey courts. It looks at key expert testimony cases and the standards that they establish. It also discusses reasons for and against allowing the use of expert testimony in Bankruptcy Court. Part III argues that judges have expanded their role as gatekeeper too far. It discusses how judges admit evidence that may not be admissible under the relevant and reliable standards. It also discusses the problems that occur when judges do indeed expand their role and the issues that arise from combining testimony. Additionally, this Note explains why judges have less of a need for expert testimony than a jury would in the same position. Part IV concludes the argument that expert testimony is not needed in bankruptcy court and should only be admitted when absolutely necessary. It provides examples of alternatives to expert testimony that may result in more consistent and fair outcomes.

II. THE USEFULNESS OF EXPERT TESTIMONY AND ITS ABUSE

A. *The Use of Expert Testimony*

Before analyzing expert testimony, specifically in bankruptcy court, an overview of its use in other courts is helpful. In the federal court system, Article VII of Federal Rules of Evidence governs expert testimony.¹⁴ Expert testimony was examined and discussed at length in *Daubert v. Merrell Down Pharmaceuticals, Inc.*¹⁵ In *Daubert*, the Supreme Court articulated a legal standard governing the admissibility of testimony for the first time.¹⁶ The petitioners in the case were two minor children who, along with their parents, alleged that they suffered birth defects as a result of the mother's ingestion

¹² Harris & Baker, *supra* note 5.

¹³ Harris & Baker, *supra* note 5.

¹⁴ Harris & Baker, *supra* note 5.

¹⁵ *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 582-601 (1993).

¹⁶ *Id.* at 595-96.

of a prescribed prenatal drug.¹⁷ The company that was responsible for manufacturing the drug possessed evidence showing that the drug ingested by the mother did not cause birth defects and moved to dismiss the case.¹⁸ The petitioners presented eight reports from different experts to the court.¹⁹ All of the experts had appropriate credentials and concluded that the ingestion of the drug could result in birth defects.²⁰

The Supreme Court relied on Federal Rule of Evidence 702 to examine the testimony.²¹ While the lower courts had found that the petitioner's expert testimony was not acceptable, the Supreme Court found that the lower courts had used too high of a standard for admitting the evidence.²² The lower court had relied on a "general acceptance" standard, which required the expert testimony to be created in a method that was considered reliable in the relevant field.²³ The Court explained that expert testimony did not have to comply with the "general acceptance" standard under Federal Rule of Evidence 702.²⁴

The Supreme Court remanded the case to the lower courts due to its misuse of the standard, while simultaneously establishing a standard for the admissibility of expert testimony.²⁵ The Court went on to say that in order for expert testimony to be admissible it must be both relevant and reliable.²⁶ Federal Rule of Evidence 401 determines both of these standards.²⁷ The Supreme Court made it clear that this should be a liberal standard of admissibility, where all relevant evidence should be admitted so long as it would assist the trier of fact in making a decision.²⁸

Before looking at the standard as a whole, it is important to know who determines whether testimony is relevant or reliable. Whenever a party seeks to admit expert testimony, it is the judge who must examine the relevance and reliability of the testimony.²⁹ The judge is viewed as the "gatekeeper" in this respect, because he or she is the only person who has the power to

¹⁷ *Id.* at 582.

¹⁸ *Id.* at 583.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Daubert*, 509 U.S. at 588.

²² *Id.* at 596-98.

²³ *Id.*

²⁴ *Id.*

²⁵ Stan Bernstein, Susan H. Seabury, & Jack F. Williams, *Squaring Bankruptcy Valuation Practice with Daubert Demands*, 16 AM. BANKR. INST. L. REV. 161, 165 (2016).

²⁶ *Id.* at 166.

²⁷ *Id.* at 165.

²⁸ *Id.*

²⁹ *Daubert*, 509 U.S. at 589.

determine whether expert testimony is reliable and relevant.³⁰

This is an important task for the judge, and it is not one that should not be taken lightly. Not only is the judge the only person to have a say in the admissibility of expert testimony, but he or she is also given a great deal of discretion in making the decision.³¹ The courts have decided that, while the factors set forth in *Daubert* are a useful guide for judges to admit or deny expert testimony, they are not definite, and the judge can admit testimony based on his or her best judgment.³² For example, in *Kumho Tire*, the Supreme Court found that the lower court judge's admission of the evidence under the reasonable and reliable standard was sufficient, and thus affirmed his decision.³³ The Court did not examine the judge's process of determining whether the testimony was relevant or reliable and just accepted it as correct.³⁴ This evinces how important deference is to the Court.

It should be noted that while *Daubert* provides a useful standard for expert testimony, the holding was limited to expert testimony in the scientific fields.³⁵ This meant that other areas of law, like bankruptcy, could not use expert testimony simply by relying on the ruling set forth in *Daubert*.³⁶ Fortunately, soon after *Daubert* was decided, another case, *Kumho Tire Company, LTD. v. Carmichael*, was examined by the Supreme Court, which addressed expert testimony outside of the field of science.³⁷

While *Kumho* mainly reaffirmed what was said in *Daubert*, it was still a vital case for the use of expert testimony.³⁸ Post-*Daubert*, scientists could be utilized in order to present expert testimony; however, other professionals did not receive this same opportunity to present testimony in court.³⁹ In *Kumho*, the court examined if the expert testimony of an engineer should be treated the same way as a scientist's expert testimony.⁴⁰ The Supreme Court classified this type of expert testimony as "technical or other specialized knowledge" instead of "scientific."⁴¹

The Court ruled that all expert testimony provided for under Federal Rule of Evidence 702 was admissible so long as it was approved under the

³⁰ Bernstein, Seabury, & Williams, *supra* note 25, at 165-66.

³¹ Bernstein, Seabury, & Williams, *supra* note 25.

³² Bernstein, Seabury, & Williams, *supra* note 25, at 168.

³³ *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 137 (1999).

³⁴ *Id.*

³⁵ Bernstein, Seabury, & Williams, *supra* note 25, at 166.

³⁶ Bernstein, Seabury, & Williams, *supra* note 25, at 166.

³⁷ *Kumho Tire Co.*, 526 U.S. at 137-38.

³⁸ *Id.*; *see also Daubert*, 509 U.S. at 579.

³⁹ *Kumho Tire Co.*, 526 U.S. at 137-38; *see also Daubert*, 509 U.S. at 579.

⁴⁰ *Kumho Tire Co.*, 526 U.S. at 137-38.

⁴¹ Bernstein, Seabury, & Williams, *supra* note 255, at 167.

“gatekeeper” analysis that was established in *Daubert*.⁴² This allowed for the admissibility of expert testimony to be expanded outside of the field of science to all specialized or technical fields. It also confirmed the factors established in *Daubert* that must be considered before expert testimony is admitted by the judge.⁴³

B. When Is Testimony Relevant and Reliable

A closer look is necessary in order to develop a full understanding of the relevant and reliable standard established in *Daubert*. The case explains that both of these factors must be present in order for the testimony to be admitted into court, so both should be looked at separately.⁴⁴ The first factor is relevance. The Court explained that, in order for the evidence to be considered relevant, it “must relate to an issue in the case and assist the trier of fact in understanding evidence of a fact.”⁴⁵ The pertinent question is, “Does the expert testimony seek to address the precise question of interest to the trier of fact?”⁴⁶ It is important that the information is relevant to the case or there is a possibility that the jury can be misled about what actually occurred in the case. This confusion may lead to an incorrect decision and injustice to one of the parties in the case.⁴⁷ It will also waste the court’s time, which should be avoided whenever possible.⁴⁸ But, in the end, the judge has a great deal of discretion as to whether or not testimony should be considered relevant and his or her decision will likely be honored.⁴⁹

Once relevance has been determined, the court must next analyze if the testimony is also reliable. Questions that should be answered to gauge the reliability of testimony are: can it be tested; is the theory or technique subject to peer review or publication; is there a known error rate; and is this a generally accepted theory or technique?⁵⁰ It is important to realize that it is not the substance of the expert’s conclusions that are examined to determine reliability, but the expert’s reasoning or methodology in coming up with their conclusions.⁵¹ The expert must show that the process that was used to come up with his or her conclusion was a reasonable and common method.⁵²

In order for testimony to be considered reliable, it must go through a

⁴² Bernstein, Seabury, & Williams, *supra* note 255, at 167.

⁴³ Bernstein, Seabury, & Williams, *supra* note 255, at 167.

⁴⁴ *Daubert*, 509 U.S. at 589.

⁴⁵ Bernstein, Seabury, & Williams, *supra* note 255, at 166.

⁴⁶ Bernstein, Seabury, & Williams, *supra* note 255, at 168.

⁴⁷ Bernstein, Seabury, & Williams, *supra* note 255, at 168.

⁴⁸ Bernstein, Seabury, & Williams, *supra* note 255, at 168.

⁴⁹ Bernstein, Seabury, & Williams, *supra* note 255, at 168.

⁵⁰ Bernstein, Seabury, & Williams, *supra* note 255, at 166.

⁵¹ Bernstein, Seabury, & Williams, *supra* note 255, at 168.

⁵² Bernstein, Seabury, & Williams, *supra* note 255, at 168.

number of tests. First, the source of the data must be legitimate and reputable.⁵³ By limiting the number of sources that can be used, the judge is given greater discretion as to what is acceptable. This can help the judge limit the amount of unqualified testimony accepted, which will save the court time and avoid confusing the trier of fact. Next, the source must be free of systematic bias.⁵⁴ If expert testimony contains systematic bias, it will likely be unreliable and would fail the *Daubert* test. The best way for experts to avoid adding bias into their valuation is for them to stick to the norms when calculating their valuation.

In bankruptcy court, experts are used in several circumstances. Experts will be used for valuation. Here, the experts give their opinion on the value of a property.⁵⁵ They will be used for feasibility. Here, the experts give their opinion on whether a plan set forth by a court can be accomplished.⁵⁶ Lastly, experts will be used to determine the solvency of transfers and whether the transfers are fraudulent.⁵⁷ Solvency measures the ability of people and business to pay their debts.⁵⁸ Experts are frequently used as witnesses for valuations,⁵⁹ which is the focus of this note.

When determining whether a source is legitimate or reputable in bankruptcy court, there are a few things to look for. It is important to look at the availability of the documents.⁶⁰ This allows the facts to be checked and verified. The history of fraud regarding the financial statements or documents used should also be checked.⁶¹ This gives the court a better idea of whether the numbers are real and can be trusted. The availability of third-party sources of financial data is also important to know.⁶² By considering the information that is available through third parties, it allows for the facts of an expert's report to be checked for accuracy. Lastly, the cost to obtain the information should be considered.⁶³ The court will be cautious when too much money is spent on a valuation. Even with these guidelines in place, it can still be difficult for a judge to determine whether or not a source is reliable. For example, some courts have stated that when an expert relies solely on his or her client's data, it would not be considered reliable.⁶⁴ But

⁵³ Bernstein, Seabury, & Williams, *supra* note 255, at 168-69.

⁵⁴ Bernstein, Seabury, & Williams, *supra* note 255, at 168-69.

⁵⁵ Harris & Baker, *supra* note 5.

⁵⁶ Harris & Baker, *supra* note 5.

⁵⁷ Harris & Baker, *supra* note 5.

⁵⁸ Harris & Baker, *supra* note 5.

⁵⁹ Harris & Baker, *supra* note 5.

⁶⁰ Bernstein, Seabury, & Williams, *supra* note 255, at 169-70.

⁶¹ Bernstein, Seabury, & Williams, *supra* note 255.

⁶² Bernstein, Seabury, & Williams, *supra* note 255.

⁶³ Bernstein, Seabury, & Williams, *supra* note 255, at 170.

⁶⁴ Bernstein, Seabury, & Williams, *supra* note 25, at 169.

still other courts have found that experts who rely solely on client data would be considered reliable.⁶⁵

Additionally, the judge must make sure that there is an absence of systematic bias from the expert testimony before it is admitted.⁶⁶ If a judge finds that an expert's testimony is biased, it should be excluded.⁶⁷ When considering systematic bias, there are two areas in particular that the judge should watch out for to prevent an unfair hearing: (1) whether the expert deviated from standard practices, and (2) whether the expert is being paid for his testimony on a contingent basis.⁶⁸

If an expert deviates from the norm, the testimony will likely be declined unless there is a legitimate reason warranting the abnormal decision.⁶⁹ *Lids Corp. v. Marathon Inv. Partners, L.P.*, demonstrates this principle.⁷⁰ In *Lids Corp.*, the defendant's expert witness gave an opinion that the debtor was solvent at the relevant time by showing a valuation of the company. The valuation used the adjusted balance sheet approach for its calculations.⁷¹ After the court took a closer look at the expert's report, it decided that the expert's opinion on fair valuation was not reliable and should be rejected.⁷²

The first reason was that the expert's analysis used the "adjusted balance sheet method" and adopted the "values" in the debtor's financial statement.⁷³ These values were prepared using the GAAP principles and practices, which usually results in the court declining the expert's analysis.⁷⁴ Usually when this method is selected, it gives unreliable and irrelevant values as to solvency, because the balance sheets used have not been "marked to market."⁷⁵ When the balance sheets have not been "marked to market," experts will exclude certain intangible assets or unrecorded liabilities from their valuation in the calculation. This excludes many important assets, such as goodwill, which has significant value.⁷⁶ Financial health is inaccurately displayed when this method is used—which is why the courts decline to admit the testimony.⁷⁷

⁶⁵ Bernstein, Seabury, & Williams, *supra* note 25, at 169.

⁶⁶ Bernstein, Seabury, & Williams, *supra* note 25, at 170.

⁶⁷ Bernstein, Seabury, & Williams, *supra* note 25.

⁶⁸ Bernstein, Seabury, & Williams, *supra* note 25, at 170.

⁶⁹ Bernstein, Seabury, & Williams, *supra* note 25, at 170-71.

⁷⁰ Bernstein, Seabury, & Williams, *supra* note 25, at 201.

⁷¹ Bernstein, Seabury, & Williams, *supra* note 25, at 201-02.

⁷² Bernstein, Seabury, & Williams, *supra* note 25, at 201-02.

⁷³ Bernstein, Seabury, & Williams, *supra* note 25, at 200-01.

⁷⁴ Bernstein, Seabury, & Williams, *supra* note 25, at 200.

⁷⁵ Bernstein, Seabury, & Williams, *supra* note 25, at 201.

⁷⁶ Bernstein, Seabury, & Williams, *supra* note 25, at 201-02.

⁷⁷ Bernstein, Seabury, & Williams, *supra* note 25, at 202.

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The defendant's expert in *Lids* also failed to make adjustments for fair valuation of tangible assets, and made some unexplained minor adjustments to the intangible goodwill in his valuation.⁷⁸ Because the defendant's expert could not give a convincing reason for his differentiation from normal practices, his unusual form of testimony was denied.⁷⁹ In the end, the judges are given a great deal of discretion for reliability, but they must be careful to avoid allowing biased testimony into evidence.

In determining whether an expert witness's testimony is reliable in bankruptcy court, the method of payment for the expert must also be considered. Courts tend to reject expert testimony from experts paid on a contingent basis.⁸⁰ Due to the nature of the evidence in bankruptcy court, the court is very hesitant to accept expert testimony when the expert will only get paid if his or her side wins the case.⁸¹ The fear is that experts will skew the results of their valuations to an extreme level if they are paid on a contingent basis. If experts are paid regardless of the outcome of the case, the court will view the expert's testimony as less likely to be biased, and find that the expert is more likely to be honest with the court. By refusing to accept testimony from an expert paid on a contingent basis, the court avoids credibility problems and the expert's testimony is more likely to be trustworthy.⁸²

C. Bankruptcy Court

Bankruptcy court is established under Title 11 of the US Code.⁸³ The cases generally involve disputes for the reduction or elimination of certain debts.⁸⁴ The court can also provide a timeline for the repayment of non-dischargeable debts over time.⁸⁵ The biggest difference between standard courts and bankruptcy courts is that, for the most part, there are usually no juries in bankruptcy court.⁸⁶ The Judicial Code authorizes jury trials for bankruptcy courts, but not by default. For there to be a jury, both parties must agree on the presence of a jury and the bankruptcy court judge must be "specially designated" to conduct a jury trial.⁸⁷ It is rare that all of these

⁷⁸ Bernstein, Seabury, & Williams, *supra* note 25, at 202.

⁷⁹ Bernstein, Seabury, & Williams, *supra* note 25, at 202.

⁸⁰ Bernstein, Seabury, & Williams, *supra* note 25, at 217.

⁸¹ Bernstein, Seabury, & Williams, *supra* note 25, at 217.

⁸² Bernstein, Seabury, & Williams, *supra* note 25, at 217.

⁸³ 11 U.S.C. § 105 (1978).

⁸⁴ *Bankruptcy*, LEGAL INFO. INST. (Nov. 8, 2017), <https://www.law.cornell.edu/wex/bankruptcy>.

⁸⁵ *Id.*

⁸⁶ See Harris & Baker, *supra* note 5.

⁸⁷ Leif M. Clark, *Jury Trials and Bankruptcy Getting the Procedures Right*, AM. BANKRUPTCY INST. (Apr. 1, 2001), <http://www.abi.org/abi-journal/jury-trials-and-bankruptcy>

factors are relevant to a case, which results in a bench-less trial.⁸⁸ This leaves the judge as the sole fact finder for the case.⁸⁹

D. Reasons for Allowing the Use of Expert Testimony in Bankruptcy Court

Expert testimony can be a very useful tool for a trier of fact who is unknowledgeable in a certain area.⁹⁰ Expert testimony is employable in closing this knowledge gap and allowing the trier of fact to better understand the case.⁹¹ This is significant, because, without the expert knowledge, an unjustified and improper ruling may be given.

In bankruptcy court, the judge is usually the sole trier of fact.⁹² While expert testimony was originally instituted with the jury in mind, there is still some subject matter judges have difficulty understanding.⁹³ Perhaps the judge is new, or he or she simply has not dealt with the particular type of issue in the past. But, due to expert testimony's increased use in the field, judges are now becoming more accustomed to the submission of expert testimony and have become more efficient at "gatekeeping."⁹⁴ This is a very important role for the judges and, as long as they can efficiently sift through the expert testimony that is posed to them, it can be very beneficial to the case at hand. Fortunately, *Daubert* has provided a better understanding of the admission standard judges employ, improving their exclusion of unreliable or irrelevant expert testimony.⁹⁵

Expert testimony may provide important information to bankruptcy courts that the court would not otherwise have access to. Experts will provide valuations, which assist the judge in assessing the solvency of a defendant.⁹⁶ While both sides will frequently give expert testimony that results in two different valuations, the valuations are still useful for the judge to have an idea of the solvency of the defendant.⁹⁷ It is also very beneficial in determining the feasibility of reorganizations in Chapter 11 bankruptcies.⁹⁸ If a plan is not feasible, it should not be passed; but it can be difficult for judges to know if a plan is feasible without certain figures. These

-getting-the-procedures-right.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Harris & Baker, *supra* note 5.

⁹³ Bernstein, Seabury, & Williams, *supra* note 25, at 196.

⁹⁴ Bernstein, Seabury, & Williams, *supra* note 25, at 200-01.

⁹⁵ Bernstein, Seabury, & Williams, *supra* note 25, at 200-01.

⁹⁶ Harris & Baker, *supra* note 5.

⁹⁷ Harris & Baker, *supra* note 5.

⁹⁸ Harris & Baker, *supra* note 5.

figures are provided by experts and may be necessary for the judge to make the appropriate decision.⁹⁹

E. Reasons against Allowing the Use of Expert Testimony in Bankruptcy Court

Expert testimony is a valuable resource in many types of courts, but there are several reasons why it does not fit as naturally in bankruptcy court. While the aforementioned reasons are sufficient when they are properly executed, judges do not always treat expert testimony in the proper manner.

One reason is that bankruptcy cases move at a quicker pace than other types of cases.¹⁰⁰ Expert testimony can be a time-consuming process, from reviewing it to admitting it.¹⁰¹ Due to the court's rapid pace, parties do not have months for fact discovery, witness discovery, or depositions like in other courts.¹⁰² This can affect the quality of the expert testimony that bankruptcy courts are presented.¹⁰³ Bankruptcy courts may receive testimony that is incomplete, and this puts the judge in an uncomfortable position.¹⁰⁴ This causes a number of problems, including a limitation on the availability and quality of rebuttals to the evidence.¹⁰⁵ Judges have been quick to accept testimony, even if incomplete, which is a dangerous habit.

Expert testimony can also be a problem because it is time sensitive. Valuations frequently fluctuate and they must be updated.¹⁰⁶ If they are not updated, they can give a false representation of the data.¹⁰⁷ This can be a big problem for the judge. Since judges are not experts, they may not be able to tell whether the information is qualified and updated and, due to the pace of the court, it may be ignored.¹⁰⁸

When problems like this occur, the judges are put in difficult positions, while under unnecessary pressure.¹⁰⁹ This can result in judges choosing to combine testimony.¹¹⁰ Judges will then accept both testimonies and use parts of both to get a single report.¹¹¹ The combination that results may be something that neither expert would have recommended, but both are now

⁹⁹ Harris & Baker, *supra* note 5.

¹⁰⁰ Harris & Baker, *supra* note 5.

¹⁰¹ Harris & Baker, *supra* note 5.

¹⁰² Harris & Baker, *supra* note 5.

¹⁰³ Harris & Baker, *supra* note 5.

¹⁰⁴ Bernstein, Seabury, & Williams, *supra* note 25 at 218, 242.

¹⁰⁵ Harris & Baker, *supra* note 5.

¹⁰⁶ Harris & Baker, *supra* note 5.

¹⁰⁷ Harris & Baker, *supra* note 5.

¹⁰⁸ Harris & Baker, *supra* note 5.

¹⁰⁹ Bernstein, Seabury, & Williams, *supra* note 25.

¹¹⁰ Bernstein, Seabury, & Williams, *supra* note 25.

¹¹¹ Bernstein, Seabury, & Williams, *supra* note 25.

forced to use.¹¹² This can be confusing and may not represent the solvency of the petitioner in an accurate way for either side.

III. CURBING THE JUDICIAL ABUSES OF EXPERT TESTIMONY

A. *Admitted Evidence May Not Be Relevant and Reliable*

Each year bankruptcy courts deal with hundreds of billions of dollars in losses between different classes and creditors.¹¹³ With such a significant amount of money at stake, it is crucial that judges correctly determine whether or not the defendant is solvent, and also ensure that they are not misled by incorrect expert testimony. It is important that the testimony admitted actually contain “predictable, fair, and consistent” results.¹¹⁴ In addition, in order for an expert to be qualified to present their testimony, it must be found that the “testimony assists the trier of fact, is relevant and is reliable.”¹¹⁵ These goals are not always achievable in bankruptcy court due to the expert testimony that is presented in bankruptcy cases.

Expert testimony in bankruptcy cases can be easily manipulated and this may undermine the integrity of the testimony.¹¹⁶ While judges are very familiar with the subject matter, they are not experts themselves. The judges have not created the data that is being shown and they likely cannot create the data. The experts creating it are highly skilled and can manipulate the testimony to fit the outcome they desire. Defense experts are more likely to have their numbers come out to a high valuation, while plaintiffs’ experts are more likely to come out with a low valuation.¹¹⁷ The problem occurs when these two expert reports are submitted to the court with significantly different valuations, but both list legitimate reasons as support for their estimates. It impedes the judge’s ability to render a proper judgment.

Experts in bankruptcy court have the goal of proving that the plaintiff is either solvent or insolvent.¹¹⁸ One popular method of valuation is the discounted cash flow method (“DCF”). This method has three different components: (1) projections of future cash flows of the debtor; (2) a discount rate that is used to convert future cash flows into their present value; and (3) a terminal value used to limit the necessary projection period.¹¹⁹ Experts

¹¹² Bernstein, Seabury, & Williams, *supra* note 25.

¹¹³ Bernstein, Seabury, & Williams, *supra* note 25, at 57.

¹¹⁴ Bernstein, Seabury, & Williams, *supra* note 25, at 57.

¹¹⁵ Bernstein, Seabury, & Williams, *supra* note 25, at 164.

¹¹⁶ Bernstein, Seabury, & Williams, *supra* note 25, at 196.

¹¹⁷ Michael Simkovic & Benjamin S. Kaminetzky, *Leveraged Buyout Bankruptcies, the Problem of Hindsight Bias, and the Credit Default Swap Solution*, 118 COLUM. BUS. L. REV. 118, 148 (2011).

¹¹⁸ *Id.* at 122.

¹¹⁹ *Id.* at 144.

have the ability to manipulate their DCF analysis to give themselves a more favorable outcome by “constructing their own post hoc . . . projections or by selectively emphasizing certain projections that were created at the time of the . . . transaction.”¹²⁰ Experts can also manipulate the terminal value by choosing a specific growth rate.¹²¹ There are several different growth rates to choose from, all of which can result in various different valuations. Experts can choose from the historical growth rate of the company, the industry, or the growth rate of a larger entity like the country or even the world.¹²² The credibility of the cash-flow projection and growth rates depends on foreseeability, which is determined on a case-by-case basis.¹²³

Experts also manipulate the discount rate by selecting the method of calculation that is most beneficial to their client. While plaintiffs’ experts will select a high discount rate and low projections, defense experts will select a low discount rate and high projections—both can be considered relevant and reliable.¹²⁴ This can be a burden on the judges.¹²⁵ With all of these ways to make a difference between reports, it is unsurprising that valuations that are different in their results can both be considered correct.

Another issue is the time sensitivity of the expert testimony. Since expert testimony needs to be updated frequently, the judge may be considering evidence that is no longer qualified.¹²⁶ This puts the judge in a difficult position, especially if the judge combines testimony that uses outdated numbers. When judges are forced to weigh options and come up with their own numbers, it makes their decision more difficult.

In *In re Heilig-Meyers Co.*, relevance and reliability were an issue in the admission of expert testimony.¹²⁷ In that case, the petitioner was a manufacturer with over 1,200 store locations.¹²⁸ It needed a debt restructuring, which it received from its bank group.¹²⁹ The debtors soon petitioned for relief.¹³⁰ Due to the broad discretion in the allowance of expert testimony, the judge decided that two expert reports, rather than different ones, were both admissible.¹³¹ The first report stated that the debtor had a

¹²⁰ *Id.* at 144-45.

¹²¹ *Id.* at 145.

¹²² *Id.* at 148.

¹²³ *Id.*

¹²⁴ Simkovic & Kaminetzky, *supra* note 117.

¹²⁵ Simkovic & Kaminetzky, *supra* note 117, at 206.

¹²⁶ Harris & Baker, *supra* note 5.

¹²⁷ *In re Heilig-Meyers Co.*, 319 B.R. 447, 463 (Bankr. E.D. Va. 2004), *aff’d*, 328 B.R. 471 (E.D. Va. 2005); Bernstein, Seabury, & Williams, *supra* note 25.

¹²⁸ *In re Heilig-Meyers Co.*, 319 B.R. at 452.

¹²⁹ *Id.*

¹³⁰ Bernstein, Seabury, & Williams, *supra* note 25, at 208.

¹³¹ Bernstein, Seabury, & Williams, *supra* note 25, at 208-09.

net worth of \$218 million at “fair valuation,” while the second report asserted that a fair valuation was half of the assets, but roughly the same amount of liabilities.¹³² The difference between these two valuations was about \$500 million. Both of these valuations were found to be relevant and reliable even though they were so far apart.¹³³ Without a more exacting standard in place, the acceptance of very different testimony will continue to be a problem.

While expert testimony is important for these judges to gain familiarity with the case, significantly different testimony can harm the predictability and consistency of the results. For example, in one particular instance it was found that loss of revenue was foreseeable when it resulted from the loss of a key customer, but it was not seen as foreseeable when a company lost a key employee.¹³⁴ In another set of cases, the judges found that low-cost competition was foreseeable in the automotive industry, but not in the mobile communications industry.¹³⁵ A different set of courts found that financial crises are not foreseeable when they are the result of defaults of poor former communist countries, but financial crises are foreseeable when they are due to defaults of subprime borrowers.¹³⁶ When judges are given this much discretion, it goes against the consistency and predictability that should follow expert testimony.

B. Judges Have Expanded Their Role as Gatekeepers Too Far

It was decided in *Daubert* that the judge’s role in expert testimony was to be a gatekeeper.¹³⁷ As gatekeeper, the judge’s job is to make sure that the expert testimony that is presented to them is both reliable and relevant.¹³⁸ This role of gatekeeper should be limited to accepting or declining expert testimony.¹³⁹ In today’s bankruptcy courts, the judges have taken on a more expansive role. Instead of just accepting or declining testimony, they now weigh multiple testimonies from different experts and come up with new numbers by combining the varying testimonies.¹⁴⁰ There are several problems with this method. If the judge is weighing multiple valuations that can be significantly different and creating their own numbers, can this really be reliable? Part of the reliability standard is the way the numbers are prepared.¹⁴¹ It is not just the end result, but the process and the different

¹³² Bernstein, Seabury, & Williams, *supra* note 25, at 209.

¹³³ Bernstein, Seabury, & Williams, *supra* note 25, at 209.

¹³⁴ See Simkovic & Kaminetzky, *supra* note 117, at 146 & nn.77-78.

¹³⁵ Simkovic & Kaminetzky, *supra* note 117, at 145-46.

¹³⁶ Simkovic & Kaminetzky, *supra* note 117, at 146.

¹³⁷ *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 579 (1993).

¹³⁸ Bernstein, Seabury, & Williams, *supra* note 25, at 167.

¹³⁹ *Daubert*, 509 U.S. at 597.

¹⁴⁰ Cf. Simkovic & Kaminetzky, *supra* note 117, at 149-50.

¹⁴¹ See Bernstein, Seabury, & Williams, *supra* note 25, at 200.

numbers that go into the calculation.¹⁴² By “split[ing] the difference” between two different valuations, it ruins the integrity of the process and results in unreliable numbers.¹⁴³ As a result of the judge going beyond their capacity as a gatekeeper, the numbers used in the trial are numbers that neither of the experts would have presented as testimony.

As mentioned, the reports can be manipulated very easily, and when judges weigh multiple expert reports, it encourages the experts to manipulate it further.¹⁴⁴ This has the potential to add in systematic bias, which should be avoided in expert testimony.¹⁴⁵ Eventually, it goes beyond providing the correct testimony and turns into mind games.¹⁴⁶ Experts have the ability to make their valuation include different possibilities, and it turns into picking one just to please the judge.¹⁴⁷ Certain judges will dislike extremes and may be less likely to accept or may weigh an extreme valuation more negatively than a more conservative one.¹⁴⁸ Other judges may feel the opposite and may weigh valuations equally. This would result in the expert with conservative numbers being disadvantaged.¹⁴⁹ Merging numbers is already an issue, but when it gets to this level, it is hard to say it is a reliable representation.¹⁵⁰

This also goes against consistency of results.¹⁵¹ When the judges are creating new numbers every time, how can the hearings be consistent? If every judge uses his or her own method of combining numbers, it would be very difficult to get a standard across all bankruptcy courts.¹⁵²

C. Expert Testimony Is Not Needed by Many Judges!

Expert testimony can be a great resource for juries to enable them to get a better understanding of the material they are dealing with. The purpose of expert testimony is to educate jury members on matters that they are likely not educated in.¹⁵³ Unlike other courts, bankruptcy courts usually do not have a jury, which leaves the judge as the sole trier of fact.¹⁵⁴ It should be considered that the judges hearing bankruptcy cases are always the same and

¹⁴² See Simkovic & Kaminetzky, *supra* note 117, at 150.

¹⁴³ Simkovic & Kaminetzky, *supra* note 117, at 150.

¹⁴⁴ See Simkovic & Kaminetzky, *supra* note 117, at 149-50.

¹⁴⁵ Bernstein, Seabury, & Williams, *supra* note 25, at 198-99.

¹⁴⁶ See Simkovic & Kaminetzky, *supra* note 117, at 149-50.

¹⁴⁷ See Simkovic & Kaminetzky, *supra* note 117, at 149-50.

¹⁴⁸ See Simkovic & Kaminetzky, *supra* note 117, at 149-50.

¹⁴⁹ See Simkovic & Kaminetzky, *supra* note 117, at 150.

¹⁵⁰ Cf. Simkovic & Kaminetzky, *supra* note 117, at 149-50.

¹⁵¹ Simkovic & Kaminetzky, *supra* note 117, at 125.

¹⁵² See Bernstein, Seabury, & Williams, *supra* note 25, at 198.

¹⁵³ State v. Harvey, 121 N.J. 407, 492-93 (N.J. 1990) (finding that the New Jersey court specifies that the subject matter must be beyond the understanding of the average juror).

¹⁵⁴ Clark, *supra* note 87; Harris & Baker, *supra* note 5.

that they see similar cases every day, because only bankruptcy judges can hear these types of cases.¹⁵⁵ Is it really necessary for judges to be provided with testimony when they are dealing with the matter regularly? Juries are provided with the information because they have no grounds to understand the material, but when the judges are continually dealing with these similar cases, it does not seem necessary.¹⁵⁶ But since the only person who is the trier of fact is familiar with the area of law, there should be less of a reason that this testimony needs to be admitted.¹⁵⁷ It is true that judges do not have all the resources and expertise available to experts, but veteran judges will have experienced enough similar cases to make a fair decision without being confused by contradictory expert testimony.¹⁵⁸ Expert testimony puts more of a burden on the bankruptcy courts than the benefit it provides them.

IV. CONCLUSION

Expert testimony can be a useful tool for bankruptcy court judges, but it has been overused. If judges truly need the testimony to guide them in an unfamiliar filed, they should be allowed to admit it. But judges need to limit the use and acceptance of testimony to instances where they are actually unfamiliar with the area in question and need background information. It has been suggested that the courts act stricter when admitting expert testimony and avoid combining separate expert reports.¹⁵⁹ For example, the court should not accept any analysis that is incomplete or that contains any bias.¹⁶⁰ Judges are currently overreaching by infusing facts from multiple reports, adjusting the reports without expert testimony to support the adjustments, and putting reports together with different weights.¹⁶¹ Judges must be constrained to acting within their duty of gatekeeping to prevent them from taking on the role of experts themselves.

Alternatively, the court can depart from the post-hoc expert opinion method and switch to a system that avoids the problems of hindsight bias and subjective financial analysis.¹⁶² For example, the court can adopt market measures that are objectively verifiable and contemporaneous.¹⁶³ This method has been tested in both Delaware and New York and has proven to be an interesting alternative.¹⁶⁴

¹⁵⁵ See Clark, *supra* note 87.

¹⁵⁶ See Clark, *supra* note 87.

¹⁵⁷ See Clark, *supra* note 87.

¹⁵⁸ See Simkovic & Kaminetzky, *supra* note 117, at 132.

¹⁵⁹ See Bernstein, Seabury, & Williams, *supra* note 25, at 198-99.

¹⁶⁰ See Simkovic & Kaminetzky, *supra* note 117, at 157.

¹⁶¹ See Bernstein, Seabury, & Williams, *supra* note 25, at 264-65.

¹⁶² Simkovic & Kaminetzky, *supra* note 117, at 206.

¹⁶³ Simkovic & Kaminetzky, *supra* note 117, at 206.

¹⁶⁴ Simkovic & Kaminetzky, *supra* note 117, at 157-58.

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These states used market prices instead of expert testimony.¹⁶⁵ It was found that this method would reduce the importance of expert opinions and prevent hindsight bias and burdens on the judges.¹⁶⁶ By reducing the importance of expert opinions, they would be submitted less frequently to the court and would most likely be used only when necessary. This would make it easier on the judges and would reduce the risk expert testimony will be combined. With the testimony having less bias, it would be more reliable and the judges could give a more accurate ruling. Additionally, it is a far more uniform method that can be used across all bankruptcy courts. This was examined in *VFB LLC v. Campbell Soup Co.*¹⁶⁷ This case showed that the alternative method made it more difficult to manipulate the numbers.¹⁶⁸ This would be greatly beneficial to the courts. Manipulation of numbers is currently a huge problem and should be limited by any means possible. While this method would not entirely eliminate expert opinions, experts would be used more as a supplement.¹⁶⁹ While expert testimony should be used to give insight, it should be limited to prevent unfair outcomes.

¹⁶⁵ Simkovic & Kaminetzky, *supra* note 117, at 157-58.

¹⁶⁶ Simkovic & Kaminetzky, *supra* note 117, at 206.

¹⁶⁷ *VFB LLC v. Campbell Soup Co.*, 482 F.3d 624, 629-633 (3d Cir. 2007).

¹⁶⁸ *See id.*

¹⁶⁹ Simkovic & Kaminetzky, *supra* note 117, at 158.