The Seventh Circuit

By: William B. Larson, Jr. and Wade A. Bredin

Bill Larson is a partner with MG+M The Law Firm, based in the Wilmington, Delaware, office. He is a well-rounded litigator, counselor, problem solver, and trial attorney with extensive experience in Delaware general and commercial litigation, real estate litigation, trusts and estates litigation, local government matters, and national product liability litigation. Bill is a council member and former chair of the Delaware State Bar Association's Litigation section. He also previously served as the senior assistant city solicitor and special deputy attorney general for the City of Wilmington.

Wade Bredin is an associate with MG+M The Law Firm, based in the Wilmington, Delaware, office. He works across a wide spectrum of civil litigation matters, including national product liability litigation, real property litigation, trusts and estates matters, and commercial litigation. He also works on local government matters. Wade has experience in all phases of litigation, from advising on pre-litigation disputes to working on appellate matters.

Manpower, Inc. v. Insurance Company of the State of Pennsylvania[1]

THE partial collapse of a Paris office building resulted in insurance litigation over the cost of business interruption. The insurance agreement set out the method for determining these costs, though the numbers chosen to calculate this amount was the subject of dispute. Each party offered forensic accounting experts to determine the costs of the business interruption. The competing experts had used different numbers—but the same calculation—in reaching their final estimates.

The lower court excluded plaintiff's expert on the grounds that his testimony was based on incorrect assumptions of future profits. Specifically, the lower court found that plaintiff's expert had relied on too short a base period of profit margins in determining future profits. The Seventh Circuit reversed and instructed the admission of both experts, stating that "the reliability of data and assumptions used in applying a methodology is tested by the adversarial process and determined by the jury; the court's role is generally limited to assessing the reliability of the methodology."[2]

Under the amendment to Rule 702(d), the court must find that each expert's opinion reflects a reliable application of sound principles and methods to the facts of the case. If the methodology or principles used by one expert is in dispute, it must hear evidence to determine whether it is more likely than not that the expert has applied sound principles and methods. Here, the court failed to determine whether Plaintiff's expert's methodology was based on sound principles, instead leaving it to the fact-finder to weigh the two experts' methods.

Smith v. Ford Motor Co.[3]

A battle of automobile experts led to an appeal when both experts were excluded on the basis that they could not be qualified as automotive design or engineering experts. The lower court reasoned that neither expert could be qualified because neither was peer-reviewed in the field of automotive engineering and because they were both proclaimed experts in something other than automotive engineering specifically. The Seventh Circuit overturned the district court's exclusion, finding that the experts could testify to conclusions of automotive

[1] 732 F.3d 796 (7th Cir. 2013).

[2] *Id.* at 808.

[3] 215 F.3d 713, 719 (7th Cir. 2000).

engineering despite being experts in related, but not exactly analogous, fields.

In so doing, the Seventh Circuit held that "the court's gatekeeping function focuses on an examination of the expert's methodology. The soundness of the factual underpinnings of the expert's analysis and the reliability of the expert's conclusions based on that analysis are factual matters to be determined by the trier of fact…."[4]

Under the amendment to Rule 702(b), this conclusion would be incorrect. Courts are responsible for determining that it is more likely than not that the expert's final opinion is based on sufficient facts and data which reliably support the conclusion; a court may no longer allow a jury to determine whether the "factual underpinnings" are reliable enough to support the expert's conclusion.

Although the decision of the Seventh Circuit in *Smith* was in accordance with the new Rule, its dicta has been misused in various ways since its publication in 2000. Under the amended Rule, Rule 702(b) clearly requires a finding that the factual underpinnings of an expert's opinion are, in fact, reliable.

***Walker v. Soo Line Railroad Co.*[5]**

Lightning struck plaintiff as he worked on defendant's railroad tower. Plaintiff sued on a theory that the tower was negligently grounded. Plaintiff sought to exclude defendant's expert, who inspected the railroad tower before the incident. The lower court allowed defendant's expert to testify despite allegations that his investigation had not been completed properly. The lower court did not discuss the expert's personal knowledge of the site or the reliability of his inspection. Defendant's expert testified that he had personally inspected the tower and that it was properly grounded.

The Court of Appeals affirmed the lower court's decision to admit defendant's expert. In so doing, it held that cross-examination—not a motion before the court—was the proper venue for questioning the reliability and completeness of the expert's investigation. The Court of Appeals wrote that "[i]f there was evidence that Tower A was unsafe that [the expert] should have considered but did not, or if there was reason to believe that [expert's] investigation was shoddy, [plaintiff] could have uncovered those flaws through cross-examination and through the presentation of contrary evidence."[6]

Pursuant to the Rule 702 amendments, courts must find by a preponderance of the evidence that an expert relied on sound principles and methods and that these

[4] *Id.* at 718.
[5] 208 F.3d 581 (7th Cir. 2000).
[6] *Id*. at 591.

principles and methods were reliably applied to the facts of the case. Here, the lower court should have heard evidence concerning the expert's investigation to determine whether it was based on reliable principles and methods and that those principles and methods were reliably applied, rather than leaving the issue in the first instance to cross-examination and the jury.

Livingston v. City of Chicago[7]

Female paramedic applicants challenged Chicago's physical testing regime alleging gender discrimination based on the disparate impact caused by the physical requirements. Chicago presented a career emergency responder as an expert in the necessary physical training to ensure paramedics were physically able to perform their duties. Plaintiffs challenged the reliability and relevance of the expert's testimony.

The judge's *Daubert* analysis referenced his gatekeeping function and mostly applied the *Daubert* standard correctly. However, in his analysis of the experts' reliable principles and methods, the judge found that the opinion was based on the expert's "expertise, the case-specific information listed in the report, and his inspection and site visit."[8] Further, the judge found that "because [the expert] connects his expertise to the facts and data in this case, his opinion is the product of reliable principles and methods, not *ipse dixit*."[9] Finally, the judge found that the "quality or remoteness" of the expert's experience as applied to the facts and data went to the "weight of his testimony, not its admissibility."[10] Further, "[d]eterminations on admissibility should not supplant the adversarial process; 'shaky' expert testimony may be admissible, assailable by its opponents through cross-examination."[11] "Thus, to the extent Plaintiffs argue that their cross-examination of Dr. Davis revealed weaknesses in his methodology, these arguments do not go to the admissibility of his testimony but rather to its weight."[12]

Under Rule 702's amendment, the court must find that the proffered expert reliably applied sound principles and methods before the expert can testify. Here, the court allowed the expert's testimony despite a lack of reliable principles and methods applied by the expert in reaching his conclusion.

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[7] 597 F. Supp.3d 1215, 1224 (N.D. Ill. 2022).
[8] *Id.* at 1224.
[9] *Id.*
[10] *Id.*
[11] *Id.* at 1221.
[12] *Id.* at 1225.

***Cage v. City of Chicago*[13]**

Defendant in a rape case challenged the admission of the City's expert, because the expert had based his opinion as to whether seminal evidence indicated rape on disputed facts. Defendant's expert based his opinion on defendant's narrative of events and presented a conflicting opinion.

When a laboratory's results came down firmly on one set of facts, the district court did not change its ruling and still allowed both sets of experts to testify, stating that this factual contradiction was: "[A]n issue the trier of fact may consider when determining how much weight to give to [the expert's] conclusion; it does not bear on admissibility for the purposes of *Daubert*."[14]

The district court held that "the emphasis in [Rule 702] on 'sufficient facts or data' is not intended to authorize a trial court to exclude an expert's testimony on the ground that the court believes one version of the facts and not the other," allowing experts to testify to their opinions based on two conflicting narrative of events.[15]

Under the amendment to Rule 702(d), the court likely would exclude the expert who based his opinion on the disproven facts because the court's gatekeeping function includes ensuring that the opinion reflects a reliable application of principles and methods to the facts of the case.

***U.S. Automatic Sprinkler Co. v. Reliable Automatic Sprinkler Co.*[16]**

Plaintiff was forced to replace a costly sprinkler system and sued based on a theory of defective manufacturing and design. Defendant introduced an expert who opined that the sprinkler design was not defective.

Defendant manufacturer challenged that opinion on the grounds that the expert's methodology failed to account for numerous metallurgical properties of the sprinklers, failed to take alternative explanations into account, failed to quantify numerous data collected, and made questionable assumptions. The court found that the potential flaws in methodology went to the weight of his opinion, not its admissibility. The court held that the arguments against the expert's methods "go to the weight of the evidence [the expert] offers, rather than the admissibility of that evidence."[17]

Under the amendments to Rule 702(c), the court is responsible for determining that it is more likely than not that the expert used reliable principles and methods in

[13] 979 F. Supp.2d 787, 810 (N.D. Ill. 2013).
[14] *Id.* at 811.
[15] *Id.* at 810.
[16] 2010 WL 1266659 (S.D. Ind. March 25, 2010).
[17] *Id.*

reaching his conclusion. The question is not one of weight, but admissibility.

***Huntington Chase Condominium Assc. v. Mid-Century Ins. Co.*[18]**

A condominium association and an insurer moved to exclude each other's meteorology experts in a dispute over hail damage coverage. The trial court held that both experts could testify despite one of them admittedly not being qualified in the computer modelling and data program he used to reach his conclusions. The court held that this lack of specific training went to the weight of his testimony, not its admissibility:

> As a general matter, however, while experts' lack of specialization in a specific subfield or technology may affect the **weight** of the opinions they express, it does not preclude the **admissibility** of those opinions. A court "should consider a proposed expert's full range of practical experience as well as academic or technical training when determining whether that expert is qualified to render an opinion in a given area.[19]

Under the amendment to Rule 702(d), the court must find that the expert's opinion reflects a reliable application of the principles and methods used. If the expert admits that he is unqualified in the use of the principles and methods used, it stands to reason that his conclusion cannot reflect a reliable application of those methods. Accordingly, the court would likely bar the testimony under the amended Rule.

[18] 379 F. Supp.3d 687 (N.D. Ill. 2019).

[19] *Id.* at 700 (emphasis in the original, internal citations omitted).