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EDVA Judge Allows Pension Investment Expert to Testify in Class Action ERISA Case

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A recent decision by Senior District Judge Robert Payne on a *Daubert* motion in class action litigation against a pension fund offers some helpful lessons on challenging expert witnesses in the EDVA. Trauernicht v. Genworth Fin., Inc., Civil Action No. 3:22-cv-532, 2024 U.S. Dist. LEXIS 95739 (E.D.Va. May 29, 2024).

Background

In *Trauernicht*, the class representatives alleged that the defendant had breached its fiduciary duties by retaining certain target date funds in its pension plan portfolio despite those funds' significant underperformance.

Plaintiffs retained Richard Marin as an expert witness to evaluate the performance of the funds under the pension plan's investment policy statement, to opine on appropriate monitoring of investments under the plan's governing documents and industry standards and to determine a replacement for the target date funds at issue.

Defendants moved to exclude Marin's testimony under *Daubert* and Fed. R. Evid. 702, claiming that his analysis was not reliable, and he did not apply his methodology in a reliable manner.

Takeaway One: The Bar for Expert Challenges Is Higher in a Bench Trial

An overarching factor in the court's analysis was that *Trauernicht* did not involve a jury trial. In a bench trial, the court noted, the court's gatekeeping function under Rule 702 is less critical, and a court may admit expert testimony subject to excluding it later. In practice, it is much less common for courts to grant *Daubert* motions in bench trials because it creates an issue for appeal and potential reversal. In a bench trial, it is far simpler for a trial court to simply admit expert testimony and then evaluate its persuasiveness as the finder of fact. That approach allows the parties to make their case while allowing the court to assess the admissibility and reliability of the expert's testimony on a full record.

Takeaway Two: It Is Difficult to Exclude an Expert Based on Lack of Qualifications

The defendant in *Trauernicht* argued that Marin's experience was insufficient because he had not worked in asset management since 2003. As Judge Payne pointed out, though, Marin had other relevant experience, including

teaching courses on pension fund management at Cornell from 2007-2017 and writing a book on pension issues relevant to the case. As a result, Judge Payne had no trouble finding that he was qualified to testify as an expert, and the defendant's arguments went only to the weight of his testimony, not its admissibility.

Challenges to an expert's qualifications are rarely successful, and that is particularly the case in high-stakes commercial litigation where parties seek the best experts available. That an expert's direct experience from employment in a particular industry was years ago is seldom, if ever, sufficient for exclusion, especially if the expert has continued to work in the field, by, for example, teaching or even testifying as an expert.

Takeaway Three: Reliability Does Not Depend on Peer Review or Publication

The defendant argued that Marin's methodology was not reliable because it was not subject to peer review or publication, and he could not cite to any authority or person who endorsed his methodology.

Judge Payne, though, noted that the *Daubert* inquiry is flexible, and a court has wide latitude to determine reliability. In the case of testimony, such as Marin's, that is primarily experiential in nature, the judge found, testability, peer review and error rates may not necessarily apply.

Rather, the court may focus on whether an experiential expert's methods are generally accepted and subject to the same level of intellectual rigor of an expert in the field, outside of litigation. The methodology Marin had used, Judge Payne found, had been deemed reliable in other cases and recognized as "both a common-sense and well established practice" in the field of retirement investment advice.

The defendant also relied on testimony from its own expert that Marin's methodology lacks general acceptability in the industry. A dispute between two experts, however, is never sufficient for exclusion. In this case, in fact, the argument backfired because the defendant's expert testified that Marin's approach was both reasonable and in conformity with the investment policy statement.

The takeaway here is that the lack of peer review and publication is rarely a successful form of attack on an expert's testimony, apart from highly specialized fields with a wealth of published studies on the topic at issue. If an expert's approach is logically consistent and considers the relevant evidence in an intellectually rigorous fashion, it is likely to satisfy Rule 702.

Takeaway Four: Evidence of Reliability Can Come From Outside the Expert's Report

The defendant argued that Marin himself did not cite in his report the caselaw and articles supporting his methodology, and so the plaintiffs should not be permitted to rely on them. EDVA judges are often sticklers for limiting an expert to the information within the four corners of the Rule 26 expert report, and Judge Payne emphasized that he would do so with Marin's testimony. That did not mean, though, that he could not consider case law and other authorities bearing on the reliability of Marin's methodology. Thus, the issue of admissibility under *Daubert* was separate from what Marin could testify to based on his expert report.

Conclusion: Exclusion of Expert Testimony in the EDVA Is the Exception

Trauernicht offers a good example of the approach among EDVA judges to *Daubert* motions. The fundamental lesson from the case is that an attack on an expert's methodology typically must include a showing that the expert's analysis ignores relevant factors, relies on assumptions for which there is no evidence or otherwise lacks logical rigor. Without some basic missing proof of a necessary element in an expert's analysis or a missing logical link in that analysis, it is difficult to persuade an EDVA judge to exclude expert testimony.

As Judge Payne noted, the Fourth Circuit has held that "rejection of expert testimony is the exception rather than the rule." Particularly in a bench trial, Judge Payne held, the proper way to test the correctness and thoroughness of an expert's opinions is through cross-examination and rebuttal evidence.

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