The Second Circuit

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A. Second Circuit Court of Appeals

THE Second Circuit's nearly 20-year-old decision in *McCullock v. H.B. Fuller*[1] appears to be the source of many of those decisions that run afoul of Federal Rule of Evidence 702's express mandates.

In *McCullock*, the plaintiff brought negligence and strict-liability claims against a hot-melt glue manufacturer for an alleged throat injury sustained from breathing fumes from the manufacturer's hot-melt glue. Over the manufacturer's objections, the court permitted the plaintiff to offer testimony from a medical doctor on causation. The Second Circuit affirmed:

> Disputes as to the strength of [the doctor's] credentials, faults in his use of differential etiology as a methodology, or lack of textual authority for his opinion, go to the weight, not the admissibility, of his testimony.[2]

In doing so, the Second Circuit misapplied Rule 702. By deferring the decision on admissibility—including apparent issues with methodology—the court failed to perform its role as a gatekeeper. Unfortunately, it also laid the foundation for subsequent decisions to similarly misapply Rule 702.

In the following years, the Second Circuit continued to misapply Rule 702 when considering the admissibility of proffered expert testimony. In *Borawick v. Shay*,[3] a tort action involving alleged child abuse, the court cited *Daubert* for the proposition that "there should be a presumption of admissibility of [scientific] evidence."[4] The Second Circuit continued misapplying Rule 702 in *Boucher v. U.S. Suzuki Motor Corporation*,[5] where it permitted a proffered vocational expert in a products liability action brought by an injured motorcyclist after falling from a motorcycle. It noted that "[a]lthough expert testimony should be excluded if it is speculative or conjectural, or if it is based on assumptions that are so unrealistic and contradictory as to suggest bad faith or to be in essence an apples and oranges comparison, other contentions that the assumptions are unfounded go to the weight, not the admissibility, of the testimony."[6]

While the Second Circuit has at times attempted to course-correct

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[1] 61 F.3d 1038 (2d Cir. 1995).
[2] *Id.* at 1044 (citing Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 113 S. Ct. 2786, 2798 (1993).
[3] 68 F.3d 597 (2d Cir. 1995).
[4] *Id.* at 610.
[5] 73 F.3d 18 (2d Cir. 1996).
[6] *Id.* at 21 (internal citations omitted).

the problematic language found in these cases, it has all too often followed them.[7] District courts have done the same. Below is a survey of some of those courts' decisions.

BPP Wealth v. Weiser Capital Management[8]

In an action for breach of contract, conversion, civil conspiracy, trademark infringement and unjust enrichment, the Second Circuit affirmed the district court's decision to admit proffered expert testimony regarding damages over objections to the expert's methodology.

Although the court correctly noted the district court's "broad discretion" in deciding whether "to admit expert testimony," the Second Circuit incorrectly explained that "[w]hile expert testimony should be excluded if it is 'speculative or conjectural,' or based on assumptions that are 'so unrealistic and contradictory as to suggest bad faith or to be in essence an apples and oranges comparison,' 'other contentions that the assumptions are unfounded go to the weight, not the admissibility, of the testimony.'"[9]

This is an improper application of Rule 702 because it creates an incorrect standard of "unrealistic" as the benchmark for exclusion, giving the impression that anything short of that should be admissible. The standard is not bad faith but rather that the sufficiency of the basis for and the reliable application of principles and methodology of the expert's opinion is demonstrated by a preponderance of the evidence to be determined by the Court.

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[7] *Compare* Amorgianos v. Nat'l R.R. Passenger Corp., 303 F.3d 256, 266 (2d Cir. 2002) ("Thus, when an expert opinion is based on data, a methodology, or studies that are simply inadequate to support the conclusions reached, *Daubert* and Rule 702 mandate the exclusion of that unreliable opinion testimony.") *and* Ruggiero v. Warner-Lambert Co., 424 F.3d 249 (2d Cir. 2005) ("After the *McCullock* court reviewed a number of factors underlying the opinion of the plaintiff's expert, the court stated that '[d]isputes as to the strength of his credentials, faults in his use of differential etiology as a methodology, or lack of textual authority for his opinion, go to the weight, not the admissibility, of his testimony.' Ruggiero is over-reading that passage.") *with* Zerega Ave. Realty Corp. v. Hornbeck Offshore Transp., LLC, 571 F.3d 206, 214 (2d Cir. 2009) (noting that "contentions that the assumptions are unfounded go to the weight, not the admissibility, of the testimony") *and* Nimely v. City of N.Y., 414 F.3d 381 (2d Cir. 2005) (noting a "presumption of admissibility" for expert testimony).

[8] 623 F. App'x 7 (2d Cir. 2015).

[9] *Id.* at 10 (internal citations omitted).

B. District Court Cases

AngioDynamics, Inc. v. C.R. Bard, Inc.[10]

AngioDynamics involved a causation and damages expert in an antitrust action. Although the Court ultimately decided to exclude the expert's testimony due to faulty "benchmarking analysis," it cited the following as guidance for its decision – "the question whether plaintiffs have met their burden of proving comparability should be left to the trier of fact to resolve because comparability challenges generally involve weighing facts"[11] and "[e]ven if the data relied on by the expert is 'imperfect, and more (or different) data might have resulted in a 'better' or more 'accurate' estimate in the absolute sense, it is not the district court's role under Daubert to evaluate the correctness of facts underlying an expert's testimony.'"[12]

Under Rule 702, the court failed to fulfill its responsibility for deciding if the underlying factual assumptions made by the expert were sufficient based upon a preponderance of the evidence. The credibility of the information may be attacked on cross-examination, but the court must assess the underlying factual analysis for purposes of admissibility.

Assured Guaranty Municipal Corp. v. Flagstar Bank, FSB[13]

In a bench trial of a breach of contract action regarding home equity loans, in which the court evaluated a damages expert with specialties in loans, the court stated that "*'[p]articularly in a bench trial*, [v]igorous cross-examination, presentation of contrary evidence, and careful ... [attention to] the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."[14]

The manner of trial – bench or jury – has no bearing on the proper application of Rule 702. For either, the issue of whether an expert's opinion is based on sufficient facts is a question of admissibility, not reserved for cross-examination, to be determined by a judge by a preponderance of the evidence.

A.V.E.L.A., Inc. v. Estate of Marilyn Monroe, LLC[15]

A merchandizing company sued an estate seeking declaratory judgment that products did not infringe intellectual property. The estate brought a counterclaim alleging false endorsement, trademark infringement, dilution, and interference with prospective economic advantage, and proffered

[10] 537 F. Supp.3d 273 (N.D.N.Y. 2021).
[11] *Id.* at 342.
[12] *Id.* at 338.
[13] 920 F. Supp.2d 475 (S.D.N.Y. 2013).
[14] *Id.* at 502 (emphasis added).
[15] 364 F. Supp.3d 291 (S.D.N.Y. 2019).

an expert regarding consumer confusion.

The court held that "'[a] trial judge should exclude expert testimony if it is speculative or conjectural or based on assumptions that are so unrealistic and contradictory as to suggest bad faith. . . . [O]ther contentions that the assumptions are unfounded go to the weight, not the admissibility, of the testimony.'"[16]

This is an improper application of Rule 702 because it creates an incorrect standard of "unrealistic" as the benchmark for exclusion, giving the impression that anything short of that should be admissible. The standard for admissibility is not bad faith, but rather that the sufficiency of the basis for and the reliable application of principles and methodology of the expert's opinion is demonstrated by a preponderance of the evidence to be determined by the judge.

In re *AXA Equitable Life Insurance Company COI Litig.*[17]

The court was presented with actuarial experts in a class action dispute over life insurance policies. The court performed an analysis of whether the experts offered improper legal conclusions – and excluded those portions – but as to questions of proper methodology for the experts' calculations, the court deferred those questions to the jury, stating: "[a]s to the other issues raised in Plaintiffs' motion, the Court concludes that they go to the weight, not the admissibility, of the experts' testimony or raise limitations on their testimony that may adequately be policed through objections at trial."[18]

The court incorrectly applied Rule 702 because the issue of whether an expert's opinion is based on sufficient facts is a question of admissibility, not reserved for cross-examination, to be determined by a judge by a preponderance of the evidence.

B & R Supermarket v. Mastercard International[19]

The United States District Court for the Eastern District of New York cited to "liberal admissibility standards" in incorrectly permitting a proffered plaintiff's expert to testify regarding class certification and damages in a case involving federal and state antitrust violations.

Incorrectly addressing the standard, the court noted "[n]evertheless, 'in accordance with the liberal admissibility standards of the Federal Rules of Evidence, only serious flaws in reasoning or

[16] *Id.* at 324 (internal citations omitted).
[17] 595 F. Supp.3d 196 (S.D.N.Y. 2022).
[18] *Id.* at 255.
[19] No. 17CV02738MKBJO, 2021 WL 234550 (E.D.N.Y. Jan. 19, 2021).

methodology will warrant exclusion.'"[20]

The court misapplied Rule 702 on the basis of "liberal admissibility standards." Such a standard is inconsistent with Rule 702.[21]

Bernstein v. Cengage Learning, Inc.[22]

Bernstein was a class action alleging violation of publishing agreements for failure to pay royalties in which plaintiff proffered an expert regarding the framework for royalty allocation and damage calculation. The court noted that "[t]he Second Circuit has recognized the 'principle that Rule 702 embodies a liberal standard of admissibility for expert opinions. The federal courts employ 'a presumption of admissibility of expert evidence,' such that 'the rejection of expert testimony is the exception rather than the rule. Notwithstanding that presumption, however, '[t]he proponent of expert testimony has the burden of establishing by a preponderance of the evidence that the admissibility requirements of Rule 702 are satisfied[.]'"[23]

The court continued:

> Nevertheless, the Second Circuit has recognized that a district court's inquiry under *Daubert* is limited, and '[a] minor flaw in an expert's reasoning or a slight modification of an otherwise reliable method will not render an expert's opinion per se inadmissible.' The Court 'should only exclude the evidence if the flaw is large enough that the expert lacks good grounds for his or her conclusions. '"This limitation on when evidence should be excluded accords with the liberal admissibility standards of the federal rules and recognizes that our adversary system provides the necessary tools for challenging reliable, albeit debatable, expert testimony.' While 'vigorous cross-examination, presentation of

[20] *Id.* at *10 (quoting *In re* Fosamax Prods. Liab. Litig., 645 F. Supp.2d 164, 173 (S.D.N.Y. 2009)).

[21] The "liberal standard of admissibility" or similar language is used in numerous other cases in the Circuit, conflicting with Rule 702. *See, e.g., In re* Zyprexa Prod. Liab. Litig., 489 F. Supp.2d 230, 282 (E.D.N.Y. 2007); Billone v. Sulzer Orthopedics, Inc., No. 99-CV-6132, 2005 WL 2044554, at *3 (W.D.N.Y. Aug. 25, 2005); MBIA Ins. Corp. v. Patriarch Partners VIII, LLC, No. 09 Civ. 3255, 2012 WL 2568972, at *15 (S.D.N.Y. July 3, 2012).

[22] No. 19CIV7541ALCSLC, 2023 WL 6303424 (S.D.N.Y. June 9, 2023).

[23] *Id.* at *9 (internal citations omitted).

> contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence,' 'a trial court should not abandon its gatekeeping role and rely only upon cross-examination to expose any flaws in a proposed expert's testimony where the expert's methodology is untestable.' Ultimately, under the *Daubert* analysis, the Court has the discretion 'needed to ensure that the courtroom door remains closed to junk science while admitting reliable expert testimony that will assist the trier of fact.[24]

While this case cites many of the correct principles of application of Rule 702, it also incorrectly applies Rule 702 because a presumption of admissibility or liberal standard of admissibility in which exclusion is the exception is inconsistent with Rule 702.

Brush v. Old Navy LLC[25]

This civil rights action involved a forensic psychologist seeking to testify about plaintiff's alleged PTSD from an alleged illegal search. Defendants challenged the manner in which the expert diagnosed the Plaintiff with PTSD. The court permitted the expert testimony on the topic of PTSD and held that "[a]ny deficiencies in those opinions may be adequately addressed through rigorous cross-examination."[26]

The court misapplied Rule 702 as the court, not the jury, must analyze whether an expert's methodology supports the conclusions.

BS BIG V, LLC v. Philadelphia Indemnity Insurance Co.[27]

Plaintiffs alleged an insurance company breached an insurance policy by refusing to indemnify plaintiffs for water damage to insured property. In evaluating a challenge to an expert regarding cause of property damage, the court noted that "'[a]lthough a district court should admit expert testimony only where it is offered by a qualified expert and is relevant

[24] *Id.* at *10 (internal citations omitted).

[25] No. 2:21-CV-00155, 2023 WL 5311434 (D. Vt. Aug. 17, 2023).

[26] *Id*. at *6.

[27] No. 19CIV4273GBDSLC, 2022 WL 4181823, at *4 (S.D.N.Y. Sept. 13, 2022).

and reliable, exclusion remains the exception rather than the rule.'"[28]

Again, this is an incorrect application of Rule 702 because a liberal standard of admissibility in which exclusion is the exception is inconsistent with Rule 702.

Cates v. Trustees of Columbia University in City of New York[29]

Participants in university defined contribution retirement plans alleged breach of fiduciary duties under ERISA. The court evaluated a challenge to experts regarding recordkeeping fees, selection of a recordkeeper, and investment decisions and noted that "'[t]here is a presumption that expert testimony is admissible ... and the rejection of [such] testimony is the exception rather than the rule.'"[30]

Further, "'in accordance with the liberal admissibility standards of the Federal Rules of Evidence, only serious flaws in reasoning or methodology will warrant exclusion.'"[31]

The court continued: "While the Court is mindful of the many defects that Defendant contends exist in the opinions offered by Plaintiffs' experts, any defects in Minnich's methodology also go to the weight to be given to his testimony. ('[F]aults in [the] use of ... [a particular] methodology, or lack of textual authority for his opinion, go to the weight, not the admissibility, of his testimony.')"[32]

The court's reasoning misapplied Rule 702 in various ways: such a liberal standard of admissibility in which exclusion is the exception is inconsistent with Rule 702; and there is not a presumption of admissibility relieving the court of its role as gatekeeper if there is fault in the use of a methodology.

Cruz v. Kumho Tire Co.[33]

In this personal injury action, the court evaluated a challenge to engineers testifying about tire

[28] *Id.* at *4 (internal citations omitted).
[29] No. 116CV06524GBDSDA, 2019 WL 8955333 (S.D.N.Y. Oct. 25, 2019), *report and rec. adopted*, No. 16CIV6524GBDSDA, 2020 WL 1528124 (S.D.N.Y. Mar. 30, 2020).
[30] *Id.* at *6 (internal citations omitted).
[31] *Id.* (internal citation omitted).
[32] *Id.* at *12 (internal citation omitted).
[33] No. 8:10-CV-219 MAD/CFH, 2015 WL 2193796 (N.D.N.Y. May 11, 2015).

design. The court noted that "disputes regarding the nature and strength of an expert's credentials, an expert's use or application of his or her methodology, or the existence or number of supporting authorities for an expert's opinion go to the weight, not the admissibility of the expert's testimony.… [A]rguments regarding [the expert's] qualifications constitute the type of 'quibble' over an expert's experience, academic training, and other alleged shortcomings that the Second Circuit has held go to the weight and credibility of an expert's testimony instead of the admissibility of his opinions."[34]

Once again, this was an incorrect application of Rule 702 because the issue of whether an expert's opinion is based on sufficient facts is a question of admissibility, not reserved for cross-examination, to be determined by a judge by a preponderance of the evidence.

Depascale v. Sylvania Electric Products, Inc.[35]

This Eastern District of New York case involved a personal injury claim alleging exposure to chemicals and solvents at a worksite with a proffered expert regarding causation of injuries from exposure to chemicals.

In its decision, the court held that "[w]hen interpreting the requirements under *Daubert* and its progeny, the Second Circuit has noted that: '[a]lthough expert testimony should be excluded if it is speculative or conjectural, or if it is based on assumptions that are so unrealistic and contradictory as to suggest bad faith or to be in essence an apples and oranges comparison, other contentions that the assumptions are unfounded go to the weight, not the admissibility, of the testimony.'"[36]

The court improperly applied Rule 702 in setting forth an incorrect standard of "unrealistic" as the benchmark for exclusion, giving the impression that anything short of that should be admissible. The standard is not bad faith but rather that the sufficiency of the basis for and the reliable application of principles and methodology of the expert's opinion is demonstrated by a preponderance of the evidence to be determined by the court.

Engler v. MTD Products, Inc.[37]

The United States District Court for the Northern District of New York permitted a proffered expert

[34] *Id.* at *6 (internal citations and quotations omitted).
[35] No. CV 07-3558, 2009 WL 10708730 (E.D.N.Y. Oct. 22, 2009).
[36] *Id.* at *3 (internal citation omitted).
[37] No. 13-CV-575 CFH, 2015 WL 900126, at *7 (N.D.N.Y. Mar. 2, 2015).

in a products liability action against a lawnmower manufacturer to testify regarding the sufficiency of any warnings and the existence of a manufacturing defect. The court called "well settled" the "presumption of admissibility of evidence" under Rule 702.[38]

However, a "presumption of admissibility" is inconsistent with Rule 702.

Feliciano v. CoreLogic Saferent, LLC[39]

In reviewing a challenge to a proffered defense expert on the collection of housing data in a class action regarding an alleged failure to ensure the accuracy of bulk tenant data before selling to landlords, the court denied the motion opining:

> While *Daubert* and its progeny assigns the district court a gatekeeping function in policing admission of expert testimony, exclusion remains 'the exception rather than the rule':
>
> > 'Although a district court should admit expert testimony only where it is offered by a qualified expert and is relevant and reliable, exclusion remains 'the exception rather than the rule,' '[T]he traditional and appropriate means of attacking shaky but admissible evidence' is not exclusion, but rather '[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof.'
> >
> > 'Under *Daubert*, expert testimony should be excluded

[38] *Id.* (citing *Borawick*, 68 F.3d at 610. This "presumption" language unfortunately appears repeatedly in the caselaw. *See, e.g.,* Powell v. Schindler Elevator Corp., No. 3:14cv579 (WIG), 2015 WL 7720460, at *2 (D. Conn. Nov. 30, 2015); Advanced Fiber Techs. (AFT) Tr. v. J&L Fiber Servs., Inc., No. 1:07-CV-1191, 2015 WL 1472015, at *20 (N.D.N.Y. Mar. 31, 2015); Nat'l Coal. on Black Civic Participation v. Wohl, 661 F. Supp.3d 78, 97 (S.D.N.Y. 2023) ("In the Second Circuit, there is 'a presumption of admissibility of evidence.'") (citation omitted); Crawford v. Franklin Credit Mgt. Corp., 08-CV-6293 (KMW), 2015 WL 13703301 (S.D.N.Y. Jan. 22, 2015); S.E.C. v. Yorkville Advisors, LLC, 305 F. Supp.3d 486, 503-04 (S.D.N.Y. 2018); *Cates*, No. 16CIV6524GBDSDA, 2020 WL 1528124 (S.D.N.Y. Mar. 30, 2020).

[39] No. 17 CIV. 5507, 2020 WL 6205689 (S.D.N.Y. June 11, 2020).

> only if it is speculative or conjectural or based on assumptions that are so unrealistic and contradictory as to suggest bad faith or to be in essence an apples and oranges comparison.... Absent this degree of unreliability, any other contentions that the assumptions are unfounded go to the weight, not the admissibility of the testimony.'[40]

The court's reasoning runs counter to Rule 702 because such a liberal standard of admissibility in which exclusion is the exception is inconsistent with Rule 702. This case is also an improper application of Rule 702 because it creates an incorrect standard of "unrealistic" as the benchmark for exclusion, giving the impression that anything short of that should be admissible. The standard is not bad faith but rather that the sufficiency of the basis for and the reliable application of principles and methodology of the expert's opinion is demonstrated by a preponderance of the evidence to be determined by the judge.

Frederick v. Deco Salon Furniture, Inc.[41]

Plaintiff proffered an expert on safety and design in support of allegations of injury from design, manufacture, sale, and distribution of a chair.

The court reasoned that "Rule 702 'embodies a liberal standard of admissibility for expert opinions.'"[42] It further noted that "[t]he Second Circuit has clarified that '[a]lthough expert testimony should be excluded if it is speculative or conjectural, or if it is based on assumptions that are so unrealistic and contradictory as to suggest bad faith or to be in essence an apples and oranges comparison, other contentions that the assumptions are unfounded go to the weight, not the admissibility, of the testimony.' Generally, '[a] district court has discretion under Federal Rule of Evidence 703 'to determine whether the expert acted reasonably in making assumptions of fact upon which he would base his testimony.'"[43]

Additionally, the court held that "'[in] deciding whether a step in an expert's analysis is unreliable, the

[40] *Id.* at *1–*2 (internal citations and quotations omitted).

[41] No. 3:16-CV-00060 (VLB), 2018 WL 2750319 (D. Conn. Mar. 27, 2018).

[42] *Id.* at *2 (internal citations omitted).

[43] *Id.* at *5 (internal citations omitted).

district court should undertake a rigorous examination of the facts on which the expert relies, the method by which the expert draws an opinion from those facts, and how the expert applies the facts and methods to the case at hand.' However, in accordance with the liberal admissibility standards of the Federal Rules of Evidence, only serious flaws in reasoning or methodology will warrant exclusion."[44]

This case presents an incorrect application of Rule 702 because such a liberal standard of admissibility is inconsistent with Rule 702. This case is also an improper application of Rule 702 because it creates an incorrect standard of "unrealistic" or "serious flaws" as the benchmark for exclusion, giving the impression that anything short of that should be admissible. The standard is not bad faith but rather that the sufficiency of the basis for and the reliable application of principles and methodology of the expert's opinion is demonstrated by a preponderance of the evidence to be determined by the judge.

Gem Financial Services, Inc. v. City of New York[45]

In this §1983 and state civil rights case brought by store and owner against City of New York, the court was presented with a challenge to an expert on lost profits and noted that "expert testimony should be excluded as unreliable if the testimony 'is speculative or conjectural or based on assumptions that are so unrealistic and contradictory as to suggest bad faith or [is] in essence an apples and oranges comparison.' Other deficiencies in the expert's assumptions go to the testimony's 'weight, not ... admissibility.'"[46]

This case is another improper application of Rule 702 because it creates an incorrect standard of "unrealistic" as the benchmark for exclusion, giving the impression that anything short of that should be admissible. The standard is not bad faith but rather that the sufficiency of the basis for and the reliable application of principles and methodology of the expert's opinion is demonstrated by a preponderance of the evidence to be determined by the judge.

Grajeda v. Vail Resorts Inc.[47]

Biomechanical engineers were proffered as experts in a personal injury lawsuit. The court held that "[u]nder *Daubert,* the accuracy of Dr. Fisher's underlying data goes to weight, not admissibility, of his [photogrammetry] testimony. They

[44] *Id*. (internal citations omitted).
[45] No. 13CV1686RPKRER, 2022 WL 409618 (E.D.N.Y. Feb. 10, 2022).
[46] *Id.* at *8 (internal citations omitted).
[47] No. 2:20-CV-00165, 2023 WL 4803755 (D. Vt. July 27, 2023).

do not contain obvious inaccuracies suggestive of bad faith. To the extent Plaintiff wishes to contest the accuracy of Dr. Scher's measurements or assumptions, he may do so on cross-examination."[48]

This is an incorrect application of Rule 702 because the issue of whether an expert's opinion is based on sufficient facts is a question of admissibility, not reserved for cross-examination, to be determined by a judge by a preponderance of the evidence.

Holick v. Cellular Sales of New York, LLC[49]

Individuals sued employer for violations of the Fair Labor Standards Act and New York State Labor Law. The defendant proffered an expert regarding filing of tax returns. The district court stated that "'[n]onetheless, the admissibility of expert testimony should be viewed within the context of the entire rules of evidence and the presumption of admissibility of evidence.' 'Indeed, doubts about the usefulness of an expert's testimony should be resolved in favor of admissibility.'"[50]

The court misapplied Rule 702 as a presumption of admissibility is inconsistent with Rule 702.

Hutch Enterprises, Inc. v. Cincinnati Insurance Co.[51]

In an action involving an alleged breach of a commercial insurance policy, the district court denied a challenge to a proffered roofing expert, holding that "challenges to whether [an expert's] opinions were properly based on a complete picture of the condition of the roofs" in insurance coverage actions "implicate the weight that the jury may afford his opinions and can be explored on cross-examination."[52]

The court was responsible for deciding if the underlying factual assumptions made by the expert were sufficient based on a preponderance of the evidence. The credibility of the information relied upon may be attacked on cross-examination, but the court must assess the underlying factual analysis for purposes of admissibility.

Junger v. Singh[53]

The Western District of New York reviewed challenges to expert witnesses, an economist and a cardiologist, in a medical malpractice and wrongful death action, and denied motions to preclude. In doing so, the court held that "[u]nless the information or

[48] *Id.* at *9 (internal quotations omitted).
[49] No. 1:12-CV-584 (DJS), 2019 WL 13175461 (N.D.N.Y. Sept. 30, 2019).
[50] *Id.* at *2 (internal citations omitted).
[51] 16-cv-01010, 2019 WL 5783574 (W.D.N.Y. Aug. 12, 2019).
[52] *Id.* at *5.
[53] 514 F. Supp.3d 579 (W.D. N.Y. 2021).

assumptions that plaintiff's expert[ ] relied on were 'so unrealistic and contradictory as to suggest bad faith,' inaccuracies in the underlying assumptions or facts do not generally render an expert's testimony inadmissible…. Expert testimony should not be rejected simply because the conclusions reached by the witness seem subjectively improbable.... It is [v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof [that] are the traditional and appropriate means of attacking shaky but admissible evidence"[54]

Although credibility of information cited by the expert may be attacked on cross-examination, the factual assumptions which form the basis of the expert's opinion are also being challenged. Therefore, an analysis of these facts is a question of admissibility for a judge to determine by a preponderance of the evidence.

Lassen v. Hoyt Livery, Inc.[55]

Plaintiff proffered an expert regarding damages owed to class based on sample size in class action for violation of Fair Labor Standards Act and Connecticut Minimum Wage Act. The district court explained that "'[i]t is a well-accepted principle that Rule 702 embodies a liberal standard of admissibility for expert opinions. Disputes as to the strength of [a proposed expert witness's] credentials, faults in his ... methodology, or lack of textual authority for his opinion, go to the weight, not the admissibility, of his testimony.'"[56]

The court also opined that "[a] trial court should 'exclude expert testimony if it is speculative or conjectural or based on assumptions that are so unrealistic and contradictory as to suggest bad faith.' Otherwise, '[o]ther contentions that the assumptions are unfounded go to the weight, not the admissibility, of the testimony.' Allegations that the factual basis for an expert's testimony are flawed or imperfect 'may diminish the probative value' of the expert testimony, but do not demand preclusion."[57]

This is an incorrect application of Rule 702 because such a liberal standard of admissibility is inconsistent with Rule 702. This case is also an incorrect application of Rule 702 because faults in the use of methodology go to admissibility; the court has a gatekeeper role to perform. This case is also an improper application of Rule 702

[54] *Id.* at 589 (internal citations and quotations omitted).
[55] No. 13-CV-1529 (VAB), 2016 WL 7165716 (D. Conn. Dec. 8, 2016).
[56] *Id.* at *7 (internal citations omitted).
[57] *Id.* at *8 (internal citations omitted).

because it creates an incorrect standard of "unrealistic" as the benchmark for exclusion, giving the impression that anything short of that should be admissible. The standard is not bad faith but rather that the sufficiency of the basis for and the reliable application of principles and methodology of the expert's opinion is demonstrated by a preponderance of the evidence to be determined by the judge.

Lavalette v. Ion Media Networks, Inc.[58]

Employee brought action alleging retaliation against employer under New York City Human Rights Law, New York False Claims Act, and breach of contract. The court was presented with a challenge to plaintiff's expert regarding stock appreciation rights. In permitting certain testimony, the court stated: "'[A] trial judge should exclude expert testimony if it is speculative or conjectural or based on assumptions that are so unrealistic and contradictory as to suggest bad faith.' '[O]ther contentions that the assumptions are unfounded go to the weight, not the admissibility, of the testimony.'"[59]

This is also an improper application of Rule 702 because it once again creates an incorrect standard of "unrealistic" as the benchmark for exclusion, giving the impression that anything short of that should be admissible. The standard is not bad faith but rather that the sufficiency of the basis for and the reliable application of principles and methodology of the expert's opinion is demonstrated by a preponderance of the evidence to be determined by the judge.

National Coalition on Black Civic Participation v. Wohl[60]

A voting rights organization brought a Voting Rights Act action against a lobbyist and political operative alleging they sent robocalls containing false information. In assessing the admissibility of testimony from a licensed investigator, court found that, in the Second Circuit, there is "a presumption of admissibility of evidence."[61]

A presumption of admissibility is inconsistent with Rule 702.

Phoenix Light SF Ltd. v. Wells Fargo Bank, N.A.[62]

A residential-mortgage-backed securities trustee brought actions against a loan servicer. Plaintiff's proffered expert, a former executive at Freddie Mac, sought to testify concerning uncured

[58] No. 16 CIV. 7286 (KPF), 2019 WL 3409899 (S.D.N.Y. July 29, 2019).
[59] *Id.* at *17 (internal citations omitted).
[60] 661 F. Supp.3d 78 (S.D.N.Y. 2023).
[61] *Id.* at 97.
[62] 574 F. Supp.3d 197 (S.D.N.Y. 2021).

document defects. In permitting the testimony, the court held that the moving party's "arguments that there are other, more appropriate comparators, or challenges to [expert's] selection of the GSE servicing standards as a 'prudent' baseline, are better addressed through competing expert testimony and cross-examination for the jury to weigh."[63]

The court misapplied Rule 702 in deferring to the jury the question of whether an expert applied reliable methodology to the facts of the case.

Pike Co., Inc. v. Universal Concrete Products, Inc.[64]

In a contractor and subcontractor construction dispute with claims of breach of contract and improper encumbrance with mechanic's lien and counterclaims of breach of contract, misappropriation of trade secrets, and tortious interference, the court addressed defendant's motion to strike plaintiff's proffered damages expert. In denying the motion, the court held: "[d]isputes as to the strength of an expert's credentials, faults in the use of a methodology, or lack of textual authority for an opinion go to 'the weight, and not the admissibility' of an expert's testimony."[65] Further, "[a]rguments about the assumptions and data underlying an expert's testimony go to the weight, rather than the admissibility, of that testimony.'"[66]

The court misapplied Rule 702 because faults in the use of methodology go to admissibility, not to weight; the court has a gatekeeper role to perform.

POM Wonderful LLC v. Organic Juice USA, Inc.[67]

In an action for selling adulterated pomegranate juice and counterclaims for false advertising, the reports of a proffered expert on consumer surveys were permitted. In so holding, the court stated that any "methodological flaws alleged in [the expert's] report go to the weight to be given to the surveys, not their admissibility."[68]

The court misapplied Rule 702. It was responsible for deciding if the underlying factual assumptions made by the expert were sufficient based on a preponderance of the evidence. Credibility may be attacked on cross-examination, but the court must assess the

[63] *Id.* at 205.
[64] 524 F. Supp.3d 164 (W.D.N.Y. 2021).
[65] *Id.* at 176 (citing United States v. American Exp. Co., No. 10-CV-4496(NGG)(RER), 2014 WL 2879811, at *2 (E.D.N.Y. June 24, 2014)).
[66] *Id.* at 176 (internal citations omitted).
[67] 769 F. Supp.2d 188 (S.D.N.Y. 2011).
[68] *Id.* at 200.

underlying factual analysis for purposes of admissibility.

Romero v. Irving Consumer Prod., Inc.[69]

In a personal injury action, the district court denied a motion to preclude defense trucking and transportation expert, finding that "[e]xpert testimony should be excluded where it is 'speculative or conjectural,' but arguments that the expert's assumptions 'are unfounded go to the weight, not the admissibility, of expert testimony'" and concluded that "[u]ltimately, the factfinders will have to weigh the credibility of both the lay and expert witnesses and come to their own conclusions as to whether [defendant] acted negligently."[70]

Although the court assessed the question of the expert's reliance on facts in dispute, and determined the credibility of the witnesses should be weighed by the jury, it misapplied Rule 702 in deferring the question of admissibility to the jury when it failed to determine whether the expert's opinion was based on sufficient facts by a preponderance of the evidence.

Rutherford v. City of Mount Vernon[71]

Rutherford involved alleged Fourth Amendment rights violations, false arrest, malicious prosecution, among other claims, arising from the execution of a search warrant. Plaintiffs' law enforcement expert's opinions were permitted even though not based on comparative data.

The court reasoned that "'[d]isputes as to the strength of [an expert's] credentials, faults in his use of different etiology as a methodology, or lack of textual authority for his opinion, go to the weight, not the admissibility, of his testimony.'"[72]

The court misapplied Rule 702. Whether an expert's opinion is based on sufficient facts is a question of admissibility, not reserved for cross-examination, to be determined by a judge by a preponderance of the evidence.

Scott v. Chipotle Mexican Grill, Inc.[73]

Plaintiffs, employees of the restaurant chain, brought a collective and class action against an employer alleging violations of the Fair Labors Standards Act and

[69] 664 F. Supp.3d 255 (N.D. N.Y. 2023).
[70] *Id.* at 265, 266.

[71] No. 18 CIV. 10706 (AEK), 2023 WL 6395375 (S.D.N.Y. Sept. 29, 2023).
[72] *Id.* at 24 (quoting *McCullock,* 61 F.3d at 1044).
[73] 315 F.R.D. 33 (S.D.N.Y. 2016).

state laws. The court evaluated a labor studies expert, economist and "restaurant analyst." In addressing the standard for expert testimony, the court held that "[i]n light of the liberal admissibility standards of the Federal Rules of Evidence, exclusion of expert testimony is warranted only when the district court finds 'serious flaws in reasoning or methodology.'"[74] The court further explained that "[o]therwise, if an expert's testimony falls within 'the range where experts might reasonably differ,' the duty of determining the weight and sufficiency of the evidence on which the expert relied lies with the jury, rather than the trial court."[75]

This case is an incorrect application of Rule 702. Whether an expert applied reliable methodology to the facts of the case is for the court, not the jury, to decide. In addition, a liberal standard of admissibility is inconsistent with Rule 702.

S.E.C. v. Badian[76]

In a civil enforcement action brought by the SEC against two defendants, alleging they conspired to violate securities laws, experts in banking and securities were proffered. The court explained that "Badian challenges Glosten and Jones' report as unreliable because [each] admitted to having concerns about 'discrepancies' in the raw data that they were asked to analyze. . . . Defendants are free at trial to challenge the strength of Glosten and Jones' analysis as a result of these modifications by, for example, conducting vigorous cross-examination . . . ."[77]

The court misapplied Rule 702 since it was responsible for deciding if the underlying factual assumptions made by the expert were sufficient based on a preponderance of the evidence. Credibility may be attacked on cross-examination, but the court must assess the underlying factual analysis for purposes of admissibility.

S.E.C v. Lek Securities Corp.[78]

In a securities fraud action against broker-dealer, the SEC sought to exclude defendant's proffered expert witness, an institutional trading expert with 37

[74] *Id.* at 43 (citing *In re Fosamax,* 645 F. Supp.2d at 173).
[75] *Id.*
[76] 822 F. Supp.2d 352 (S.D.N.Y. 2011).
[77] *Id.* at 364.
[78] 370 F. Supp.3d 384 (S.D.N.Y. 2019).

years' experience. Although the court excluded some of the testimony because it was "just flat out wrong," it then, despite describing the expert's analysis as "misleading and unreliable," permitted portions of the report as "shaky but admissible evidence best addressed by cross examination."[79]

Here, too, the court misapplied Rule 702 since it was responsible for deciding if the underlying factual assumptions made by the expert and his methodology were sufficient based on a preponderance of the evidence. Credibility may be attacked on cross-examination, but the court must assess the underlying factual analysis for purposes of admissibility.

Sitts v. Dairy Farmers of America, Inc.[80]

This action, involving alleged antitrust claims under the Sherman Act in the dairy industry, addressed admissibility of a proffered economist. The court held that "[t]his type of challenge goes to the weight of [the expert]'s opinion rather than its admissibility as it pertains only to whether [the expert]'s regression analysis is sufficiently detailed and illustrative to yield persuasive conclusions."[81]

This is another example of improper application of Rule 702. The court was responsible for deciding if the underlying factual assumptions made by the expert were sufficient based on a preponderance of the evidence. The credibility of the information relied upon may be attacked on cross-examination, but the court must assess the underlying factual analysis for purposes of admissibility.

Tedone v. H.J. Heinz Co.[82]

Plaintiff, allegedly injured when opening a glass bottle of ketchup, brought a personal injury action against manufacturer and hotel. Defendant moved to exclude plaintiff's expert on the source of the bottle's fracturing on the grounds that the witness did not rely on sufficient facts, use reliable methods, or apply principals to the facts of the case. In permitting the testimony, the court held: "Ultimately, the Defendant's challenge to [expert's] qualifications and methods go to the weight of his testimony, not its admissibility."[83]

The court failed to properly apply Rule 702. Whether an expert applied reliable methodology to the

[79] *Id.* at 414.
[80] 2:16-cv-00287, 2020 WL 3467993 (D. Vt. June 24, 2020).
[81] *Id.* at *10.
[82] 686 F. Supp.2d 300 (S.D.N.Y. 2009).
[83] *Id.* at 310.

facts of the case is for the court, not the jury, to decide.

51 Webster St., Inc. v. Atlantic Richfield Co.[84]

Plaintiff sued a former gas station operator for remediation costs. Motions by both parties to exclude the other side's experts (in environmental forensic chemistry and geology) were denied. In reaching its determination, the court reasoned that "[i]n light of the liberal admissibility standards of the Federal Rules of Evidence, exclusion of expert testimony is warranted only when the court finds 'serious flaws in reasoning or methodology.'"[85]

This case is an incorrect application of Rule 702 because such a liberal standard of admissibility in which exclusion is the exception is inconsistent with Rule 702. This case is also an improper application of Rule 702 because it creates an incorrect standard of "serious flaws" as the benchmark for exclusion, giving the impression that anything short of that should be admissible. The standard is not "serious flaws" but rather that the sufficiency of the basis for and the reliable application of principles and methodology of the expert's opinion is demonstrated by a preponderance of the evidence.

[84] No. 16-CV-468-MJR, 2019 WL 76573 (W.D.N.Y. Jan. 2, 2019).

[85] *Id.* at *2 (internal citation omitted).