

The First Circuit

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THE First Circuit does not have a large body of Rule 702 case law, but it is the home of one of the leading wayward cases, *Milward v. Acuity Specialty Products Group*.¹ In *Milward*, the First Circuit reversed the district court's exclusion of plaintiffs' general causation expert, who relied upon a "weight of the evidence" methodology in opining that the plaintiff's exposure to benzene was the cause of plaintiff's acute promyelocytic leukemia ("APL"). The district court had excluded the evidence based on the lack of any epidemiologic evidence associating benzene exposure with APL and its conclusion that the other evidence proffered by the expert showed only that causation was biologically plausible.

The First Circuit reversed, relying on case law and reasoning that has now been squarely rejected by the amended Rule. Citing back to one of the cases specifically criticized during the Advisory Committee's deliberations,² the First Circuit held that the district court had overstepped its role as

gatekeeper, because "[t]he soundness of the factual underpinnings of the expert's analysis and the correctness of the expert's conclusions based on that analysis are factual matters to be determined by the trier of fact."³ The First Circuit continued: "When the factual underpinning of an expert's opinion is weak, it is a matter affecting the weight and credibility of the testimony—a question to be resolved by the jury."⁴ In so holding, the First Circuit improperly shifted the burden of proof to defendants and disregarded the plaintiffs' burden under Rule 702(b) and 702(d).

This incorrect understanding of the burden imposed on the proponent of expert testimony under Rule 702 has continued to be cited in First Circuit case law, all of which insofar as they are based on such reasoning, should be considered overruled by the 2023 Amendments to Rule 702.⁵

In addition to the continued improper reliance on *Milward*, other cases in the First Circuit

¹ 639 F.3d 11 (2011).

² *Smith v. Ford Motor Company*, 215 F.3d 713, 721 (7th Cir. 2000).

³ *Milward*, 639 F.3d at 23 (citing *Smith*, 215 F.3d at 718).

⁴ *Id.*

⁵ *See, e.g.*, *Pritt v. John Crane Inc.*, 2022 WL 13843411, *4 (D. Mass. Aug. 3, 2022); *Ionics, Inc. v. Massaro*, 266 F. Supp.3d 461, 470 (D. Mass. 2017); *E.E.O.C. v. Texas Roadhouse, Inc.*, 215 F. Supp.3d 140, 164 (D. Mass. 2016); *Coffin v. AMETEK, Inc.*, 2020 WL 5552113, *8 (D. Maine Sept. 16, 2020); *West v. Bell Helicopter Textron, Inc.*, 967 F. Supp.2d 479, 487 (D. N.H. 2013).

reflecting a misapplication of Rule 702 are set forth below.

Bricklayers and Trowel Trades Intern. Pension Fund v. Credit Suisse Securities (USA) LLC⁶

In this securities fraud action, the First Circuit Court of Appeals reviewed a district court's exclusion of an expert, who had conducted an event study in support of plaintiffs' damages model. Defendant argued that plaintiffs' expert had improperly used variables in his model that were obtained at random in violation, which was contrary to standard methodology and produced an abnormal result.⁷

The First Circuit concluded that the expert's failure to include a specific analysis of dummy variables used for the calculation should not discount an expert's opinion.⁸ The court held that though the variables selected by the expert may have affected the outcome of the event study, this "may be a dispute that should be resolved by the jury."⁹

Though the First Circuit ultimately excluded the expert testimony for other reasons, the court's reasoning in deferring to the jury the question whether the expert's opinion reflected a reliable

application of his methodology is contrary to Rule 702(d).

United States v. Jackson¹⁰

Defendant Laveneur Jackson appealed from his conviction for possessing a firearm as a prohibited person, alleging that the district court erred in admitting the expert testimony of Special Agent John Forte.¹¹ Agent Forte provided testimony about where the guns in question were likely manufactured. To provide that testimony, he relied on reference materials, including periodicals, books, online research, and notes gathered by other examiners.¹² Defendant Jackson moved to strike that expert testimony, arguing that it was not based on "scientific, technical, or other specialized knowledge" nor was the testimony the product of "reliable principles and methods."¹³

The First Circuit held that the district court did not abuse its discretion in admitting Forte's opinions. Quoting *Milward*, the court held that where the factual underpinning of an expert's opinion is weak, but the methods are otherwise found to be reliable, such an issue is "a matter affecting the weight and credibility of the

⁶ 752 F.3d 82 (1st Cir. 2014).

⁷ *Id.* at 87.

⁸ *Id.* at 93 (internal citations omitted).

⁹ *Id.*

¹⁰ 58 F.4th 541 (1st Cir. 2023).

¹¹ *Id.* at 548.

¹² *Id.*

¹³ *Id.*

[expert's] testimony – a question to be resolved by the jury.”¹⁴

The clarified language of the amended Rule 702 made clear that a judge (as gatekeeper) must determine, by a preponderance of the evidence, whether an expert's testimony is based on sufficient facts or data to be admissible. The basis for an expert's testimony is a question of admissibility for the judge and not a question of weight to be evaluated by the jury.

United States v. Pena¹⁵

Defendant was convicted by a jury in district court for the District of Massachusetts for possession of cocaine with intent to distribute and for possession of a firearm during or in relation to a drug crime. He was sentenced to 120 months imprisonment, which he appealed.

Plaintiff's argument on appeal was that the district court admitted the prosecutor's expert testimony concerning a fingerprint analysis without making any evaluation of the scientific standard used in reaching its conclusions. The First Circuit Court of Appeals held that there was no abuse of discretion by the district court allowing the expert's fingerprint testimony. In reaching that decision, the First Circuit noted the trial court had

criticized the defendant's motion to exclude for relying solely on “one article from the Fordham Law Review, and that's not enough to carry the weight of the exclusion motion.”¹⁶

With that analysis, the party seeking to exclude the evidence was improperly given the burden of proof to establish that an expert should not be admitted. Rule 702 quite clearly delineates that the party proffering the evidence has the burden of proof.

United States v. Sandoval¹⁷

Multiple defendants appealed from federal convictions stemming from their participation in the transnational criminal organization, “MS-13.” Defendants alleged, among other things, that the district court abdicated its gatekeeping role in admitting the expert testimony of an FBI agent.¹⁸ The expert testimony at issue was offered by the government to provide evidence of the history, structure, and organization of MS-13.¹⁹

Defendants moved to exclude the proposed testimony on the grounds that the agent's testimony was not based on sufficient facts and data and was not based a reliable application of the expert's

¹⁴ *Id.* (quoting *Milward*, 639 F.3d at 11).

¹⁵ 586 F.3d 105 (1st Cir. 2009).

¹⁶ *Id.* at 110.

¹⁷ 6 F.4th 63 (1st Cir. 2021).

¹⁸ *Id.* at 83.

¹⁹ *Id.*

methodology.²⁰ The district court denied the defendants' motion, finding that the agent's background and experience was sufficient for him to testify on the topics at issue. The court did not assess the reliability of the agent's methodology in reaching his opinions.²¹ In the appeal, the First Circuit held that the district court properly fulfilled its gatekeeping role, and acted within its discretion, to admit the expert testimony even without a determination that the expert reliably applied his methodology to the facts of the case.²² The court's decision appears to be, at least in part, based on the fact that the witness's expertise was based on experience rather than scientific observations.

Rule 702 (d) emphasizes that expert opinions "must stay within the bounds of what can be concluded from a reliable application of the expert's basis and methodology."²³ Here, the First Circuit incorrectly suggests that this requirement does not apply when a witness's expertise is experience-based.

United States v. Shea²⁴

Five defendants were convicted after a jury trial in the U.S. District Court for the District of New Hampshire on charges of conspiracy to commit robbery, operating a racketeering enterprise, carjacking, and firearm offenses. Four defendants were sentenced to life imprisonment, and each defendant appealed. At issue in the case was the admissibility of DNA evidence which tied defendants to the crime scene. There was a lengthy hearing assessing admissibility of the DNA expert's evidence, which was ultimately admitted.

The district court held that any flaws in the expert's application of an otherwise reliable methodology "went to weight and credibility and not to admissibility."²⁵ The First Circuit Court of Appeals upheld the district court's decision to allow the evidence in under this basis, holding that it did not constitute an abuse of discretion.²⁶

This decision demonstrates an incorrect application of Rule 702's burden of proof.

Carmichael v. Verso Paper, LLC²⁷

Plaintiff, a former employee, filed suit against Defendant, his

²⁰ *Id.* at 84.

²¹ *Id.*

²² *Id.*

²³ Fed. R. Evid. 702.

²⁴ 211 F.3d 658 (1st Cir. 2000).

²⁵ *Id.* at 668.

²⁶ *Id.*

²⁷ 679 F. Supp.2d 109 (D. Me. 2010).

former employer, claiming his termination violated state and federal law for disability discrimination. Defendant moved for summary judgment, arguing that plaintiff could not establish his ability to perform the essential functions of the position. Plaintiff submitted an expert report which opined on the plaintiff's ability to perform the essential functions of his position.

Defendant sought to exclude the expert report, arguing that the expert's testimony was not grounded in a scientific foundation required under Rule 702. The district court disagreed, allowing the expert's opinion and holding that "at trial, [defendant] is free to vigorously explore whether [expert's] opinions, both at the trial itself and at the deposition, are sufficiently well grounded to be persuasive."²⁸

In rendering that decision, the trial court did not conduct any analysis of the sufficiency or reliability of the expert's methodology. With that, the court shifted the burden of proof standard to the defendant, which was tasked with the obligation to disprove the foundation of the expert's opinions on cross examination.

²⁸ *Id.* at 117.