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## The Need For Expert Testimony

In complex securities cases, jurors might require extra help

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The securities markets have grown increasingly complex. Indeed, some have theorized the collapse of the subprime market is due, at least in part, to a lack of understanding and appreciation for the market risks inherent in collateralized debt obligations and related securities. Growing complexities in the market will create new challenges in the prosecution and defense of the next wave of securities fraud cases. The inevitable challenge of such cases will be to ensure that the prosecution and defense evidence concerning complicated financial products and transactions is comprehensible to the jury. Two recent cases have addressed this issue.

In *United States v. Nacchio*, 2008 WL 697382 (11th Circuit, March 17, 2008), the prosecution alleged that Joseph Nacchio, the former CEO of Qwest Communications Inc., sold more than a million shares of Qwest stock while in possession of inside information that Qwest would not meet its projected earnings targets.

During trial, the defense attempted to introduce the expert testimony of an economics professor that Nacchio's pattern of stock sales was not consistent with what one would expect if sales were premised on inside information. The trial court excluded the proffered testimony, finding that the topic was "within the common knowledge of the jury" and that "the jury



simply d[id]n't need this so-called expert witness to testify." The ruling eviscerated Nacchio's defense and he was ultimately convicted on 19 counts of insider trading. On appeal, one of Nacchio's principal claims was that the preclusion of the expert testimony was reversible error because it deprived him of his Sixth Amendment right to present a defense.

### No Absolute Right

The Sixth Amendment guarantees a defendant in a criminal trial the right to present witnesses in his or her own defense. As the Tenth Circuit observed on appeal in *Nacchio*: "The right of a defendant to call witnesses is crucial for testing the prosecution's case and defeating the charges against him. Indeed, the 'right to present a defense . . . is a fundamental element of due process

of law.'" (quoting *Washington v. Texas*, 388 U.S. 14, 19 (1967)).

The right to call witnesses in one's defense is not, however, absolute. For example, evidentiary rules precluding the introduction of evidence offered by the defense do not offend the Sixth Amendment if the rules are rationally related to a legitimate purpose. At trial, that legitimate end is the trial judge's obligation to ensure that a jury considers only reliable evidence and that confusing or irrelevant evidence is excluded.

Rule 702 of the Federal Rules of Evidence governs the admission of expert testimony. That Rule provides that "if scientific, technical, or other specialized knowledge will assist" the jury to understand the evidence or to determine a fact in issue," it may be admitted into evidence.

In performing a gate-keeping function, trial courts are mindful not to allow expert testimony to usurp the role of the jury as the finder of fact. Courts are acutely aware that jurors tend to give extra weight and credence to expert testimony. For that reason, courts are reluctant to permit the

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introduction of expert testimony if the subject is not beyond the ken of the average juror employing his or her common sense.

In *Nacchio*, the Tenth Circuit found that understanding the complexities and nuances of insider trading claims require something more than common sense. More particularly, the court held that “armchair economics is not the way to decide complex securities cases.” The court found that the district court erred in excluding the expert’s testimony, reversed the conviction and remanded the case for a new trial.

### ‘Complicated Issue’

Two days after the *Nacchio* reversal, a District Court in New Jersey held the converse, that the prosecution may be required to introduce expert testimony in an insider trading case to assist the jury in understanding the complex proof the government intended to present.

In *United States v. Schiff*, the government alleged that Frederick Schiff, former CFO of Bristol-Myers Squibb, engaged in securi-

ties fraud. In considering the jury’s likely difficulty understanding the government’s evidence concerning “materiality,” the court held that “the ability of the jury to infer materiality from evidence of a stock price drop may be a complicated issue that may require expert testimony.” *United States v. Schiff*, 2007 WL 726897 (D.N.J. 2008). The *Schiff* court hypothesized that if a company “announced a disclosure related to the charged misstatement on the same day that [the company] lost a major patent case, a jury would not be able, without the assistance of an expert, to determine whether the observed drop in [the company’s] stock price was appreciably affected by the disclosure of the charged misstatement or not. If the jury cannot determine such a relationship using common sense, then the stock price drop is not probative of the materiality of the alleged misstatements absent expert methodology to separate the effects of the two factors and give the jury a basis to draw an inference without speculating.”

Thus, in *Nacchio*, the court held that the market concepts and materiality in particular are sufficiently complex to be beyond the understanding of the average juror and therefore a permissible topic for expert testimony. The *Schiff* court, by contrast, held that in certain circumstances the government must (not may) present expert testimony to explain concepts to the jury because, in the absence of such testimony, the risk of the jury reaching a verdict based on confusion is too great.

These two cases illustrate that courts recognize that the increasing complexities of the financial markets often necessitate expert testimony to ensure both a defendant’s right to a fair trial and respect for a defendant’s Sixth Amendment right to present a defense.

The average person may know to “buy low and sell high,” but, at least according to these two recent decisions, common knowledge does not extend to more sophisticated notions of security market dynamics. ■