

Look For Flags On Expert Claims After Sunday Ticket Reversal

By **Maggie Ebert, Henry Dobson and Jonathan Baker** (August 19, 2024, 4:08 PM EDT)

For the past 30 years, fans have been able to watch any NFL game at any location in the U.S. through the NFL's Sunday Ticket package. However, the future of the NFL's broadcasting model was called into question after a federal jury [found](#) Sunday Ticket to be a violation of antitrust law.

Despite the jury's findings, on Aug. 1, U.S. District Court Judge Phillip Gutierrez of the [U.S. District Court for the Central District of California](#) invoked Rule 702 of the Federal Rules of Evidence and [overturned](#) the verdict in *In re: NFL Sunday Ticket Antitrust Litigation*, granting the NFL a judgment as a matter of law, a very rarely used tool of judicial discretion, and ruled that "no reasonable jury could have found classwide injury or damages," without the excluded expert testimony.

This decision will be appealed to the U.S. Court of Appeals for Ninth Circuit and potentially the U.S. Supreme Court. Judge Gutierrez's decision to set aside the verdict could signal the start of an emerging trend in exercising judicial discretion to exclude expert witness testimony under Rule 702.

Judge Gutierrez's ruling was made possible because on Dec. 1, 2023, the U.S. Supreme Court adopted new changes^[1] to Rule 702, which implemented provisions that strengthened federal judges' power as the gatekeeper of expert testimony.

First, the changes now require that the proponent of the expert testimony must establish each of the four elements of the rule by a preponderance of the evidence.^[2]

This means the proponent can no longer show just some evidence that the expert's methods are reliable — they must prove the expert's methods are "more likely than not" reliable. Second, the language of Rule 702(d) was changed to require a stronger connection between experts' opinions and the methods they use.^[3]

Under this subsection, experts must not only use reliable methods, but must also reliably apply their methods and principles to facts of the case. This change granted judges broad discretion to determine whether a specific expert opinion is "more likely than not" supported by an expert's methodology.

As discussed below, Judge Gutierrez properly exercised his discretion under Rule 702 by excluding the flawed expert testimony that caused the jury to reach an erroneous verdict.

Further, it is likely that more judges will exercise this discretion, and more future litigants will challenge



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expert testimony admissibility under Rule 702.

What Is Sunday Ticket?

The NFL's Sunday Ticket on [DirecTV](#) was a broadcasting package offered by DirecTV[4] from 1994-2023 that allowed NFL fans and entertainment venues to watch every out-of-market NFL game for a single fee[5] each season.

Prior to Sunday Ticket, out-of-market fans could only watch their favorite team if they played on national television, which was limited to just three total games each week. Thus, Sunday Ticket created the opportunity for fans to watch their favorite team, or any NFL game, from anywhere in the U.S.

However, unlike the other major sports leagues,[6] the NFL did not offer subscribers the option to purchase a single team subscription and bundled all the rights of all 32 teams together. Under this model, even if a subscriber only wanted to watch their favorite team, they still had to pay the full Sunday Ticket price.

What Happened in NFL Sunday Ticket Litigation

In 2015, residential and commercial class action plaintiffs originally filed suit against the NFL alleging Sunday Ticket intentionally eliminated competition and drove up prices for football fans. These classes represent 2.4 million residential subscribers and 48,000 commercial establishments who purchased Sunday Ticket during the class period between 2011 and 2023.

Unlike the other major sports leagues, NFL teams pool their broadcasting rights and sell them directly to the networks. Positively, this allows local fans to watch games for free over the air and allows for a service like Sunday Ticket to operate.

However, under Supreme Court precedent from the 2010 decision in *American Needle Inc. v. NFL*,[7] each of the NFL's 32 teams are considered to be competing businesses. Thus, under antitrust law, when NFL teams collude with one another, as is the case here with pooled broadcasting rights, their coordination should not cause more economic harm than economic benefit.

In the NFL Sunday Ticket antitrust litigation, the class plaintiffs argued that NFL teams illegally conspired to not compete, and thus manipulated prices by pooling their broadcasting rights and only offering a bundled Sunday Ticket package without a cheaper single-team option.

This argument states that, on balance, the unnecessarily high cost of Sunday Ticket outweighs the benefits of having pooled broadcasting rights that allow every NFL game to be available across the country.

The NFL rebutted this by arguing that if its teams were forced to compete in licensing out-of-market broadcasts, many teams would simply not attempt to, and consumers would suffer because fewer games would be shown.

For example, it is unlikely the [Arizona Cardinals](#) would attempt to find a broadcast partner for their fans on the East Coast or in many rural communities. Thus, the NFL argued, the cost of Sunday Ticket reflects the guarantee that fans can watch any game regardless of their location.

On June 27, following a three-week trial and testimony from 27 witnesses, a Los Angeles federal jury agreed with the plaintiffs and found Sunday Ticket to be a violation of antitrust law.

The jury awarded the plaintiffs \$4.8 billion[8] in damages, which could have ended up as high as \$14.4 billion after trebling. In addition to the monetary damages, this verdict would have forced the NFL to comply with antitrust law, which could have threatened Sunday Ticket's existence and the NFL's entire broadcasting model as a whole.

However, on Aug. 1, Judge Gutierrez granted the NFL a judgment as a matter of law[9] and set aside the jury verdict, including all monetary damages. Judge Gutierrez declined to grant a new trial, meaning that his judgment entirely replaces the jury verdict. Judge Gutierrez reasoned the plaintiffs' experts used "flawed methodologies" to mislead the jury and caused the jury to incorrectly find classwide injury and damages.[10]

Judge Gutierrez took issue with the plaintiffs' expert Daniel Rascher, who testified during the trial that if the NFL adopted a nonpooling broadcasting model, its games would "become available, just like [college football games], on over-the-air channels and ... basic sport cable channels," and customers would not "pay anything extra above what they were already paying for their TV package." [11]

Despite allowing this testimony during trial, Judge Gutierrez granted the NFL's post-trial Rule 702 Daubert motion to exclude Rascher's trial testimony because it "was based on speculation and ipse dixit opinion."

Judge Gutierrez determined the testimony "was not the product of sound economic methodology," and stated that Rascher didn't explain "how these out-of-market [NFL] telecasts would have been available for free to cable and satellite customers."

Analysis of Rule 702 Application and Future Implications

Under the new changes to Rule 702, Judge Gutierrez appears to have soundly applied the revised rule to the facts of this case. While Judge Gutierrez should have granted the NFL's Daubert motions during the trial, Judge Gutierrez rectified this mistake by setting aside the verdict.

As Judge Gutierrez argued, it seems unlikely that Rascher's testimony, which asserted that all NFL games could be available for free over the air, has merit. Rascher's but-for world where the consumer would pay \$0 to watch every NFL game was not supported by his testimony and only was plausible in a fictional, but-for world. Thus, Rascher failed to reliably apply his methods to the facts of the case.

Moreover, the plaintiffs' expert John Douglas Zona failed to demonstrate that a single provider was

attempting to compete — and plausibly could have competed — with DirecTV in a but-for world where DirecTV did not have the exclusive rights to Sunday Ticket. While Zona's argument that a plausible competitor could have existed due to the underlying costs of a DirecTV subscription, and the annoyances of a satellite installation is reasonable, so is the position of Judge Gutierrez that this argument ultimately swallowed itself.

No plausible direct-to-consumer streaming service existed during the class period, and a competing satellite or cable provider would also have had an underlying subscription cost.

Accordingly, Zona's methods were not reliably applied to the facts of the case, and Judge Gutierrez properly excluded his testimony under Rule 702.

Judge Gutierrez's exercise of his judicial discretion could be a telling sign for the future application of Rule 702. While the 2023 change to the rule heightened the standard for what is admissible expert testimony, it has also increased the judicial involvement in determining that standard.

As shown in this case, flawed expert testimony can significantly influence a jury, and it is the judge's duty to take an active role in deciding if an expert has met admission requirements — providing the jury with relevant and reliable testimony.[12]

Both Rule 702 challenges from litigants, as well as Rule 702 exclusions from judges, are likely to increase going forward.

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[1] FRE 702 (Testimony by Expert Witness) now 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 the proponent demonstrates to the court that it is more likely than not that:

- a. The expert's scientific, technical, or other specialized knowledge will help the trier of fact 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
- d. The expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

[2] See Footnote 1.

[3] <https://www.mcguirewoods.com/client-resources/alerts/2024/1/important-changes-to-rule-702-and-expert-testimony/>.

[4] [YouTube TV](#) purchased the rights to Sunday Ticket beginning in the 2023-24 season.

[5] The average price throughout the class period was \$102.74; while bars and restaurants paid a fee depending on fire code occupancy. The price for Sunday ticket in 2022 was \$293.94.

[6] The NBA, NHL, and [MLB](#) offer single-team packages; the NHL was previously sued based on a similar set of facts in 2015. The NHL settled with plaintiffs and agreed to offer single-team packages and reduce the cost of "NHL Center Ice."

[7] In 2009, the [United States Supreme Court](#) struck down the NFL's argument that its teams are a "single entity" in *American Needle, Inc. v. NFL*, 560 U.S. 183 (2010).

[8] Residential class plaintiffs received \$4.7B, while commercial class plaintiffs received \$96M.

[9] Pursuant to Federal Rule of Civil Procedure 50(b), a motion for a judgment as matter of law asks the court to enter a judgment based on the conclusion that no reasonable jury could have reached the same verdict.

[10] https://www.bloomberglaw.com/public/desktop/document/InreNationalFootballLeaguesSundayTicketAntitrustLitigationDocketN/10?doc_id=X5F78BMG95Q864AJF7I71L91UO7.

[11] Rascher essentially argued the "but-for" price of Sunday Ticket, absent collusion, is \$0.

[12] *In re Onglyza Prods. Liab. Litig.*, 93 F.4 th 339, 348 (6th Cir. 2024).