

94 Am. Bankr. L.J. 155

American Bankruptcy Law Journal

Winter, 2020

Article

Geoffrey S. Stewart^{al} Victoria Dorfman^{aa1} Gabrielle E. Pritsker^{aaa1}

Copyright © 2020 by the National Conference of Bankruptcy Judges; Geoffrey S. Stewart, Victoria Dorfman, Gabrielle E. Pritsker

***155 VALUING LITIGATION IN BANKRUPTCY: THE USE OF EXPERT WITNESSES TO TESTIFY ABOUT THE MERITS AND VALUE OF LITIGATION CLAIMS**

Introduction	156
I. The Importance of Legal Claims	158
II. Expert Testimony About the Merits of Lawsuits	164
A. Actions for Legal Malpractice	167
B. Insurance Claims Litigation	170
C. Expert Testimony About Legal Context	171
1. Experts in Complex Cases	172
2. Industry Standards/Corporate Governance	173
D. Valuation of Assets Where Value is Affected by Regulatory Issues	174
E. Asbestos Bankruptcy Litigation	176
III. Expert Testimony About the Value of Litigation	177
IV. The <i>Daubert</i> Standard	181
A. Admissibility of Expert Testimony Under <i>Daubert</i> and Rule 702	183
B. Litigation Valuation Experts Under <i>Daubert</i> and Rule 702	185
1. Qualified to Give Expert Testimony	185
2. Specialized Knowledge and Usefulness to the Judge	185
3. Methodology is the Product of Reliable Principles and Methods	186
Conclusion	188

***156 ABSTRACT**

Legal claims often are valuable assets in a bankrupt entity's estate. Yet, despite the extensive use of expert witnesses to value other types of assets, expert testimony is seldom offered on the value of a debtor's litigable claims. Instead, valuation of legal claims typically is handled by the bankruptcy judge largely on the basis of her or his subjective experience. This approach has significant limitations, particularly for complex non-bankruptcy related claims. There is no inherent reason why valuation of a debtor's legal claims would not benefit from expert analysis and testimony. In other areas, the use of expert testimony in the valuation of lawsuits has been accepted for many years, and the growing recognition and success of the litigation finance industry indicates that the market itself has accepted certain methods of determining the value of lawsuits. This article will demonstrate the viability and benefits of using an expert to value litigation claims consistent with analogous types of expert testimony that have met the test set forth in  [Daubert v. Merrell Dow Pharmaceuticals, Inc.](#), 509 U.S. 579 (1993).

INTRODUCTION

The spate of large corporate bankruptcies that reached some of their highest levels in 2017 and 2018 highlighted the importance of legal claims as assets of the bankruptcy estate and underscored the difficulty of accurately evaluating their worth. Many of these filings were made by companies taken private in leveraged buy-out (“LBO”) transactions and subsequently controlled

by the firms that acted as the LBO sponsors. As a company struggled under its debt load, its sponsors may have arranged for the transfer of its assets to bankruptcy-remote entities, the sale of its assets to related parties, or the transfer of its assets or debt among members of the company's corporate structure. If the company later filed for bankruptcy, the debtor or another representative of the bankruptcy estate might bring lawsuits against sponsors, transferees, or corporate directors arguing that the eleventh-hour remedial measures were fraudulent transfers or constituted breaches of fiduciary duty by the company's board. The U.S. Supreme Court's recent decision in *Merit Management Group, LP v. FTI Consulting, Inc.* made potential fraudulent transfer claims even more potent by limiting the scope of a common safe harbor provision in the Bankruptcy Code.¹

Valuation of the bankruptcy estate's assets, of course, is at the heart of most bankruptcy cases. For decades, there have been accepted methods to determine the value of such tangible assets as real property, fixtures, plant, *157 and equipment. Similarly, bankruptcy courts have been able to determine the worth of intangible assets like leasehold interests, patent rights, trademarks, and other intellectual property by relying on experts in the field. However, there has been little progress when it comes to valuing what a lawsuit is worth. Instead, the approach has been ad hoc. The debtor or another party in interest customarily submits a description of the legal questions and factual issues in the lawsuit, estimates of the cost of prosecuting the case, and a prediction of the collectability of a judgment, and it is left to the court, without the aid of expert testimony, to determine the lawsuit's value. The reasoning underlying this method is that, since it is the job of judges to decide lawsuits in the first place, the judge in a bankruptcy case can take this limited record and reach a fair estimation of a lawsuit's worth. There are several flaws to this approach. First, important inputs into the valuation process may be overlooked, such as the relative experience and resources of counsel in the underlying case, the credibility of witnesses, and the pace at which the case will move toward trial. Second, there are types of information not readily available to a bankruptcy judge in weighing the issues, such as the results of jury research (including focus groups and mock trials) or the reports of private services that collect and analyze trends in damage awards in different jurisdictions. Third, the cost of litigation - including expert witness fees, the expense of electronic discovery, the expense of trial graphics or animations, the cost of trial space for out-of-town cases, and court reporter charges - is notoriously difficult to estimate, even if a bankruptcy judge has a good sense of the amount of legal fees alone. The possibility of a post-trial settlement, the likelihood that a judgment will be collectible, and the length of the appellate processes add more unknowns to the mix. Finally, the existing approach puts the judge in an odd position. Instead of serving as a dispassionate recipient of the evidence, a judge must become an investigator to make her adjudication.

It is tempting to conclude that fairly appraising the value of a piece of litigation is not susceptible to an accurate determination and that the existing manner of handling things is the best anyone can expect. But past practice in other areas and recent developments in the funding of litigation belie that conclusion. There are some types of litigation where courts have long received expert testimony as probative of the merits of an underlying lawsuit. Moreover, it is increasingly common for law firms to agree upon - or even seek - alternative fee arrangements in big-ticket commercial cases. In addition, there is now a growing and vibrant market for financing lawsuits, where a financing source agrees to fund litigation in return for a share of the proceeds of the case (or, in some cases, for losses avoided).

According to published reports, these alternative funding arrangements *158 have been successful.² The economic foundation of alternative funding is the development of the expertise necessary to closely examine the many variables that underpin the merits of a lawsuit, reach a conclusion about the likely outcome, and put a price on it. While each firm may consider its particular way of doing business a trade secret, it is clear that methodologies have emerged for assessing the worth of a lawsuit with reasonable accuracy and that these methodologies can be usefully applied outside of the field of litigation finance itself.

It is not surprising, given how recently the field of litigation finance has emerged, that there appear to be no reported bankruptcy cases directly addressing the use of an expert in evaluating a lawsuit. However, there does not seem to be any principled reason why this would not be a proper use of expert testimony. This article examines the feasibility of using experts to evaluate and quantify litigation claims in bankruptcy proceedings and the issues that will arise with respect to the admissibility of their testimony. From this, we conclude that the use of these experts will allow for a more efficient and accurate assessment of the litigation claims involved in complex bankruptcy cases - a task that is currently on the already heavily-burdened shoulders of bankruptcy judges.

This article is divided into four sections. Part I discusses the role of legal claims as assets in chapter 11 bankruptcy cases. Part II examines five situations where courts have accepted expert testimony on the evaluation and quantification of legal claims. Part III explains the approach experts use to determine the value of claims and litigation. Part IV sets forth the liberal standard governing all experts under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*³ and [Federal Rule of Evidence 702](#), examines the

commonplace use of valuation experts to estimate the value of tangible assets, and explores how an expert valuing legal claims would fit into the *Daubert* and Rule 702 framework.

I. THE IMPORTANCE OF LEGAL CLAIMS

The need to accurately value legal claims in bankruptcy cases is important for several reasons. At the threshold, the value of the legal claims owned by the debtor is a fundamental part of the bankruptcy estate's value and must *159 be considered in administering the estate. Similarly, especially if there are substantial legal claims *against* the debtor,⁴ a chapter 11 plan of reorganization cannot be confirmed unless the bankruptcy court is satisfied that any ongoing civil litigation involving the debtor will not result in liquidation or “the need for further financial reorganization, of the debtor.”⁵ In certain cases, the reorganization plan will provide for creation of a litigation trust to pursue potential claims held by the estate, the proceeds of which will be distributed to different classes of creditors.⁶ Valuation of such claims is a key part of the reorganization process. Obviously, forecasting the likely amount of this distribution is the basis for determining what range of recovery is being promised to those creditors and whether they should support or oppose the reorganization plan.

Valuation of litigation claims also comes into play when lawsuits are settled. Most claims in bankruptcy - including legal claims - are resolved by settlement. In that context, Federal Rule of Bankruptcy Procedure 9019(a) requires the bankruptcy court to hold a hearing to determine whether a compromise or settlement of claims is “fair and equitable,”⁷ as it “necessarily affects the rights of other creditors by reducing the assets of the estate available to satisfy other creditors' claims.”⁸ This requires the bankruptcy court to “form an educated estimate of the complexity, expense, and likely duration of such litigation, the possible difficulties of collecting on any judgment *160 which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise.”⁹ Courts, in turn, have carried out these instructions by considering a variety of factors, including “(a) the probability of success in the litigation; (b) the difficulties, if any, to be encountered in the matter of collection; (c) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; [and] (d) the paramount interest of the creditors and a proper deference to their reasonable views in the premises.”¹⁰

Yet another instance where a bankruptcy judge is required to value legal claims is when there is a need to estimate unliquidated claims against the debtor.¹¹ The mechanism of estimating claims against the estate is provided by Bankruptcy Code § 502(c), which directs the court, for purposes of the allowance of a claim, to estimate the amount of “any contingent or unliquidated claim, the fixing or liquidation of which ... would unduly delay the administration of the case.”¹²

Neither the Bankruptcy Code nor the Federal Rules of Bankruptcy Procedure provide guidelines for claims estimation, instead giving the bankruptcy judge broad discretion to adopt “whatever method is best suited” to the case.¹³ The only limitation on the judge's discretion is that the estimate must be formed in light of the legal rules governing that type of claim.¹⁴ A judge's discretion manifests itself in multiple ways. For example, some judges adopt an “all or nothing” approach, awarding the full-value of the claim if the claimant can meet the mere preponderance of the evidence standard, and awarding nothing if he cannot.¹⁵ Other courts use a “probability” method that “estimates the probability a claim will succeed and appl[ies] the probability to the damages.”¹⁶ This approach might focus its analysis on the probability that *161 the claimant prevails on questions of fact,¹⁷ questions of law,¹⁸ or a blend of both.¹⁹ In any case, the bankruptcy judge is the sole decider, and may apply the chosen methodology however she sees fit, tailoring her approach to fit the circumstances presented by the case at hand.

Regardless of the context in which the need for valuation of a lawsuit arises, the nature of the bankruptcy judge's task is similar. She needs to analyze each of the claims and defenses in the case, determine the applicable law, look at the evidence adduced so far, make an educated guess about the probable outcome at trial, calculate damages, subtract the cost of prosecuting the case, estimate how long the litigation process will take, and decide how much of the judgment will be collectible in the end. In this, bankruptcy courts “have employed a wide variety of methods to estimate claims, including summary trial, a full-blown evidentiary hearing, and a review of pleadings and briefs followed by oral argument of counsel.”²⁰ Whatever technique the court follows, all of these approaches end up at the same place: the court truncates the extended litigation process into an abbreviated one and, applying its inherent expertise, decides on a limited record how a full-blown trial on the merits would come out. It is a daunting process.

*In re Eagle Bus Manufacturing, Inc.*²¹ illustrates this process; there, the bankruptcy court estimated the value of a National Labor Relations Board (“NLRB”) back-pay claim brought against a chapter 11 debtor, Greyhound Lines Inc. The claim arose after Greyhound and the Amalgamated Council of Greyhound Local Unions, which represented a vast majority of Greyhound's employees, were unable to come to an agreement on a successor contract to their collective bargaining agreement.²² Upon expiration of the agreement, the Union called a strike and Greyhound “unilaterally implemented certain terms of its final pre-contract expiration.”²³ The NLRB alleged the unilateral implementation was “premature” and filed a complaint against Greyhound *162 “asserting that the Union's strike was caused by this unfair labor practice.”²⁴

To estimate the value of the unliquidated claim pursuant to 502(c), the bankruptcy court conducted a two-day summary trial, though it noted “that a full trial of the NLRB complaint could take approximately 200 days.”²⁵ During the brief trial, the court considered the NLRB's procedures, the charges against Greyhound, and the testimony of the NLRB's economic expert, who opined that Greyhound's back-pay liability, *if the strike were found to be an unfair labor practice*, was \$125,000,000.²⁶ It was thus up to the bankruptcy court to determine the likelihood of success of the NLRB's claim that the strike was caused by an unfair labor practice. “The Bankruptcy Court then discounted this amount [\$125,000,000] based on the assessment of three factors: (i) the NLRB's ‘likelihood of success’; (ii) the ‘likelihood of settlement’ of the NLRB's claim; and (iii) the ‘Debtor's ability to pay such a judgment.’”²⁷ The court discounted the NLRB's claim by 75%, estimating its value at \$31,250,000.²⁸ The court did not explain which factors weighed more heavily in its decision.

Missing from this litany of methods, however, is one that a court ordinarily would resort to in valuing an asset of the estate, that is, receiving testimony about that value from a witness qualified as an expert in the field of valuing legal claims. This, in part, is due to the understanding that the judge, herself, could be considered an expert in this context; the process of holding a summary trial or hearing or listening to the arguments of counsel is the means by which the judge will form her expert opinion. Yet this occludes a series of important considerations.

At the outset, it is important to note that the process the bankruptcy judge engages in when she assesses the fairness of a settlement or estimates a claim is not truly equivalent to adjudication of the underlying lawsuit. A fairness hearing or estimation proceeding often will occur before dispositive motions have been decided, discovery materials exchanged, depositions taken, expert reports submitted, or theories of a case have been adjusted to conform to the evidence. Nor will the abbreviated procedures available to a bankruptcy judge in these circumstances permit a full airing of the evidence. Instead, what the bankruptcy judge is called upon to do is to predict what would happen if the lawsuit ran its course. Such predictions, at bottom, are the essence of rendering an expert opinion in the first place, and it is for that reason that courts so often express their conclusions in terms of percentages *163 and probabilities or, aptly, as “estimations.”²⁹

This process is incomplete in other respects. One element of a [Rule 9019](#) hearing, for example, is a determination of “the expense, inconvenience and delay necessarily attending” the case.³⁰ Budgeting for a major litigation includes many considerations, including knowledge of the costs of electronic discovery, expert witness fees, the cost of litigation graphics and electronic trial support, rent for trial support space in out-of-town cases, or the fees of litigation consultants. Similarly, there are a host of predictive tools well known to civil litigators that are unavailable to a bankruptcy court. The court, for example, lacks the resources to engage jury consultants to advise it about likely verdicts, or to commission the focus groups and mock trials that now are standard in trial preparation. Nor is the court likely to have subscribed to the various services that make it their business to track down and compile trends in jury verdicts and damages awards. Although it is conceivable that a debtor seeking to have a settlement approved, or an objector hoping to prevent it, could provide some of this information to the court, concerns about admissions and waiver of privilege may constrain full disclosure of those facts. More fundamentally, each of these additional elements significantly complicates the court's job.

There is another troubling twist in the standard approach. The purpose of summary proceedings is to assist the court in reaching an opinion about a lawsuit's likely result. Customarily, though, the process of reaching a conclusion through the application of expertise and the derivation of an opinion is an adversary one; the judge hears experts from both sides and decides whom to credit, or which part of each analysis to rely upon. Today, though, there is no such process. The bankruptcy court reaches its own expert conclusion, without a countervailing expert to offer a competing analysis or serve as a guide against error.

Certainly, many cases, if not the great majority of them, do not involve issues so complicated or damages so great as to warrant a departure from the usual practice. However, recent experience shows that there are bankruptcy cases where much of the value of

the estate is found in the debtor's litigation claims against others.³¹ These cases are too massive to lend themselves to the summary procedures contemplated by Rule 9019 or Bankruptcy Code § 502(c). Additionally, though bankruptcy judges frequently evaluate bankruptcy-specific claims asserted against the debtor, they are not often faced with the debtor estate's own claims against other parties. Such claims are typically not bankruptcy-specific (e.g., avoidance actions) and are usually litigated in a non-bankruptcy forum. A bankruptcy judge, an expert in the law of bankruptcy, is unlikely to possess similar expertise in the area of torts, labor law, or intellectual property. Thus, bankruptcy matters with these latter types of litigation claims - outside the bankruptcy court's core experience - could most benefit from the use of expert testimony to unify and appraise the many elements that comprise a lawsuit's value. *164

The highly deferential standard of review appellate courts follow when a bankruptcy court's valuation is appealed further emphasizes the importance of having the fullest possible record before a Bankruptcy Judge. Bankruptcy court valuations under Federal Rule of Bankruptcy Procedure 9019(a) (settlements) and Bankruptcy Code § 502(c) (claims estimation) are generally reviewed for abuse of discretion.³² Precisely because the bankruptcy court's decisions are afforded such deference, it is particularly important that its decision benefit from a wide range of evidence.³³ The use of experts to evaluate and quantify litigation claims, particularly those unrelated to bankruptcy, may ensure that the Bankruptcy Judge has as much information as possible at her disposal to make an accurate valuation.

II. EXPERT TESTIMONY ABOUT THE MERITS OF LAWSUITS

To be admissible, expert testimony must meet the standards set forth by the Federal Rules of Evidence and the principles articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,³⁴ and its progeny. (The Federal Rules of Evidence are made applicable to bankruptcy cases pursuant to Federal Rule of Bankruptcy Procedure 9017.) The principal authority on admissibility of expert testimony is Evidence Rule 702. There is significant overlap between Rule 702 and *Daubert*, mainly because the Rule was amended in 2000 to incorporate the *Daubert* standard.³⁵ (*Daubert* and Rule 702 are discussed in further detail in Part IV, *infra*.) In addition to Rule 702, courts also consider Federal Rules of Evidence 403 and 704 in determining the admissibility of expert testimony.³⁶

The Federal Rules of Evidence do not prohibit courts from receiving evidence from experts whose testimony includes opinions about the law. Rather, courts have held that such experts are subject to restrictions under Federal Rules of Evidence 702, 403, and 704 because receiving certain testimony on the governing law of the case would be considered as trespassing upon the court's own role.³⁷ Federal Rule of Evidence 702 prohibits expert testimony on the law governing the case because "the meaning of governing law is not a question of fact, to be resolved by the jury after a battle of experts. It is a question of law to be resolved by the court."³⁸ Likewise, Rule 403 bars expert testimony on the governing law because it will either "be a waste of time if witnesses or counsel should duplicate the judge's statement of the law" or "will necessarily confuse the jury by providing competing interpretations of the law."³⁹ Finally, Rule 704 prohibits legal conclusions, "not because they involve an ultimate issue, but because they do not assist the trier of fact."⁴⁰ Thus, experts are not permitted to offer interpretations of "statutes, regulations, and contract terms" determinative of the outcome in *166 the matter because this is "a subject for the court, not for testimonial experts."⁴¹ Moreover, experts are prohibited from applying the governing law to the specific facts of the case.⁴²

There are a handful of reported bankruptcy cases where an expert was proffered to value litigation claims. By and large, these efforts were unsuccessful: the experts typically offered valuations of smaller claims and were largely discredited due to the expert's unreliable methodology.⁴³ But neither these fact-bound determinations nor the Federal Rules of Evidence preclude use of valuation testimony by experts in appropriate circumstances.

To be sure, it is commonly argued that the use of experts to value a lawsuit is impermissible because it usurps the role of the court itself to decide the merits of a lawsuit. However, this principle does not necessarily apply in evaluating legal claims in a bankruptcy case because the litigation being evaluated in the bankruptcy case is not the case before the court itself; in other words, the expert would be offering an opinion about the value of a lawsuit pending in another forum and, in any event, would not purport to advise the court on what the outcome should be of the bankruptcy case. Instead, the purpose of the expert testimony would be to offer an opinion about the value of an asset or the exposure to a liability that happens to be a piece of litigation. When examined closely, it is clear that, in other contexts, courts have accepted expert testimony on similar issues.

As discussed below, courts have accepted expert testimony in analogous *167 situations, including cases involving: (1) the evaluation of legal claims and quantification of damages in legal malpractice actions; (2) the evaluation of underlying claims to allocate settlement and litigation costs among insurance-covered and non-covered claims; (3) the context of complex legal or corporate issues or standards; (4) valuation of assets with regulatory considerations; and (5) asbestos bankruptcy litigation.

A. ACTIONS FOR LEGAL MALPRACTICE

Legal malpractice is an area where expert testimony about the value of a lawsuit has been commonly offered and received for years. That is because, in an action for legal malpractice, the plaintiff must prove “that ‘but for’ the attorney’s negligence, the plaintiff would have prevailed on the underlying litigation.”⁴⁴ Customarily, this element of the plaintiff’s case is proven through expert testimony. Such expert testimony evaluates the strengths and weaknesses of the underlying lawsuit for three purposes. One is to determine whether the original attorney’s handling of the case met the requisite standard of care.⁴⁵ Second, if the claim was, in fact, handled negligently, the expert may offer an opinion of what the verdict or judgment should have been in the underlying case had it been handled competently.⁴⁶ Finally, the expert can testify about the probable money damages the plaintiff would have been awarded had the underlying case been successful.⁴⁷

In *Nika v. Danz*,⁴⁸ the plaintiff was injured when he slipped on spilled ink while attempting to move an ink barrel. His original lawyer concluded the plaintiff did not have a viable claim and did not pursue it. The plaintiff later brought a lawsuit against the lawyer for malpractice. The court admitted *168 both sides’ expert testimony evaluating the plaintiff’s personal injury claim against U.S. Printing Ink to determine whether the original attorney had been negligent in failing to pursue that claim and in placing a value on that claim.⁴⁹ The plaintiff’s expert testified that the defendant “had an obligation to investigate the facts of the case, inform plaintiff whether a common law action existed, and whether he would file it or that plaintiff should hire someone else to file the action.”⁵⁰ The plaintiff’s expert testified that the plaintiff’s claim was not barred by the doctrine of contributory negligence and that, considering factors such as “cost to the client, evidence of the client’s contributory negligence, and the value of the workers’ compensation lien,” plaintiff’s damages should have been between \$300,000 and \$500,000.⁵¹ The defendant’s expert, by contrast, concluded that the plaintiff’s method in moving the ink barrel amounted to contributory negligence and, therefore, his action was barred and that any further investigation by the defendant would have been “futile.”⁵² Given the complexity of the case, the appellate court upheld the use of expert testimony presented on the plaintiff’s contributory negligence because the testimony assisted the jury in understanding the legal implications of the plaintiff’s contributory negligence in moving the ink barrel on his own.⁵³

In *Talmage v. Harris*,⁵⁴ the court admitted, over *Daubert* objections, expert testimony on the viability of the plaintiff’s underlying claim and the defendants’ negligence in failing to pursue it. The plaintiff’s underlying claim alleged bad faith by his insurer for fire losses, which the plaintiff’s original attorneys failed to pursue within the relevant statute of limitations.⁵⁵ The court admitted testimony from the plaintiff’s expert - a lawyer in private practice - that the insurer’s failure to conduct a timely and reasonable investigation and evaluation after a fire, which resulted in wrongfully delayed payments to the plaintiff, gave rise to a viable bad faith claim.⁵⁶ The court also admitted expert testimony on the defendants’ negligence in failing to pursue the underlying bad faith claim and in failing to inform the plaintiff of their intent not to file the claim.⁵⁷

Focusing solely on the issue of damages in a malpractice action, the court *169 in *Duncan v. Lord*⁵⁸ considered the testimony of two experts, who proposed likely dollar assessments for jury verdicts and settlement figures had the original personal injury claim been competently handled. The plaintiff’s age and severe injuries made it highly likely that if “responsibly handled,” her case “would have settled short of trial.”⁵⁹ The court ultimately based its final calculation on the expert’s opinion whose settlement figure included a detailed analysis “of the kind of Philadelphia Common Pleas jury to whom plaintiff probably would have presented her case.”⁶⁰ Taking the nature of the injury into account along with a consideration of the elements and strength of the initial claim, the expert’s detailed analysis concluded that the jury would have awarded at least \$10,000 a year for the plaintiff’s stipulated life expectancy of about 23 years.⁶¹

In *Brown v. Gitlin*,⁶² the court upheld the dismissal of a malpractice claim concerning the classification of a sale of stock. The plaintiff alleged that the attorney negligently failed to register a sale of stock with the Illinois Secretary of State.⁶³ Three experts opined that the sale of stock, between two 50% owners of a corporation, reasonably appeared to be a “sale of a business” rather than a “transaction that was covered by the Securities Law.”⁶⁴ The court accepted these opinions and found there was ample evidence to conclude that the defendant had acted “commensurate with the practice of the reasonably competent lawyer in Cook County, Illinois.”⁶⁵

Finally, in *Honeywell, Inc. v. American Standards Testing Bureau, Inc.*,⁶⁶ the U.S. Court of Appeals for the Third Circuit affirmed the trial court's admission of a lawyer's testimony about the consequences of failing to produce an expert witness in a personal injury trial and the likely alternative result, had an expert been retained. At trial, an expert testified that the failure of American Standards Testing Bureau, Inc. to provide an expert witness for Honeywell, Inc. in the underlying state personal injury action caused Honeywell to lose that state action.⁶⁷ On appeal, American Standards challenged the expert's opinion “as to what the former jury would have decided with additional evidence,” arguing that the jurors themselves “were qualified *170 to speculate as to the probable effect of the additional evidence,” rendering the expert's testimony within the jurors' common knowledge and thus inappropriate and inadmissible.⁶⁸ The Third Circuit held that it was not an abuse of discretion to admit this testimony given the trial court's broad discretion and the scope of Rule 702.⁶⁹

B. INSURANCE CLAIMS LITIGATION

For an insured to recover indemnity and defense costs from an insurer for settlements or judgments, the insured must prove that the underlying risk was covered by its insurance policy. This requires expert testimony, often from lawyers, about the operation of the insurance policy and about the precise nature of the risks it covers.

In *UnitedHealth Group Inc. v. Executive Risk Specialty Insurance*,⁷⁰ UnitedHealth Group Inc. (“UnitedHealth”) had reached a \$350 million lump sum settlement to resolve two lawsuits, each of which involved both an antitrust claim and a claim under the Employee Retirement Income Security Act (“ERISA”). However, only antitrust claims were covered under UnitedHealth's professional liability excess insurance policies.⁷¹ Thus, UnitedHealth had the burden to demonstrate how much of the \$350 million was covered by its insurance policy.⁷²

It has long been the case that, to demonstrate the allocation of a settlement between covered and non-covered claims, parties can rely on expert testimony about the value of the lawsuits.⁷³ UnitedHealth introduced an antitrust expert who testified as to the value of the covered antitrust lawsuit claims.⁷⁴ However, UnitedHealth's expert lacked expertise in ERISA law, and UnitedHealth offered no other expert opinion on the value of the ERISA claims.⁷⁵ The court excluded the opinion of the antitrust expert because he was not qualified to opine on the relative value of the antitrust claims *as *171 compared to the ERISA claims.*⁷⁶ Notably, this did not indicate that the court was not prepared to accept expert testimony about the value of a lawsuit; instead, its holding was that UnitedHealth should have offered expert testimony on two sets of claims - antitrust and ERISA - and not just one.

Similarly, in *Nodaway Valley Bank v. Continental Casualty Co.*,⁷⁷ the plaintiff sought to recover a settlement payment and attorney's fees under its liability policy that covered only the plaintiff's officers and directors. However, the settlement and related fees and costs included both insured individuals and uninsured corporations and individuals, requiring the district court to allocate the settlement and attorney's fees between insured and non-insured parties. The district court heard competing expert testimony from attorneys involved in the underlying suit, from an insurance claims manager, and from an expert in business litigation about the proper allocation.⁷⁸

On appeal, the Eighth Circuit analyzed whether such an allocation was a question of fact or one of mixed fact and law.⁷⁹ The court defined the issue as “the evaluation of the comparative responsibilities of the particular parties and of their exposure to an award of damages in the underlying suit.”⁸⁰ It explained that, although the testimony about allocation “necessarily started with legal considerations,” ultimately the “determination was primarily a judgmental one in which facts were analyzed in light

of the controlling law.”⁸¹ As a result, the court concluded that the matter of allocation was fact-based, reviewable under a clearly erroneous standard.⁸²

C. EXPERT TESTIMONY ABOUT LEGAL CONTEXT

Some types of expert testimony that address legal issues at the heart of a lawsuit are allowed, provided that the expert does not opine on the outcome of the case.⁸³ For example, courts have allowed attorneys to testify about the *172 background of relevant industry and corporate governance standards and to opine on facts or conduct that support a particular legal conclusion, provided they do not testify that “the facts actually warrant the conclusion.”⁸⁴ Relatedly, if an expert's testimony contains terms that have both an ordinary “everyday” meaning and a separate legal definition, the expert's opinion remains admissible as long as it offers a proper analysis and explanation of its ultimate conclusion.⁸⁵ Finally, courts have also indicated readiness to admit expert testimony when the case implicates complex regulatory or legal standards.⁸⁶

1. *Experts in Complex Cases*

Courts have admitted expert opinions where the subject of the claim requires the application of a complex regulatory or legal standard to a particular factual background.

In *United States v. Van Dyke*,⁸⁷ the U.S. Court of Appeals for the Eighth Circuit reversed the defendant's conviction for making false statements to financial institutions, bank fraud, false loan documentation, and mail fraud, in part due to the trial court's improper exclusion of expert testimony on the meaning of a specific bank regulation that the prosecution claimed the defendant had violated. The court explained that the excluded testimony “would clearly have assisted the jury in understanding the regulation and the defendant's reasons for asserting that he had not violated its provisions.”⁸⁸

The court in *Amari Co. v. Burgess* admitted a tax expert's opinion “gauging the soundness” of the defendant's tax advice, an opinion which included a description of “any inaccuracies or deficiencies in the tax advice received by *173 plaintiffs.”⁸⁹ This testimony was offered to assist the jury in determining what the defendant delivered in relation to what he had promised, which was relevant “to the issue of whether [the defendant] provided anything of value in exchange for the fees he generated, and whether the services corresponded to what was advertised.”⁹⁰ However, the court explicitly prohibited the expert from opining on any legal issues that would determine the outcome of the case, including whether the defendant committed fraud or whether the defendant's services were a swindle.⁹¹

2. *Industry Standards/Corporate Governance*

Experts also have been permitted to outline the legal backdrop against which a jury may view the case to better understand the evidence or determine a fact in issue. For example, in *CDX*, a key issue for the jury was whether the defendant board members breached their fiduciary duties under Maryland and Delaware law. The bankruptcy court allowed expert testimony on the general standards governing boards of directors.⁹² The court denied the defendants' motion to exclude the testimony, which the defendants argued was an effort to “espouse the law and to apply it.”⁹³ Instead, the court allowed the expert to draw upon his relevant training, education, and practical experience to provide the jury with a helpful explanation of standard practices and procedures of corporate governance, standards of conduct applicable to directors and officers, the types of alternatives available to the board, and the types of factors a board can and should consider when making decisions.⁹⁴ The expert, however, was not allowed to give an opinion about his interpretation of Delaware or Maryland fiduciary duty law nor to apply the facts of this case to those fiduciary standards.⁹⁵

In contrast, the U.S. Court of Appeals for the Seventh Circuit in *Lupton* affirmed exclusion of the testimony of an expert whose opinions were based on a personal interpretation of the relevant law rather than his purported knowledge of general broker practices.⁹⁶ The defendant had been convicted of corrupt solicitation, wire fraud, and false statements to governmental officials. *174 ⁹⁷ In attempting to prove that his actions fell within admissible guidelines, the defendant sought to have an expert

“testify about the industry standards of practice governing commercial real estate brokers in Wisconsin.”⁹⁸ The district court excluded the testimony, in part, because it was “based on his interpretation of state statutes and regulations and the contracts in this case,” rather than “his knowledge of general broker practices.”⁹⁹ The court explained that this “essentially amount[ed] to legal interpretation,” a subject only within “the province of the court.”¹⁰⁰ The court of appeals affirmed because the expert’s “exchange with the court demonstrates that he was acting - and even saw himself as - nothing more than a legal expert.”¹⁰¹

D. VALUATION OF ASSETS WHERE VALUE IS AFFECTED BY REGULATORY ISSUES

In certain cases, a court has received expert testimony, albeit generally not from lawyers, where the value of an asset or liability is a function of a regulatory scheme. For example, in determining whether to admit expert testimony and its weight, the court in *General Elec. Co. v. Jackson*¹⁰² noted the importance of considering possible contingent liabilities, such as potential claims by third parties, defenses, or the probability of enforcement.

In *General Electric*, an expert submitted a report on the decline in the value of a company’s stock after the Environmental Protection Agency issued a unilateral administrative order (“UAO”) requiring General Electric Co. (“GE”) to clean up a hazardous waste site. GE brought a due process challenge against the EPA’s authority to issue the UAO, arguing that the UAO, which caused a decline in GE’s stock price, had been a taking of its property. The court accepted the testimony of an economist opining that, as a potential responsible party to an environmental clean-up order, GE was deprived of a property right because the stock price of companies customarily falls after they receive UAOs because of investors’ fears about the impact on a company that fails to comply with the UAO.¹⁰³ In particular, the expert analyzed the two routes the EPA followed in seeking to force companies to clean up environmental hazards - the practice of sending “special notice letters” to targets in hopes of settling the matter or the issuance of a UAO. Using *175 various tools to analyze “the impact on stock price and cost of financing,” the expert found that a firm’s refusal to comply with a UAO would subject the firm to a loss in market value that is 5.9 times greater than the loss in market value arising from a special notice letter.”¹⁰⁴

The court rejected the EPA’s *Daubert* challenge.¹⁰⁵ It found that the expert’s methodology was acceptable to demonstrate the impact on a company’s stock price due to noncompliance with a UAO, even though there was no direct empirical evidence on point. The court criticized the expert’s report on two grounds, both of which suggested that the court was prepared to accept a more refined analysis from the expert. First, it suggested that the expert should have attempted to further refine his conclusions to reflect and quantify such subtleties in the case as the fact that the EPA might not always enforce a UAO, that GE might have other defenses to the UAO, or that a court might impose a lesser fine than GE feared.¹⁰⁶ Second, the court rejected the expert’s assumption that the EPA generally delayed bringing enforcement actions, indicating that the expert should have also considered whether a quicker EPA filing would result in lower exposure for GE.¹⁰⁷

*In re LTV Steel Co.*¹⁰⁸ was another case involving environmental liabilities where the court accepted expert testimony, this time about the costs of environmental compliance and remediation.¹⁰⁹ At issue was the allocation of cash proceeds owed to lienholders from a sale of a set of integrated steel assets, three of which were subject to significant environmental liabilities and expenses.¹¹⁰ The environmental laws were such that these liabilities would be greater if a buyer shut down the facilities - which would trigger environmental shutdown liabilities and remediation - than if the buyer continued to operate them. Conversely, continuing to operate the facilities would cost the buyer millions of dollars to maintain compliance with environmental regulations.

The debtor’s valuation expert, an investment banker, analyzed studies and other information about the environmental liabilities attached to the assets and how these would affect their price.¹¹¹ His valuation also considered *176 the fact that the debtor LTV Steel Co. had to find a buyer who would operate the facilities “in order to avoid environmental shutdown liabilities.”¹¹² The bankruptcy court adopted the investment banker’s valuation of two of the steel-producing assets and accepted the opinion of another investment banker for a third asset. The court credited two expert valuations that included a reduction in asset value for environmental liabilities and criticized valuations ignoring these liabilities.¹¹³

Although these cases address non-lawyers’ testimony on valuation of regulated assets, they are instructive for determining whether to admit expert testimony on valuation of litigation claims and for determining the testimony’s weight. If, for instance,

an evaluation of a regulated asset requires consideration of possible contingent liabilities, such as potential claims by third parties, defenses, or the probability of enforcement, the costs associated with environmental compliance and remediation, and the potential risk of future changes in a regulatory environment, it is also likely that similar factors will be relevant to a valuation of litigation claims. These cases also illustrate the importance of quantifying the impact of legal and regulatory considerations concerning assets' value.

E. ASBESTOS BANKRUPTCY LITIGATION

The treatment of asbestos liabilities in chapter 11 cases provides a useful analogy for using experts to evaluate litigation claims.

 Bankruptcy Code § 524(g) provides that a qualified settlement fund may be created for present and future asbestos claimants “to assume all future asbestos-related liabilities of the debtor.”¹¹⁴ Thus, “by its very nature ... a reorganization plan seeking to rely on  § 524(g) will almost invariably necessitate an estimation of both pending and future asbestos liabilities for the purpose of determining feasibility.”¹¹⁵ As a result, bankruptcies involving mass asbestos claims often rely upon expert testimony in claims estimation hearings.¹¹⁶

While the practice of claims estimation is congressionally mandated in asbestos bankruptcy cases, nothing in the Bankruptcy Code or the Federal *177 Rules of Evidence suggests that this practice cannot be extended where appropriate.¹¹⁷ Rule 702 governing expert testimony is inclusive and embodies a presumption of admissibility.¹¹⁸ The successful use of claims estimation experts with respect to asbestos claims confirms the general utility of expert testimony in evaluating likely recoveries in litigation.

III. EXPERT TESTIMONY ABOUT THE VALUE OF LITIGATION

As described above, courts' attitudes toward expert testimony about the value of litigation claims have been paradoxical. On one hand, bankruptcy courts often have refused to credit such expert testimony on the grounds that the court has the ability to reach its own expert opinion on what a legal claim is worth. However, in the context of legal malpractice actions, insurance claims litigation, cases involving highly-regulated industries, and elsewhere, courts have for years received the testimony of expert witnesses about the merits of a lawsuit, the interplay of legal issues within the case, and the probable amount of damages a judge or jury would award.

In this light, the recent growth of new businesses whose success hinges on accurate prediction of litigation outcomes is a logical extension of forms of analyses that have been around for years. The litigation finance business, of course, is a well-known example. Law firms' increasing use of alternative fee arrangements in commercial litigation is another.¹¹⁹ Less well-known, but equally relevant, is the willingness of some major insurance companies to write insurance against mass tort liability *after* class action lawsuits have been filed.¹²⁰ Either way, the touchstone of the economic bet that a law firm, *178 a litigation finance firm, or an insurance company makes is its ability to accurately assess litigation risk and monetize that analysis.

While techniques litigation finance analysts follow in reaching their judgment are generally viewed as being proprietary to their firm or company, there is no secret about their general approach.¹²¹ The team analyzing or performing due diligence on the case usually consists of lawyers, often with years of litigation experience.¹²² Analysis begins with the pleadings that have been filed and whatever dispositive motions have been made.¹²³ The analysts then research the applicable law, including even slight differences among circuits or jurisdictions and the prospect that the law may change as a result of legislation or appellate review.¹²⁴ Ordinarily, they read all hearing *179 and deposition transcripts to get a sense of the case and, in larger cases, may personally interview material witnesses and review the most significant materials produced in discovery.¹²⁵ The analysts look carefully at the court where the case is pending, the possibility for arbitration, whether there are parallel proceedings elsewhere that may affect the case, what the judicial statistics of the relevant jurisdiction say about the time to trial and the pre-trial disposition rate of civil cases, the reputation of the trial judge, reports of jury research firms that summarize demographic and education attainment levels in the venire, and reports of trends in jury verdicts.

An analyst also will evaluate the skill, experience, and track record of the lawyers handling the case, estimate the fees and costs of litigation, predict the time to trial, consider whether the jurisdiction allows interlocutory appeals and other causes of delay, and assess the likelihood of collection, including the possibility that a defendant may propound significant counterclaims of its own or even file for bankruptcy.¹²⁶ The analyst will scrutinize the damages theories of the plaintiff and the defendant and, if necessary, bring in economists to double-check the accuracy of the damages analyses.¹²⁷ Finally, he *180 will reach a conclusion about the likelihood of settlement at various milestones in the case, and the range of settlement values at each milestone.¹²⁸

At the conclusion of the process, the team analyzing the case will have an understanding of the major elements of the case. As always, some issues will remain nebulous and others may tend to offset or compound each other. It may well be the case in some instances that ambiguities in the facts or law mean that the analyst will be unable to reach a conclusion at all. In many cases, though, the process will lead to a sufficiently concrete view of the lawsuit that will enable the litigation finance firm, the law firm, or the insurer offering post-accident coverage to be in a position to determine the lawsuit's economic value.¹²⁹

In the case of the litigation finance firm, this will become a prediction of the damages to come from the lawsuit and a value at which the firm can sell interests in the case to investors.¹³⁰ For an insurer, this will be a premium sufficient to cover the risk the insurer is taking to accept the coverage,¹³¹ and for a law firm, an alternative “fee structure that will result in getting paid fairly for one's legal services.”¹³² Regardless, the fact that an arms-length *181 buyer is prepared to strike this economic bargain confirms the viability of the methodology, especially since it “grow[s] naturally and directly out of research conducted independent of the litigation.”¹³³ Indeed, performing a valuation from an actual business perspective demonstrates that the expert “is being as careful as he would be in his regular professional work outside his paid litigation consulting.”¹³⁴

The question then becomes whether these techniques for evaluating litigation can pass muster under *Daubert*. As shown below, we believe that they would.

IV. THE *DAUBERT* STANDARD

As discussed before, expert testimony must meet the standards set by the Federal Rules of Evidence and *Daubert*. Although there is a general presumption of admissibility¹³⁵ and the district and Bankruptcy courts are given wide discretion in whether to admit evidence,¹³⁶ the courts nonetheless must act as “evidentiary gatekeeper[s]” to ensure *Rule 702*'s and *Daubert*'s requirements are met.¹³⁷

Rule 702 states:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact *182 to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

In applying *Rule 702*, courts determine (1) whether the expert witness is qualified; (2) whether the testimony assists “the trier of fact to understand the evidence or to determine a fact in issue”; and (3) whether the expert applies a reliable reasoning or methodology.¹³⁸

Specifically, *Rule 702* requires an expert to be qualified in the field in which he is offering an opinion through knowledge, skill, experience, training, or education; any one of these bases may be sufficient.¹³⁹ The standard for qualifying an expert is liberal, allowing for a flexible inquiry into witness's expertise.¹⁴⁰ The standard for determining whether an expert would help the trier of fact is similarly liberal.¹⁴¹

Daubert also sets forth a non-exhaustive checklist of factors for trial courts to consider when assessing the reliability of scientific expert testimony: (1) whether the expert's technique or theory can be or has been tested; (2) whether the technique or theory has been subjected to peer review and publication; (3) the known or potential rate of error of the technique or theory; (4) "the existence and maintenance of standards controlling the technique's operations"; and (5) whether the technique or theory has "widespread acceptance" within the "relevant scientific community."¹⁴²

The Advisory Committee's Notes to [Rule 702](#) provide several other factors utilized by courts, such as: (1) 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;"¹⁴³ (2) whether the expert "is *183 being as careful as he would be in his regular professional work outside his paid litigation consulting;"¹⁴⁴ and (3) whether the expert's field is known to "reach reliable results for the type of opinion the expert would give."¹⁴⁵

A. ADMISSIBILITY OF EXPERT TESTIMONY UNDER DAUBERT AND [RULE 702](#)

Before analyzing the application of [Rule 702](#) to expert testimony valuing litigation claims, it is worth reiterating that courts regularly admit under that Rule¹⁴⁶ valuation of businesses and assets, while recognizing the often difficult nature of the valuation.¹⁴⁷ Most likely to be admitted is valuation testimony where experts utilize recognized definitions and economic models.¹⁴⁸ Conversely, courts will exclude the testimony of experts who do not rely upon accepted definitions or reliable methodologies or are insufficiently qualified in the type of valuation being performed.¹⁴⁹

In the context of the valuation of a business, an expert is also expected to *184 exercise his professional judgment to assign different weights to various factors because valuation is not an exact science and "is, in not insubstantial measure, an inherently subjective and predictive methodology, which relies in part on the expert's judgment and experience."¹⁵⁰ Thus, an expert's experience and judgment play a legitimate role in assigning weights to different factors, provided that there is no settled standard method which would supply a definitive answer or a factual sources from which that number can be drawn. The case law shows that the weight assigned to various factors can either be expressed by a range of value or a specific number value.¹⁵¹ If multiple parties offer competing valuation experts, disputes may "be resolved on the basis of which expert the court deems to be the most credible."¹⁵² Secondary sources have compiled factors courts have used in determining the credibility of valuation experts, including: (1) objectivity; (2) "demeanor, research, and methodology"; (3) thorough diligence in the expert's inspection of assets or business and comparable assets or businesses; (4) "significant experience" in the type of valuation undertaken; (5) clear-cut or straightforward application of valuation principles;¹⁵³ and (6) disclosure of assumptions and information supporting the expert's appraisal.¹⁵⁴

*185 These factors and considerations for admissibility of business valuation experts are instructive in determining the admissibility of an expert valuing litigation claims.

B. LITIGATION VALUATION EXPERTS UNDER DAUBERT AND [RULE 702](#)

1. *Qualified to Give Expert Testimony.*

To qualify as an expert under [Rule 702](#)'s liberal standard, an expert valuing litigation claims must have the appropriate educational background, relevant training and experience, and specific knowledge and experience within the areas of the law being valued.¹⁵⁵ Moreover, a valuation expert must demonstrate that he has "significant experience" in the type of valuation he will undertake.¹⁵⁶

There are, undoubtedly, potential experts who could satisfy these requirements. For example, most U.S. members of the litigation finance firm, Bentham IMF, are experienced trial lawyers who spent years litigating large commercial disputes.¹⁵⁷ Moreover, many of these attorneys have specific knowledge in certain specialties, such as insurance, finance, or employment law. And, as

noted before, partners in many large and sophisticated law firms now routinely assess the value of litigation in deciding whether to offer alternative fee arrangements, and specific terms.

2. *Specialized Knowledge and Usefulness to the Judge.*

Federal Rule of Evidence 702(a) requires a valuation expert to have “specialized” knowledge that is “help[ful]” to the judge in ascertaining the full value of the party’s potential or pending litigation claims. As discussed *supra*, courts have routinely admitted expert testimony about the valuation of businesses and assets under Rule 702,¹⁵⁸ and recognized that it is helpful to evaluate the effects of specific regulatory regimes on the value of business assets.¹⁵⁹ *186 Likewise, it has long been the case that courts receive expert testimony in malpractice and insurance actions to value litigation claims.¹⁶⁰ For these reasons, an expert would be deemed to have specialized knowledge and utility if he could offer insights into aspects of a lawsuit or methods for assigning value to a lawsuit that may not be readily or easily available to the bankruptcy court. For example, a seasoned trial lawyer specializing in fraudulent transfer claims would have direct experience about the expenses of complex litigation, including: (1) estimated costs of electronic discovery, depositions, jury consultants, and experts; (2) estimated time to disposition of the claims; (3) the ability of a jury to comprehend complex financial evidence; (4) the likelihood of settlement before trial or pending appeal; (5) the tactical utility of adding or dropping additional parties; and (6) the resources and motivations of the defendants. He also may have specialized knowledge about the insurance coverage available to the defendant, whether that coverage will increase the cost of litigation (as the opponent’s legal fees may be effectively subsidized), what defenses the insurer may raise to coverage, and whether the insurer may facilitate an early settlement. Even if the judge has experience in some of these areas, the expert’s opinion would offer a useful comparison against which the court can evaluate her own understanding of the claims.¹⁶¹

These types of experts could be particularly helpful in the context of evaluating litigation claims held by the estate *against* others, rather than evaluating claims asserted against the estate in bankruptcy. As discussed in Part I, bankruptcy judges routinely adjudicate claims against estates whose issues are typically bankruptcy-specific. Therefore, bankruptcy judges may find expert testimony on these types of claims to be less useful to their own analysis. In contrast, bankruptcy judges deal far less frequently with claims of an estate against another creditor, particularly those litigated in the non-bankruptcy context. Thus, expert testimony related to these types of claims, which are outside the bankruptcy court’s core expertise, offer specialized knowledge and a greater usefulness to the court’s assessment of the claims.¹⁶²

3. *Methodology is the Product of Reliable Principles and Methods.*

Under Rule 702(c), an expert must also offer testimony that is “the product *187 of reliable principles and methods.” Because bankruptcy courts have generally been reluctant to accept expert testimony about the value of litigation claims, a party proposing the expert may need to educate the court about the growing body of expertise in the area. Foremost among the points to be made will be demonstrating there are standard methods of valuing lawsuits and that those methods are reliable. By now, it is a fact that litigation finance firms, insurance companies, and law firms commonly place large bets on their ability to forecast litigation outcomes; as such, it is strong evidence that such predictions can be made reliably.¹⁶³ Similarly, the growing body of commentary on litigation finance and alternative fee arrangements confirms that a set of methodologies has emerged.¹⁶⁴

The most straightforward evidence of a reliable methodology is the experience of litigation finance firms. Although their specific techniques are typically proprietary,¹⁶⁵ litigation finance analysts follow the same general approach to valuing litigation claims that the bankruptcy courts have used in valuing litigation claims, as discussed in Part I, or typical methodologies in business valuations, as discussed in Part IV.A. These approaches are similar to the “probability method” used by bankruptcy judges in claims estimation¹⁶⁶ or the DCF analysis often used in business valuations.¹⁶⁷ At a base level, these experts perform a detailed analysis and comparison of the claim’s probability of success at each stage of the litigation based on the law, facts, and jurisdiction as compared to the complexity, expense, and difficulties of the litigation.¹⁶⁸

*188 This should fit the *Daubert* template. As discussed in Part II, courts have credited experts that appropriately took into account legal and contingent liabilities.¹⁶⁹ And, as shown in Part III (pp. 177-181), a properly-credentialed litigation finance analyst would review and analyze a wide variety of factors to assess the expense and timeline of a lawsuit, the likelihood of prevailing on the merits, and the odds of collecting on a judgment. Thus, a comprehensive analysis of all contingencies, using a

consistent method, would strengthen the reliability of a valuation of a lawsuit. Performing a valuation from an actual business perspective of a law firm considering an alternative fee arrangement or a litigation finance firm financing a lawsuit would corroborate the expert's reliability because it demonstrates that he "is being as careful as he would be in his regular professional work outside his paid litigation consulting."¹⁷⁰

CONCLUSION

In sum, there is precedent for accepting testimony from experts as to the value of litigation claims, and the growing use of litigation finance and alternative fee arrangements indicates that there is a body of expertise that should pass the requirements of [Federal Rule of Evidence 702](#) and *Daubert*. Particularly since litigation claims are often a major element of value in bankruptcy cases, the potential for expert testimony seems clear. Properly-qualified expert witnesses have the potential to make the bankruptcy court's findings of value more efficient and accurate and to expedite resolution of complicated issues, especially in cases involving the estate's own litigation claims that are outside the bankruptcy court's core expertise.

Footnotes

a1 Of Counsel, Jones Day.

aa1 Partner, Jones Day.

aaa1 Associate, Jones Day. Special thanks to James O. Johnston for his excellent substantive comments, and to Evan Ward, Cortney Robinson, and Andrea Beathard for their valuable research assistance. Opinions expressed herein do not necessarily express the views or opinions of Jones Day.

1  [138 S. Ct. 883, 885, 895 \(2018\)](#) (holding that the § 546(e) safe harbor from constructive fraudulent transfer claims does not apply to transfers where a financial institution is a "mere conduit" with no "beneficial interest" in the transferred property).

2 See Chris Johnson, *Your Clients Want Alternative Fees: Is Your Firm Ready?*, THE AMERICAN LAWYER (Aug. 24, 2015), <https://www.law.com/americanlawyer/almID/1202735048162/> ("Alternative fees are now used in almost every type of legal work, even for the largest transactions and disputes."); see also David Hechler, *A New Kind of Litigation Funding: This One Has A Twist - It's A Type Of Insurance*, CORPORATE COUNSEL BUSINESS JOURNAL (Aug. 31, 2017), <https://ccbjournal.com/articles/new-kind-litigation-funding-one-has-twist—its-type-insurance> ("There's been a lot of talk about third-party litigation funding in recent months. The industry seems to be doing well - business is apparently booming.").

3  [509 U.S. 579 \(1993\)](#).

4 See *Texas District Court Affirms Bankruptcy Court's Use of Claim Estimation Process*, JONES DAY (July/Aug. 2015), <https://www.jonesday.com/Texas-District-Court-Affirms-Bankruptcy-Courts-Use-of-Claim-Estimation-Process-07-31-2015/> ("One of the most important aspects of a bankruptcy case is the resolution ... of 'claims' asserted by creditors against a debtor ... although such claims are not quantified when a debtor files for bankruptcy, an essential part of administering a bankruptcy estate involves assigning a monetary amount (or a range of monetary amounts) to every claim.").

5  [11 U.S.C. § 1129\(a\)\(11\) \(2018\)](#); see also  [Harbin v. IndyMac Bank FSB \(*In re Harbin*\), 486 F.3d 510, 514 \(9th Cir. 2007\)](#) ("[A] bankruptcy court considering the feasibility of a plan of reorganization [under chapter 11] ... must evaluate the possible effect of a debtor's ongoing civil litigation with a potential creditor, whether that litigation is pending at the trial or on appeal.").

6 Specifically, the debtor's potential claims against third parties can be transferred to a litigation trust. The trust is then responsible for pursuing the claims, either through litigation or settlement, and will distribute any net proceeds to certain classes of creditors pursuant to the reorganization plan. See Martin R. Pollner & Brian R. Socolow, *The Litigation*

Trustee: A Major Tool for Creditors' Committees, ABI JOURNAL (March 1, 2001), <https://www.abi.org/abi-journal/the-litigation-trustee-a-major-new-tool-for-creditors-committees>.

- 7  [Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson](#), 390 U.S. 414, 424 (1968). Bankruptcy judges are also typically responsible for any valuation of pending legal claims that are not included in a settlement agreement or a litigation trust. See  [Harbin](#), 486 F.3d at 519 (“Congress has explicitly given the bankruptcy court jurisdiction to consider questions concerning confirmation of a debtor’s plan, and in doing so to *estimate the various claims and interests against the debtor’s estate.*”) (emphasis added); [In re ELL 11, LLC, No. 07-60089 JTL, 2008 WL 916695](#), at *2 (Bankr. M.D. Ga. Apr. 2, 2008) (“[*Harbin*] did not hold that any ongoing litigation defeats the feasibility of a plan; only that a court must exercise discretion in evaluating feasibility in light of such claims.”).
- 8  [Reynolds v. C.I.R.](#), 861 F.2d 469, 473 (6th Cir. 1988).
- 9  [TMT Trailer Ferry](#), 390 U.S. at 424.
- 10  [In re Bard](#), 49 F. App’x 528, 530 (6th Cir. 2002) (internal citations omitted).
- 11 See  11 U.S.C. § 502(c) (2018); see also FED. R. BANKR. P. 3018(a) (allowing the court to “temporarily allow the claim or interest in an amount which the court deems proper for the purpose of accepting or rejecting a plan”).
- 12 See also [In re Chemtura Corp.](#), 448 B.R. 635, 649-50 (Bankr. S.D.N.Y. 2011) (“Claims estimation under [§] 502(c) (1), which most commonly is used with respect to prepetition claims, can be used for a variety of purposes, including determining voting rights on a reorganization plan, gauging plan feasibility, determining the likely aggregate amount of a related series of claims, setting claim distribution reserves, or (though this is less commonly wise) allowing claims. ... [E]stimation, authorized under [§] 502(c) of the Code, provides a means for a bankruptcy court to achieve reorganization, and/or distributions on claims, without awaiting the results of legal proceedings that could take a very long time to determine.” (internal citations omitted)).
- 13  [In re Ralph Lauren Womenswear, Inc.](#), 197 B.R. 771, 775 (Bankr. S.D.N.Y. 1996).
- 14  [Bittner v. Borne Chem. Co., Inc.](#), 691 F.2d 134, 135 (3d Cir. 1982) (“For example, when the claim is based on an alleged breach of contract, the court must estimate its worth in accordance with accepted contract law.”).
- 15  *Id.* at 134.
- 16 [In re POC Props., LLC](#), 580 B.R. 504, 509 (E.D. Wis. 2017).
- 17 [In re Windsor Plumbing Supply Co., Inc.](#), 170 B.R. 503, 521 (Bankr. E.D.N.Y. 1994) (“An estimator of claims must take into account the likelihood that each party’s version might or might not be accepted by a trier of fact. The estimated value of a claim is then the amount of the claim diminished by [the] probability that it may be sustainable only in part or not at all.”).
- 18  [Ralph Lauren Womenswear](#), 197 B.R. at 775 (“[P]arties’ legal arguments must be evaluated ... for their correctness as a matter of governing law.”); [In re Chemtura Corp.](#), 448 B.R. 635, 651 (Bankr. S.D.N.Y. 2011) (“[R]esponsible estimation analysis at the bankruptcy court level should, while still evaluating the parties’ positions for their correctness as a matter of governing law, also recognize the possibility (and try to estimate the *probability*) of different conclusions in the appellate process.”) (internal quotations omitted) (emphasis in original)).
- 19 [Chemtura](#), 448 B.R. at 651.
- 20 *Id.* at 650.
- 21  158 B.R. 421 (S.D. Tex. 1993).

- 22 See [id.](#) at 423-24.
- 23 *Id.*
- 24 *Id.*
- 25 *Id.* at 424.
- 26 *Id.*
- 27 *Id.*
- 28 *Id.* at 424-25.
- 29 *In re Windsor Plumbing Supply Co.*, 170 B.R. 503, 521 (Bankr. E.D.N.Y. 1994) (“In determining exactly how to estimate the value of a claim ... courts should make a speedy and rough estimation of [the] claims for purposes of determining [claimant’s] voice in the chapter 11 proceedings It is merely the court’s best estimate for the purpose of permitting the case to go forward and thus not unduly delaying the matter.” (internal quotations omitted)).
- 30 *In re Diplomat Constr., Inc.*, 454 B.R. 917, 920 (Bankr. N.D. Ga. 2011) (quoting [Wallis v. Justice Oaks II, Ltd.](#) (*In re Justice Oaks II, Ltd.*), 898 F.2d 1544, 1549 (11th Cir. 1990)).
- 31 See, e.g., [In re Tronox Inc.](#), 855 F.3d 84, 91 (2d Cir. 2017) (potential recovery from the estate’s fraudulent transfer claims was a major estate asset, such that the reorganization plan held the debtor’s interest in those claims in a litigation trust, of which several creditors were beneficiaries); *In re Caesars Entm’t Operating Co.*, 561 B.R. 441, 453 (Bankr. N.D. Ill. 2016) (“[T]he business was just one of the ‘two significant sources of value’; the other was the estate’s claims against CEC arising out of the disputed transactions The claims are vital estate assets, in other words, and a reorganization will either settle them ... or allow them to be pursued later on for the benefit of creditors.”).
- 32 See, e.g., [In re Holly Marine Towing, Inc.](#), 669 F.3d 796, 799 (7th Cir. 2012) (“We will not disturb a bankruptcy court’s approval of a settlement unless such approval constituted an abuse of discretion. This standard is highly deferential since the bankruptcy court is in the best position to consider the reasonableness of a particular settlement.” (citing [In re Doctors Hosp. of Hyde Park, Inc.](#), 474 F.3d 421, 426 (7th Cir. 2007))); [Bittner v. Borne Chemical Co.](#), 691 F.2d 134, 136 (3d Cir. 1982) (“In reviewing the method by which a bankruptcy court has ascertained the value of a claim under [§] 502(c)(1), an appellate court may only reverse if the bankruptcy court has abused its discretion. That standard of review is narrow.”).
- 33 *In re 47-49 Charles St., Inc.*, 209 B.R. 618, 620 (S.D.N.Y. 1997) (“A bankruptcy court’s decision to approve a settlement should not be overturned unless it is manifestly erroneous and a clear abuse of discretion.”); see [Bittner](#), 691 F.2d at 136 (“[Section 502\(c\)\(1\)](#) of the Code embodies Congress’ determination that the bankruptcy courts are better equipped to evaluate the evidence supporting a particular claim within the context of a particular bankruptcy proceeding.”). *Cf.* [id.](#) at 135 n.2 (noting that whether bankruptcy court reached valid findings of fact, rather than whether it used an appropriate method to estimate a claim, is reviewed by the “clearly erroneous” standard).
- 34 [509 U.S. 579](#) (1993).
- 35 FED. R. EVID. 702 advisory committee’s note to 2000 amendment.
- 36 Federal Rule of Evidence 403 provides that “[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” FED. R. EVID. 403; see also [Nimely v. City of New York](#), 414 F.3d 381, 397 (2d Cir. 2005) (“In addition to the requirements of Rule 702, expert testimony is subject to Rule 403, and ‘may be excluded if its probative value is substantially outweighed by the danger of

unfair prejudice, confusion of the issues, or misleading the jury.”). [Federal Rule of Evidence 704\(a\)](#) states that “[except for the exception in 704(b) relating to mental state in criminal cases] [a]n opinion is not objectionable just because it embraces an ultimate issue.” [FED. R. EVID. 704\(a\)](#).

- 37 *See, e.g.*, [CDX Liquidating Trust ex rel. CDX Liquidating Trustee v. Venrock](#), 411 B.R. 571, 585-90 (Bankr. N.D. Ill. 2009).
- 38 *Id.* at 585 (internal citation and quotation omitted).
- 39 *Id.*
- 40 *Id.* at 587; *see also* [In re Commercial Corp.](#), 396 B.R. 730, 740 (Bankr. N.D. Ill. 2008) (noting that “legal opinions are impermissible, not because they are legal, but because they do not ‘assist the trier of fact’”). *Cf.* [United States v. Bilzerian](#), 926 F.2d 1285, 1294 (2d Cir. 1991) (“[A]n expert may opine on an issue of fact within the jury’s province, [but] he may not give testimony stating ultimate legal conclusions based on those facts.”).
- 41 [United States v. Lupton](#), 620 F.3d 790, 799-800 (7th Cir. 2010) (“The only legal expert in a federal courtroom is the judge.”); *see also* [CDX](#), 411 B.R. at 585 (“[C]ourts have consistently excluded experts who proffer testimony on the law governing the case.”).
- 42 [CDX](#), 411 B.R. at 587 (expert cannot opine that defendants breached their fiduciary duty); [Amari Co. v. Burgess](#), No. 07-C-01425, 2012 WL 5389787, at *8 (N.D. Ill. Nov. 2, 2012) (expert cannot testify whether defendant had committed fraud).
- 43 *See, e.g.*, [In re Tribune Co.](#), 464 B.R. 126, 172-74 (Bankr. D. Del. 2011) (rejecting both parties’ expert assessments of litigation outcomes related to settlement of potential avoidance claims because “[n]either suppl [ied] a reliable basis upon which the Court could adopt either viewpoint”); [In re Cherry](#), 84 B.R. 134 (Bankr. N.D. Ill. 1988) (denying confirmation of debtor’s plan of reorganization that relied on payments from personal injury suit, partly because expert’s valuation of personal injury claim was merely “speculative” and therefore “the prospects of the personal injury suit’s favorable settlement or judgment are [not] sufficiently concrete”); [In re Ball](#), 201 B.R. 204, 208 (Bankr. N.D. Ill. 1996) (criticizing expert valuation of recovery from class action claim for its failure to take into account risks inherent in litigation); [In re Ball](#), 201 B.R. 210, 213-14 (Bankr. N.D. Ill. 1996) (rejecting expert’s fair market value of Truth in Lending Act claim because there “is generally no market for buying/selling consumer causes of actions” but accepting the settlement value due to its consideration of statutory damages, plaintiffs’ fees and costs and the costs of defense, which were all rational factors to consider); [In re Bard](#), 49 F. App’x 528 (6th Cir. 2002) (upholding bankruptcy court’s approval of trustee’s request to settle employment claims over expert’s rebuttal opinion on claims’ higher value). *But see* [In re Texas Extrusion Corp.](#), 844 F.2d 1142, 1157-58 (5th Cir. 1988) (affirming bankruptcy court’s approval of settlement of a corporate lawsuit because the court “reached an intelligent, objective and educated evaluation of the settlement value of the corporate lawsuit against a sufficient factual background,” including hearing testimony from several experts and attorneys on the value of the lawsuit).
- 44 [Talmage v. Harris](#), 354 F. Supp. 2d 860, 865 (W.D. Wis. 2005); *see also* [Nika v. Danz](#), 556 N.E.2d 873, 882 (Ill. App. Ct. 1990). *Cf.* [Ball ex rel. Hedstrom v. Kotter](#), 746 F. Supp. 2d 940, 951 (N.D. Ill. 2010) (holding that in Illinois, expert testimony is not required “when the common knowledge or experience of lay persons is extensive enough to recognize or infer negligence from the facts, or where an attorney’s negligence is so grossly apparent that a lay person would have no difficulty in appraising it”).
- 45 *See* [Nika](#), 556 N.E.2d at 886 (“In legal malpractice cases, expert testimony is generally used to establish the standard of care attorneys must exercise when representing clients. It is also admissible to prove what the result should have been in the underlying proceeding.” (internal citations omitted)); *see also* [Ball](#), 746 F. Supp. 2d at 951 (“Under Illinois law, ‘[f]ailure to present expert testimony is usually fatal to a plaintiff’s legal malpractice claim.’ ‘The standard recognizes that lay jurors are not equipped to determine what constitutes reasonable care in professional conduct without measuring the actor’s conduct against that of other professionals.’” (internal citations omitted) (alternation in original)); [Brown](#)

v. Gitlin, 313 N.E.2d 180, 182-83 (Ill. App. Ct. 1974) (“In Illinois the question of whether a lawyer has exercised a reasonable degree of care and skill in representing and advising his client has always been one of fact, and the standard of care against which a professional's actions are measured must be based on expert testimony.” (internal citations omitted)).

46

See  *Nika*, 556 N.E.2d at 886.

47

See  *Duncan v. Lord*, 409 F. Supp. 687, 692-93 (E.D. Pa. 1976); see also  *Nika*, 556 N.E.2d at 881. Cf.  *Talmage*, 354 F. Supp. 2d at 867.

48

 556 N.E.2d at 876.

49

See  *id.* at 880-81, 887.

50

 *Id.* at 880.

51

Id.

52

See *id.* at 886.

53

Id. at 887. The court also noted that the plaintiff waived the issue of admission of expert testimony on his contributory negligence by failing to object to the evidence. See *id.* at 886.

54

 354 F. Supp. 2d 860 (W.D. Wis. 2005).

55

See  *id.* at 864.

56

See *id.*

57

See *id.* at 866-67.

58

 409 F. Supp. 687, 692-93 (E.D. Pa. 1976).

59

Id.

60

 *Id.* at 693.

61

See *id.* at 693 (accepting expert's damages estimate but reducing the settlement figure by \$25,000 “because we find from his testimony that [the expert] considered to a limited extent his assessment damages arising from a possible psychiatric injury. Such considerations is beyond the bounds of the stipulation and no record evidence supports it”).

62

313 N.E.2d 180, 182-83 (Ill. App. Ct. 1974)

63

See *id.* at 181.

64

Id. at 182.

65

Id. at 182-83.

66

851 F.2d 652 (3d Cir. 1988).

67

Id. at 656.

68

Id.

69

See *id.* at 656-57.

- 70  870 F.3d 856 (8th Cir. 2017).
- 71 See  *id.* at 861-62.
- 72  *Id.* at 862-63.
- 73 *Id.* at 863 (“To prove allocation, parties can present testimony from attorneys involved in the underlying lawsuits, evidence from those lawsuits, expert testimony evaluating the lawsuits, a review of the underlying transcripts, or other admissible evidence.”); see also  *Nodaway Valley Bank v. Continental Gas Co.*, 916 F.2d 1362 (8th Cir. 1990) (holding that a district court’s consideration of competing expert attorney testimony regarding the allocation of insurance settlement payments between insured and noninsured parties was not “clearly erroneous”).
- 74  *UnitedHealth Group*, 870 F.3d at 866.
- 75 *Id.* (“The company declined to present additional expert testimony about the value of the *Malchow* suit to complement Halverson’s testimony about the *AMA* suit, or to identify an expert who was qualified to address both.”).
- 76  *Id.* at 865 (“But Halverson admitted that he is not an expert on ERISA, and he testified in his deposition that he did not analyze the *Malchow* lawsuit. Without analyzing the *Malchow* suit, Halverson could not provide an expert opinion about its value. And without knowing the value of the *Malchow* suit, Halverson could not testify as to the *relative value of the AMA* suit compared to the *Malchow* suit.”).
- 77  916 F.2d 1362 (8th Cir. 1990).
- 78 See  *id.* at 1364.
- 79 *Id.*
- 80 *Id.* at 1366.
- 81 *Id.*
- 82 The court alternatively concluded that the allocation decision should be reviewed under a clearly erroneous standard because the allocation of settlement responsibilities required a non-technical, fact-intensive inquiry, and thus the district court was better positioned to determine the issue. See *id.* (“Review must be deferential to give the district court the necessary flexibility to resolve questions involving multifarious, fleeting, special, narrow facts that utterly resist generalization. Thus, even if we grant Continental its argument that the question before us is a mixed one of law and fact, the issue is sufficiently factual in its essence that the district court is far better able to effectively and efficiently resolve it.” (internal quotations and citations omitted)).
- 83 See, e.g.,  *Amari Co. v. Burgess*, No. 07-C-01425, 2012 WL 5389787, at *8 (N.D. Ill. Nov. 2, 2012); *CDX Liquidating Trust ex rel. CDX Liquidating Trustee v. Venrock*, 411 B.R. 571, 587 (Bankr. N.D. Ill. 2009).
- 84  *In re Commercial Corp.*, 396 B.R. 730, 740 (Bankr. N.D. Ill. 2008); see also *CDX*, 411 B.R. at 588 (permitting an expert to “testify about defendant’s conduct in light of industry practices and standards”).
- 85 See *CDX*, 411 B.R. at 588 (testimony admitted as long as there is no “naked conclusion” not based on “adequately explored legal criteria” (internal citation and quotations omitted));  *Commercial Corp.*, 396 B.R. at 740 (terms with congruent meanings allowed “as long as opinion is not a bald legal conclusion”). For example, in *Commercial Corp.*, the bankruptcy court admitted a financial advisor’s expert report over a *Daubert* objection that the report offered an impermissible legal conclusion in its use of the term “conduit.”  396 B.R. at 740. The court acknowledged that “conduit” had both a specific legal connotation within fraudulent transfer cases of this kind (“someone who received and then transferred property but lacked sufficient control over the property to be liable under section 550(a) as either an

initial or subsequent transferee”) and a mundane meaning. *See id.* Because the expert's affidavit provided an explanation of the origin and movement of funds among entities to support its argument that two entities were “mere conduits,” and because the testimony was not a “bald legal conclusion,” the court permitted his testimony. *See id.* (“That the expert happens to use the word conduit in the process, a word that appears in some judicial decisions, does not turn his opinion in a legal one.”).

86

See, e.g., [U.S. v. Van Dyke](#), 14 F.3d 415, 422 (8th Cir. 1994); [Amari](#), 2012 WL 5389787, at *1, *8. *Cf.* [Nieves-Villaneuva v. Soto-Rivera](#), 133 F.3d 92, 100-01 (1st Cir. 1997).

87

[14 F.3d 415](#) (8th Cir. 1994).

88

Id. at 422.

89

[2012 WL 5389787](#), at *7-8.

90

Id. at *7.

91

Id. at *8; *see also* [Nieves-Villaneuva](#), 133 F.3d at 101 (noting, in dicta, that the judge may depart from the general prohibition on legal testimony and admit it, where an area of law is governed by multiple sources, such as regulations, guidelines, or advisory rulings, or entails a highly complex or technical matter).

92

[CDX Liquidating Trust ex rel. CDX Liquidating Trustee v. Venrock](#), 411 B.R. 571, 583-84 (Bankr. N.D. Ill. 2009).

93

Id. at 584.

94

See id. at 589-90.

95

Id. at 587 (“[I]f [the expert] were to opine that ... [the defendant's] conduct constituted a breach of fiduciary duty, he would necessarily be deeming Plaintiff's version of the fact to be the credible account, which is prohibited.”).

96

[United States v. Lupton](#), 620 F.3d 790, 799-800 (7th Cir. 2010).

97

Id. at 793.

98

Id. at 797.

99

Id.

100

Id. The district court also found that: (1) the expert lacked relevant expertise and experience; (2) his opinions were not reliable due to the lack of facts or data underlying them; and (3) his extensive testimony on the meaning of state law would confuse the jury since the defendant was charged with violating federal laws. *See id.* at 799-800.

101

Id. at 800.

102

[595 F. Supp. 2d 8](#), 24, 30 (D.D.C. 2009).

103

See id. at 24.

104

Id.

105

See id. at 23-24.

106

See id. at 24, 30.

107

GE also presented the report of another expert (also a law professor) to prove a decline in stock price, but his testimony was struck by the court as largely duplicative of the original expert's conclusion in a “more general and imprecise way.” *Id.* at 25. The court did, however, accept the expert lawyer's report claiming the existence of a reduction in a potentially

responsible party's brand value despite its failure to apply any scientific methodology "because no one [not even EPA's rebuttal expert] dispute[d] his conclusion." *Id.*

108  285 B.R. 259 (Bankr. N.D. Ohio 2002).

109  *Id.* at 273-77.

110 See  *id.* at 271.

111 *Id.* at 266.

112 *Id.* at 269.

113 See *id.* at 273-78; see also *id.* at 267 (describing failure to consider environmental liabilities associated with the facility as "ignoring or leaving behind the poisoned stem and roots" while only valuing the "fruit of an asset").

114 Kathy Yeatter, *Fumbling Toward Consistency*, AM. BANK. INST. J. (Nov. 2006), at 50; see also  11 U.S.C. § 524(g) (2018).

115 Yeatter, *supra* note 114, at 50.

116 See, e.g.,  *In re W.R. Grace & Co.*, 475 B.R. 34, 143 (Bankr. D. Del. 2012) (claims estimation expert in asbestos bankruptcy testified during the confirmation hearing that value of assets available for distribution to creditors was much higher under joint chapter 11 plan than in chapter 7 liquidation); see also Yeatter, *supra* note 114, at 50 (explaining that asbestos estimation proceedings generally fall within purview of  Bankruptcy Code § 502(c));  *In re Garlock Sealing Techs., LLC*, 504 B.R. 71, 94 (W.D.N.C. 2014) (debtor offered "legal liability" approach to estimation of estate's present and future mesothelioma claims).

117 Experts at estimation hearings are also commonly used in complex mass tort cases that involve the estimation of thousands of claims asserted against debtors in complex bankruptcies. See, e.g.,  *In re A.H. Robins Co.*, 88 B.R. 742 (E.D. Va. 1988) (detailing estimation hearing proceedings to determine aggregate liability for mass personal injury claims, which involved, in part, review of expert reports).

118 See *infra* Part IV.

119 Law firms have increasingly relied upon the use of alternative fee arrangements ("AFAs"), rather than the traditional billable hour payment structure, due to increasing corporate client concerns and calls for cost predictability and transparency. See Johnson, *supra* note 2 ("Alternative fees are now used in almost every type of legal work, even for the largest transactions and disputes."); see also *Three in Four Large Law Firms Now Employ Pricing Officers*, ALM MEDIA PROPERTIES, LLC (June 10, 2014), http://www.alm.com/press_release/three-in-four-large-law-firms-now-employ-pricing-officers/; *ALM: 2015 Law Firm Pricing Report*, PATRICK ON PRICING, www.patrickonpricing.com/alm-2015-law-firm-pricing-report (last accessed Jan. 20, 2019) ("98% of law firms reported hiring a pricing professional because of [AFAs]."). What is clear is that the skills to estimate the costs of a litigation for alternative fee arrangements go beyond typical legal analysis, whether valuation is done by a law firm's own lawyers or pricing professionals with legal experience. See Timothy J. Perla and Zach Beasley, *The Art of Projecting Budgets for Litigation Alternative Fee Arrangements*, BLOOMBERG LAW (Oct. 24, 2017), <https://news.bloomberglaw.com/us-law-week/the-art-of-projecting-budgets-for-litigation-alternative-fee-arrangements> ("The shift in fee arrangements means lawyers must develop a new set of skills, in addition to their legal expertise.").

120 While litigation funding or finance covers litigation costs as they are incurred, litigation insurance covers legal expenses once the matter has concluded. See Allison Chock, *The Benefits of Using Litigation Funding Over Litigation Insurance*, BENTHAM IMF (Sept. 27, 2017), <https://www.benthamimf.com/blog/blog-full-post/bentham-imf-blog/2017/09/27/the-benefits-of-using-litigation-funding-over-litigation-insurance>. Some policies also allow the insured to hold off on paying the insurance premiums until the case is successfully completed. See Hechler, *supra* note 2.

- 121 See, e.g., William P. Farrell Jr. & Michael A. Nicolas, *Commercial Litigation Finance: Helping Companies Enforce Their Legal Rights Without Blowing the Budget*, STOUT RISIUS ROSS JOURNAL, Spring 2015, at 2 (“Each litigation finance firm has its own process for underwriting potential investment opportunities. In our view, a preferred method is to employ a two-stage underwriting process. During the first stage of underwriting, the litigation finance firm’s experienced litigation team analyzes the legal claims to determine if they meet the firm’s investment criteria and portfolio objectives. Next, for claims identified for further underwriting, the litigation finance firm engages outside legal, subject matter, and damages experts to evaluate independently the merits of the legal claims.”). Cf. Perla & Beasley, *supra* note 119 (detailing different factors and options for creating alternative fee arrangement proposals, including the “bottom up” approach and best way to estimate and value projections for litigation tasks); Toby Brown, *Pricing Legal Services: Alternative Fee Arrangements*, THE ADVOCATE, Winter 2017 (“Although there are only a handful of types of AFAs, there are many ways you can combine them into meeting the client’s fee goals [Then] with a fee type in hand, the pricing person then models it for profitability The best practice is to use this profit prediction modeling as a decision making tool for which AFAs to approve.”).
- 122 For example, Burford Capital, an international litigation finance firm, has over 60 lawyers on staff, with over 250 collective years of litigation experience in its investment committee. See *Team*, BURFORD, <http://www.burfordcapital.com/team/> (last accessed Jan. 6, 2020) (“We’re experts at the intersection of law and finance - veterans of top law firms, companies and financial institutions. We have the deepest bench in the business *and do all diligence in-house.*” (emphasis added)); see also *Five Commonly-Asked Questions About Bentham’s Litigation Funding Process*, BENTHAM IMF, https://www.benthamimf.com/blog/blog-full-post/bentham-imf-blog/2019/05/15/five-commonly-asked-questions-about-bentham-s-litigation-funding-process?utm_source=bentham+IMF+US+Newsletter+List&utm_campaign=e80a914c75-EMAIL_CAMPAIGN_2019_09_04_05_41&utm_medium=email&utm_term=0_9e0ad5c0a2-e80a914c75-255290521 (last accessed Jan. 6, 2020) (“[Bentham IMF] use[s] a highly-skilled team of litigators and a proven process for evaluating litigation for potential investment ... our in-house investment team ... is comprised of senior litigators with experience from elite law firms.”).
- 123 See, e.g., *We Understand Your Value - Likely Duration of the Litigation Process, Probability of Success on the Merits*, LAKE WHILLANS, <https://lakewhillans.com/claim-valuation/> (analysis includes consideration of “the stage of the litigation at the time financing is sought” and “the case schedule”) (last accessed Jan. 6, 2020). Cf. *Five Commonly-Asked Questions*, *supra* note 122 (“We fund matters at various stages of the dispute resolution process, from the pre-trial/hearing phase through appeals and enforcement.”).
- 124 See, e.g., Emily O. Slater, *Getting to “Yes”: What Lawyers Need to Know About Burford’s Litigation Finance Diligence Process*, BURFORD CAPITAL (Dec. 6, 2016), <http://www.burfordcapital.com/insights/insights-container/getting-to-yes-what-lawyers-need-to-know-about-burford-s-litigation-finance-diligence-process/> (“Burford’s underwriting process undertakes a review of five key aspects of a case [including] assess[ing] cases carefully to ensure they have strong merits.”); see also *We Understand Your Value*, *supra* note 123 (consideration of “the likely outcome and duration of any appeals” and “the complexity of the subject matter”).
- 125 See generally *Five Commonly-Asked Questions*, *supra* note 122 (“As we [Bentham IMF] conduct due diligence, we usually ask the claimant, its counsel, or both to discuss the matter with us and to provide documents and other information The information we gather helps us determine the potential value of the case, its strengths and weaknesses, the ability of a defendant to pay, and the length of time a case may take.”).
- 126 See *We Understand Your Value*, *supra* note 123 (factors that increase the likelihood of success include “(i) documentary evidence supporting the case narrative and damages; (ii) strong witnesses; and (iii) favorable discovery”); *id.* (analysis of duration of lawsuit includes “the practices of the presiding judge and/or jurisdiction”); see also *Getting to “Yes”*, *supra* note 124 (initial assessment step); Chris Catalano, *After We Say Yes: How Case Monitoring Works*, BURFORD CAPITAL (Feb. 4, 2020), <https://www.burfordcapital.com/insights/insights-container/legal-finance-101/> (“[W]e dig in and do our own substantive analysis so that we have the most complete possible picture of where the case is headed and when and on what terms it may be resolved ... We also track the legal spend and compare it to stage that the case is in.”); Craig Arnott, *Pricing Risk, Structuring Agreements & the Cost of Legal Finance Capital*, BURFORD CAPITAL (Feb. 4, 2020), <https://www.burfordcapital.com/insights/insights-container/legal-finance-101/> (“When we make an investment decision, we’re not just investing in the underlying merits of the litigation, we’re investing in and trusting the litigation

counsel the claimant has chosen to execute a strong legal strategy. We're investing in the entire potential of that case and the people who are going to run it.”).

- 127 See *Getting to “Yes”*, *supra* note 124 (“The proposed damages must be realistic and supported by evidence - not necessarily an expert report, but a comparable or other solid contemporaneous evidence of loss or valuation, including evidence of a company's investment in a project or investment if relevant.”). Additionally, litigation financiers will also “assess[] the budget, lawyer risk-share, damages, and the ratio between the budget and the settlement value of the case.” *Id.*; see also *Five Commonly-Asked Questions*, *supra* note 122 (“We [Bentham IMF] leverage our in-house investment team ... to assess the merits of the claims, potential damages, settlement and collection prospects, and the amount of capital needed to pursue the litigation. We also frequently engage trusted outside diligence counsel to provide a second opinion about the likelihood of the case resulting in a favorable outcome.”).
- 128 Cf. Gary L. Sasso, *Alternative Fee Arrangements*, CARLTON FIELDS (July 15, 2015), <https://www.carltonfields.com/insights/publications/2015/alternative-fee-arrangements> (describing factors considered for proposing an alternative fee structure for legal services including “an in-depth review and analysis of key documents, interviewing key witnesses, performing basic legal research, and even presenting both sides of the matter to key decision makers inside the client organization, including heads of business units as well as inside counsel”); *Five Commonly-Asked Questions*, *supra* note 122.
- 129 See, e.g., *Five Commonly-Asked Questions*, *supra* note 122 (“[Bentham has] used a highly-skilled team of litigators and a proven process for evaluating litigation for potential investment. Over time, this approach has allowed us to achieve an impressive track record, with 90 percent of the cases we've invested in reaching a successful settlement or judgment.”).
- 130 See *Getting to “Yes”*, *supra* note 124.
- 131 The cost of the premium is determined by an insurer's underwriting process, and is based on the cost of the underlying litigation and the policy limit. See Roy Storm, *Litigation Finance, Sure. Litigation Insurance?, UK Broker Seeks US Sales*, THE AMERICAN LAWYER (June 14, 2017), <https://www.law.com/americanlawyer/almID/1202789743668/>. Thus, to determine the premium, the insurance company must estimate the insured's anticipated losses from the lawsuit and set a premium higher than the anticipated loss. See Hechler, *supra* note 2. Similar to litigation finance, insurance providers need to evaluate claims and estimated litigation costs in order to determine premiums and potential profits. See *Advice When Making an Application for Litigation Insurance and/or Litigation Funding*, THE JUDGE (Mar. 22, 2019), <https://www.thejudgeglobal.com/application-advice/> (“Good case presentation is invaluable when seeking litigation insurance and/or litigation funding. ... [Providing a case summary] enables underwriters to quickly form a view about the case and to focus their more in depth analysis.”). Other types of litigation insurance include attorney fee insurance (policies cover billable hours, out-of-pocket costs, or both, with the premiums contingent on the success of the litigation) and contingency fee insurance. See Hechler, *supra* note 2; see also Storm, *supra* note 131 (describing a standard litigation insurance policy as being able to cover litigation costs between 40% to 70% of attorney fees).
- 132 Amy Larson, *Alternative Fee Arrangements: Why and When?*, ABOVE THE LAW: Small Firm Center (July 11, 2019), <https://abovethelaw.com/small-firm-center/2017/12/alternative-fee-arrangements-why-and-when>; see also Perla & Beasley, *supra* note 119 (“The key question at the outset is simple - what will it cost? Estimating correctly starts with planning. The primary way to develop an AFA is to build from the bottom up by estimating casts and resources devoted to each component of the work This requires fully scoping out the matter to reflect all aspects of the work during the life cycle of the case and communicating this road map to the client.”).
- 133  [Daubert v. Merrell Dow Pharmaceuticals, Inc.](#), 43 F.3d 1311, 1317 (9th Cir. 1995).
- 134  [Sheehan v. Daily Racing Form, Inc.](#), 104 F.3d 940, 942 (7th Cir. 1997); see also  [Kumho Tire Co. v. Carmichael](#), 526 U.S. 137, 151 (1999) (*Daubert* requires the trial court to assure itself that the expert “employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field”).
- 135 See, e.g.,  [Krist v. Eli Lilly & Co.](#), 897 F.2d 293, 298 (7th Cir. 1990) (noting that Rule 702 is “notably liberal”);  [AMPAT/Midwest, Inc. v. Ill. Tool Works, Inc.](#), 896 F.2d 1035, 1045 (7th Cir. 1990) (Rule 702 sets liberal standard for admission of expert testimony); 1 Jack B. Weinstein & Margaret A. Berger, WEINSTEIN'S FEDERAL EVIDENCE

§ 702.02 (Mark S. Brodin, ed., Matthew Bender 2d ed. 2016) (“Expert testimony is liberally admissible The general approach of the Rules is to relax traditional barriers to expert opinion testimony.”).

- 136 See generally WEINSTEIN, *supra* note 135 § 702.02; see also *In re Barnes*, 266 B.R. 397, 404 (B.A.P. 8th Cir. 2001).
- 137  *Daubert*, 509 U.S. at 589 (1993);  *Kumho Tire*, 526 U.S. at 147-49; see also *United States v. Lupton*, 620 F.3d 790, 799-800 (7th Cir. 2010) (“We give district courts wide latitude to make their evidentiary determinations: we review whether they applied the *Daubert* framework de novo, but we review their ultimate conclusions as to the admissibility of expert testimony only for abuse of discretion.”); *CDX Liquidating Trust ex rel. CDX Liquidating Trustee v. Venrock*, 411 B.R. 571, 578 (Bankr. N.D. Ill. 2009) (“[A] district court has a ‘gatekeeping role’ of ensuring an expert’s testimony is both reliable and relevant.”).
- 138 See *CDX*, 411 B.R. at 579.
- 139 See WEINSTEIN, *supra* note 135 § 702.04 (abuse of discretion to exclude expert solely because “witness lacks a certain educational or other experiential background”).
- 140 See, e.g.,  *Krist*, 897 F.2d at 298;  *Lees v. Carthage College*, 714 F.3d 516, 524 (7th Cir. 2013) (expert qualified to testify on premises security because he had several degrees in sociology and educational sociology, was published in relevant field, had specifically trained in physical premises security, and had testified as an expert in similar cases); WEINSTEIN, *supra* note 135 § 702.04 (abuse of discretion to exclude expert testimony solely because “the witness lacks expertise in specialized areas that are directly pertinent to the issues in question, if the witness has educational and experiential qualifications in a general field related to the subject matter of the issue in question”).
- 141 See, e.g.,   *United States v. Lamarre*, 248 F.3d 642, 648 (7th Cir. 2001) (findings of social science expert did not “invade[] the common sense inquiry of jurors” but rather could help jury understand that defendant’s low cognitive skills made him dependent on another person); see also Victor James Gold, *Federal Rules of Evidence*, 29 FED. PRAC. & PROC. EVID. § 6265 (2d ed. 2016).
- 142  *Daubert*, 509 U.S. at 593-95.
- 143  *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995).
- 144  *Sheehan*, 104 F.3d at 942; see also  *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 151 (1999) (*Daubert* requires trial court to ensure that expert “employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field”).
- 145 See  *Kumho Tire*, 526 U.S. at 151 (*Daubert*’s general acceptance factor does not “help show that an expert’s testimony is reliable where the discipline itself lacks reliability, as, for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy.”). For additional factors relevant in determining whether an expert’s testimony is sufficient reliable, see the advisory committee notes to the 2000 amendment to [Fed. R. Evid. 702](#).
- 146 At least one court emphasized that “[w]hile *Daubert* applies to valuation testimony, whether offered by [CPAs], or economists, the *Daubert* factors are not to be rigidly applied in this or any other context. In some context, they may not be applicable at all or may have diminished utility as measures of reliability.”  *Loeffel Steel Prods., Inc. v. Delta Brands, Inc.*, 387 F. Supp. 2d 794, 805 n.7 (N.D. Ill. 2005).
- 147 See, e.g., *Olsen v. Floit*, 219 F.3d 655 (7th Cir. 2000) (considering experts’ valuations of company’s competitive sales and of employee’s covenant not to compete to determine whether transaction was “fair” to corporation); *id.* at 658 (“Valuation of closely held businesses is something of a black art. ... This process is difficult for public companies [as well].”). Cf.  *In re Emerald Casino*, 530 B.R. 44, 215 (Bankr. N.D. Ill. 2014) (“[b]usiness valuation generally ... is not within common knowledge” and can “greatly assist” courts in determining material facts), *aff’d in part, vacated in part*, 867 F.3d 743 (7th Cir. 2017).

- 148 See, e.g., [Manpower, Inc. v. Ins. Co. of the State of Penn.](#), 732 F.3d 796, 810 (7th Cir. 2013) (reversing trial court's exclusion of forensic accounting expert who calculated plaintiff's business interruption loss because expert was qualified, had used an "appropriate and recognized" growth-rate extrapolation method, and opinion was "reasoned and founded on [actual] data" of company's past performance).
- 149 See, e.g., [Loeffel Steel](#), 387 F. Supp. 2d at 802-17 (excluding testimony of damages expert because: (1) he used his own definition of "economic loss" which was "not peer reviewed, not tested, and not generally accepted" and excluded a necessary component; (2) of his "unquestioning reliance" on unsupported assumptions from defendant's employees that "would, in effect, [vouch] for [employees'] labor-added methodology, when he has absolutely no knowledge of whether the theory is valid and reliable"; and (3) comparability analysis in model was unreliable and speculative because expert was not qualified to conclude that companies were comparable and competed with plaintiff's company); *In re Spatz*, 222 B.R. 157, 171-72 (Bankr. N.D. Ill. 1998) (upholding exclusion of valuation expert's testimony because expert had insufficient real estate appraisal experience). Cf. [In re Tribune Co.](#), 464 B.R. 126, 174 (Bankr. D. Del. 2011) (discounting both experts' testimony because the "methods employed by each expert here involve deeply subjective judgements. Black's conclusions, as he admits, are based, in large measure, upon highly subjective assessments. Beron's conclusions, on the other hand, follow from the use of information supplied by his client in contemplation of this litigation. Neither supply a reliable basis upon which the Court could adopt either viewpoint.").
- 150 Compare [Brown v. Brewer](#), No. CV06-3731-GHK SHX, 2010 WL 2472182, at *27 (C.D. Cal. June 17, 2010); see also [Consol. Rock Prods. Co. v. Du Bois](#), 312 U.S. 510, 526 (1941) ("Since its application requires a prediction as to what will occur in the future, an estimate, as distinguished from mathematical certitude, is all that can be made. But that estimate must be based on an informed judgment which embraces all facts relevant."), with [Tribune Co.](#), 464 B.R. at 174 (discounting experts' assessments of litigation outcomes for debtor's avoidance claims as unreliable because "methods employed by each expert here involve *deeply subjective* judgments." (emphasis added)).
- 151 For cases stating a preference for a range, see for example, [Harris Trust & Sav. Bank v. Ellis](#), 810 F.2d 700, 706 (7th Cir. 1987) ("Fairness" is a range, not a point.); [Lippe v. Bairnco Corp.](#), 288 B.R. 678, 690 (S.D.N.Y. 2003) ("Common sense and the authorities in the area suggest that an opinion as to the value of a business should be expressed as a range of values rather than as a single number." (internal citations omitted)), *aff'd*, [99 F. App'x 274](#) (2d Cir. 2004). For cases suggesting that a single number is also appropriate, see for example, [Steiner Corp. v. Benninghoff](#), 5 F. Supp. 2d 1117 (D. Nev. 1998) (using single numbers throughout calculation and assessment of company's value); [In re Mt. Laurel Lodging Associates, LLP](#), No. 13-11697-RLM-11, 2014 WL 1576971, at *3-6 (Bankr. S.D. Ind. Apr. 18, 2014) (evaluating two experts' [discounted cash flow ("DCF")] valuations, both reaching a single value, and selecting a \$19,600,000 valuation for a hotel because the assumptions of that valuation were more credible); [In re Bachrach Clothing, Inc.](#), 480 B.R. 820, 867 (N.D. Ill. 2012) (crediting one of the two experts, whose DCF analysis produced a value of approximately \$6 million in shareholder equity); [In re Young Broad. Inc.](#), 430 B.R. 99, 126 (Bankr. S.D.N.Y. 2010) ("A [DCF] analysis arrives at a value, or a range of values."); [In re Nanovation Technologies, Inc.](#), 364 B.R. 308, 346 (N.D. Ill. 2007) (concluding that accountant's valuation of the stock at \$9.20 per share was reasonable).
- 152 Harold S. Novikoff, *Valuation Issues in Chapter 11 Cases*, SS029 A.L.I.-A.B.A. 421, 462 (2010).
- 153 This factor is important because it demonstrates that the expert is "not manipulating the analysis to arrive at a particular result." *Id.*
- 154 For additional factors and case law, see Novikoff, *supra* note 152 at 462-63. Additionally, the Association of Insolvency and Restructuring Advisors has developed a standard methodology for valuing distressed businesses which includes: (1) identifying the purpose of the valuation; (2) identifying the standard of valuation (e.g., fair market value, investment value, intrinsic value, etc.); (3) identifying the premise of value (e.g., going concern value, orderly liquidation value, etc.); (4) identifying a valuation approach; and (5) disclosing all sources of information relied upon by the expert. See Stan Bernstein et al., *Squaring Bankruptcy Valuation Practice with Daubert Demands*, 16 BANKR. INST. L. REV. 161, 175-76 (2008).

- 155 See generally [UnitedHealth Group Inc. v. Exec. Risk Specialty Ins.](#), 870 F.3d 856, 861-62 (8th Cir. 2017); [Lees v. Carthage College](#), 714 F.3d 516, 524 (7th Cir. 2013); [Krist v. Eli Lilly & Co.](#), 897 F.2d 293, 298 (7th Cir. 1990).
- 156 See Novikoff, *supra* note 152 at 462-63; [In re Spatz](#), 222 B.R. 157, 171-72 (Bankr. N.D. Ill. 1998).
- 157 See, e.g., *Our Team*, BENTHAM IMF, <https://www.benthamimf.com/about-us/our-team> (last accessed Jan. 6, 2020).
- 158 See, e.g., [Manpower, Inc. v. Ins. Co. of the State of Penn.](#), 732 F.3d 796, 807-10 (7th Cir. 2013); [Popovich v. Sony Music Entm't](#), 508 F.3d 348, 358-60 (6th Cir. 2007); [Olsen v. Floit](#), 219 F.3d 655 (7th Cir. 2000). For more detail, see Part IV.
- 159 See [General Elec. Co. v. Jackson](#), 595 F. Supp. 2d 8, 24, 30 (D.D.C. 2009) (criticizing expert's failure to quantify potential market responses to contingent liabilities of unilateral administrative order such as likelihood of its enforcement, possible defenses, and court imposition of lower penalty than sought); [In re LTV Steel Co.](#), 285 B.R. 259, 268-71 (Bankr. N.D. Ohio 2002) (crediting expert valuation that included consideration of environmental liabilities and remediation costs of steel-producing asset).
- 160 See, e.g., [Nika v. Danz](#), 556 N.E.2d 873, 882 (Ill. App. Ct. 1990) (admitting two legal valuations of plaintiff's damages had underlying personal injury claim been pursued).
- 161 See, e.g., [Nodaway Valley Bank v. Continental Gas Co.](#), 916 F.2d 1362, 1365 (8th Cir. 1990); [Nika](#), 556 N.E.2d at 882.
- 162 To maintain her usefulness to the bankruptcy judge, the expert must also ensure she utilizes a reliable methodology, discussed Part IV(B)(3), *infra*. See also [In re Tribune Co.](#), 464 B.R. 126, 174 (Bankr. D. Del. 2011) (declining to adopt either expert's valuation of the estate's potential avoidance claims because experts did not supply "a reliable basis" for their opinions and thus were not "particularly helpful").
- 163 See *Five Commonly-Asked Questions*, *supra* note 122 ("Over time, [Bentham IMF's litigation finance] approach has allowed us to achieve an impressive track record, with 90 percent of the cases we've invested in reaching a successful settlement or judgment.").
- 164 See *supra* Part III.
- 165 [But see In re Emerald Casino](#), 530 B.R. 44, 215 (Bankr. N.D. Ill. 2014) (excluding expert in part due to use of own "Rittvo" method - a proprietary method not used by anyone else in the industry); [Loeffel Steel Prods., Inc. v. Delta Brands, Inc.](#), 387 F. Supp. 2d 794, 802-03 (N.D. Ill. 2005) (excluding expert who used own definition of "economic loss" that was not generally accepted and excluded a necessary component from traditional definition).
- 166 See, e.g., [In re POC Properties, LLC](#), 580 B.R. 504, 509 (E.D. Wis. 2017).
- 167 See, e.g., [In re Valley-Vulcan Mold Co.](#), 5 F. App'x 396, 399 (6th Cir. 2001) (describing discounted cash flow analysis as a "well-recognized methodology for determining a business's going-concern values"). [But see In re Emerald](#), 530 B.R. at 222 ("[T]he Seventh Circuit has recognized the malleability of DCF analysis.").
- 168 Other methodologies for legal valuation may also include the use of the "Monte Carlo Simulation," which has been used by some litigation finance firms and often in the financial field, though experts using this method should be well versed in its intricacies and aware of the limited body of case law addressing its use. See, e.g., [Lyondell Chemical Co. v. Occident Chemical Corp.](#), 608 F.3d 284, 293 (5th Cir. 2010) (permitting expert to use Monte Carlo Simulation statistical methodology and noting that the "Monte Carlo analysis is now at home not only in the physical sciences, but in a wide variety of fields including for instance, the world of high finance."); see also Michael McDonald, *Monte Carlo Simulation - Don't Build a Bad House*, ABOVE THE LAW (Feb. 14, 2017), <https://abovethelaw.com/2017/02/monte-carlo-simulation-dont-build-a-bad-house/> ("Monte Carlo simulation is a technique that is widely used in both the

financial and legal industries [including] a few litigation finance firms to project expected returns for their portfolio. ... [Monte Carlo simulations] should be used much more widely in the [litigation finance] field, but many firms lack the expertise to set them up properly, or believe that the results are not worth the upfront cost of setting up the system.”).

169 *See supra* Part II(D).

170 *See*  [Sheehan v. Daily Racing Form, Inc.](#), 104 F.3d 940, 942 (7th Cir. 1997); *see also*  [Kumho Tire Co. v. Carmichael](#), 526 U.S. 137, 151 (1999) (holding that *Daubert* requires the trial court to assure itself that the expert “employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field”); *see also* *Pricing Risk*, *supra* note 126 (“When Burford finances matters, we assume an extraordinary degree of risk. Typically, legal finance is provided on a non-recourse basis, meaning that we lose our capital if the underlying matters are unsuccessful ... and we take on the inherent uncertainty of matters that may take years to resolve.”).

94 AMBKRLJ 155

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.