# DO CONFLICTING EXPERTS PRECLUDE SUMMARY JUDGMENT?

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Courts award summary judgment to a party when there is no genuine dispute of material fact and the moving party is entitled to judgment in its favor as a matter of law. What if two experts have conflicting opinions about a material fact? Can summary judgment be awarded? That question, among others, was taken up by the Second Circuit in *Dalberth v. Xerox Corp.*, 2014 WL 4390695 (2d Cir. Sept. 8, 2014), a decision in a long-running securities fraud litigation.

One of the elements that plaintiffs must establish to successfully assert a claim for securities fraud is "loss causation," that is, a causal connection between the material misrepresentation and plaintiffs' losses. Plaintiffs typically establish loss causation by tracing a drop in the price of their stock to a "corrective disclosure," i.e., a public disclosure by the relevant company that reveals the truth about a matter that had previously been misrepresented. To this end, plaintiffs often retain experts to opine that a particular disclosure revealed some aspect of the fraud to the public, and thereby caused a statistically significant drop in the stock price.

In the *Xerox* securities fraud litigation, plaintiffs hired a specialist in financial economics, Professor Anthony Saunders, as their loss causation expert. Saunders conducted an event study to determine the "artificial inflation" in the price of Xerox stock caused by the company's alleged material misrepresentations, and to identify the corrective disclosures that caused this artificial inflation to be eliminated. The misrepresentation alleged was that Xerox had concealed from investors that one component of a worldwide restructuring initiative – the Customer Business Organization Reorganization (CBOR) – had caused significant and ongoing financial distress to the company. Accordingly, Saunders attempted to identify the corrective disclosures that revealed the problems with the CBOR to the public.

The defendants sought to exclude Saunders expert report under *Daubert*, but the trial court held that the report was admissible. *See In re Xerox Securities Litigation,* 746 F.Supp.2d 402 (D. Conn. 2010). Among other things, the trial court upheld Saunders' methodology as reliable, and concluded that "Saunders could show that the alleged corrective disclosures contained new information that was material," and revealed some aspect of the alleged fraud.

Fast forward to 2014 when the district court awarded summary judgment to the defendants. On appeal, one of the grounds for reversal advanced by plaintiffs was that the trial court's 2010 opinion admitting Saunders' report on loss causation precluded summary judgment. In essence, plaintiffs were arguing that Saunders' expert opinion concerning whether the corrective disclosures he had identified contained new material information created a genuine dispute of material fact.

The Second Circuit rejected plaintiffs' argument. Preliminarily, it observed that the evidence in the record established that, prior to the corrective disclosures identified by Saunders, investors already had access to numerous earlier disclosures concerning sales disruptions and operational difficulties caused by the CBOR.

What the trial court concluded in its 2010 decision was that Saunders "*could* show that the alleged corrective disclosures contained new information that was material" (emphasis in original). However, the Second Circuit explained, the 2010 decision did not conclude that Saunders had actually established any particular fact.

More generally, the Second Circuit held that "summary judgment is not *per se* precluded because there are conflicting experts." While such experts are entitled to their opinions, other evidence in the record may demonstrate that such opinions are unsustainable.

Have you encountered the fact pattern in this case – i.e., an award of summary judgment in favor of one party despite conflicting expert opinions? Do you agree with the Second Circuit's decision in *Xerox*?