***In re Pfizer Inc. Sec. Litig.*: S.D.N.Y. Reiterates Importance of "Gatekeeping" Function Applicable to Expert Testimony under Federal Rule of Evidence 702**

On May 21, 2014, in *In re Pfizer Inc. Sec. Litig.*, Judge Laura Taylor Swain of the United States District Court for the Southern District of New York excluded the expert testimony of Professor Daniel R. Fischel regarding loss causation and damages, as unreliable and unhelpful.[1]

I. Background

On February 16, 2006, investors "who purchased or acquired Pfizer stock between October 31, 2000, and October 19, 2005" filed a Consolidated Class Action Complaint asserting violations of Section 10(b) of the Securities and Exchange Act of 1934 and Rule 10b-5(b) based on allegations that Pfizer and certain Pfizer corporate officers "fraudulently misrepresented the cardiovascular risks associated with two Pfizer drugs [Celebrex and Bextra]."[2] The case "survived a motion to dismiss, two motions for reconsideration, and a five-day *Daubert* proceeding."[3] At summary judgment, Plaintiffs relied on the expert testimony of Professor Daniel R. Fischel as evidence in support of the loss causation element of their Section 10(b) claim. Professor Fischel's testimony was based on an "event study" in which he purported to have "(1) identified seven disclosure events…that revealed adverse cardiovascular risks associated with Celebrex and Bextra; (2) tied those events to statistically significant declines in Pfizer's stock price; and (3) cited market commentary confirming that it was those events…that caused the price declines."[4] On March 28, 2013, the District Court issued an order granting Defendants' motion for summary judgment in part and denying it in part. The court ruled that two of the dates Professor Fischel had identified as disclosure events for purposes of his event study did not qualify as "corrective disclosures" for purposes of the loss causation analysis. Further, the court dismissed Plaintiffs' claims to the extent they were based on statements made by another company, Pharmacia, prior to the time it was acquired by Pfizer and over which Pfizer did not exercise control. In response to the court's summary judgment decision, Professor Fischel submitted a "four-paragraph Supplemental Report."[5] Rather than conducting a new analysis that took the court's summary judgment ruling into account, Fischel "opined that the stock inflation reduction attributable to the two excluded disclosure events reduced the overall stock inflation figure by 9.7%" and so "he therefore revised his damages calculations to reduce by 9.7% the intermediate stock price increases associated with the other events."[6]

II. The Decision of the District Court

In assessing the Supplemental Report the court determined that Professor Fischel had:

- failed to offer any "explanation of the relationship among the events triggering the respective price decreases and increases";

[1] Case No. 04-CIV-9866 (LTS)(HBP) (S.D.N.Y. May 21, 2014).

[2] *In re Pfizer Sec. Litig.*, 936 F. Supp. 2d 252, 257 (S.D.N.Y. 2013)

[3] *Id.* A party may raise a *Daubert* motion, before or during trial, to exclude the presentation of unqualified evidence to the jury. *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 592-93 (1993) (requiring judges faced with a proffer of expert testimony to conduct a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.").

[4] *Id*. at 265-66.

[5] *In re Pfizer Sec. Litig.*, No. 04-CIV-9866 (LTS)(HBP) at 1.

[6] *Id.*

- failed to offer or cite any research reference or peer review information to support his parallel adjustment method;
- failed to "[m]ake any adjustments or otherwise disaggregate his computations to identify any stock price inflation attributable to the dismissed claims that were based on statements by Pharmacia" despite the fact that "he ha[d] asserted in his prior report and in deposition testimony that his stock inflation opinions [we]re premised on the assumption that Defendants are responsible for all the alleged misrepresentations and omissions alleged in the complaint"; and
- failed to provide any "foundation or references in support of his parallel 9.7% adjustments" beyond stating that other methods would have resulted in larger damage claims.[7]

Federal Rule of Evidence 702 permits expert testimony that is "the product of reliable principles and methods reliably applied to the facts of the case" and that is of "a character that 'will help the trier of fact to understand the evidence or to determine a fact in issue.'"[8] Applying Rule 702 to the above findings, the court concluded that Professor Fischel's "9.7% parallel adjustment ha[d] not been shown to be the product of reliable principles and methods reliably applied" and that his "failure to account in any way for the impact of the excluded Pharmacia statements render[ed] his opinions unhelpful to the jury in making calculations of damages proximately caused by Defendants' alleged misrepresentations and omissions."[9] As such the court held that Professor Fischel's testimony failed "to meet the standards set by Rule 702" and excluded Professor Fischel's report and testimony from the trial of the action.[10]

III. Significance

In complex securities class actions, it is common for plaintiffs to seek to prove loss causation and damages through experts. No expert, no matter how credentialed, may successfully offer opinions that satisfy the requirements of Rule 702 unless the opinions are supported by an explanation of the methodology which a court finds "reliable." The court's exclusion of Professor Fischel's testimony in this case as unreliable and unhelpful, despite Plaintiffs' assertion that Professor Fischel had never been excluded from testifying in over 50 trials over the course of a 30-year career,[11] highlights the importance of the trial court's gatekeeping function under *Daubert* and a case-by-case assessment under Rule 702.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Jon Mark at 212.701.3100 or jmark@cahill.com; John Schuster at 212.701.3323 or jschuster@cahill.com.

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[7] *Id*. at 2.

[8] *Id*. at 2; Fed. R. Evid. 702(a).

[9] *Id*. at 2-3.

[10] *Id*. at 3.

[11] Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion *In Limine* No. 8 to Exclude the Expert Testimony of Daniel Fischel, 04-CIV-9866, at Dkt. No. 580.

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