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Bad Faith Experts After *Kumho*

by **Evan M. Tager**, **Eileen Penner**, and Alan E. Untereiner

Editor's Note

Increasingly, plaintiffs in bad faith cases have turned to so-called bad faith experts to help make their case. Courts have often accepted this relatively new species of expert testimony uncritically, allowing these putative experts to testify not simply to the duties of a claims handler, but also to such topics as the insurer's reasons for acting as it did toward the insured[1] and whether the insurer has an overall practice of cheating its insureds.[2] The Supreme Court's recent decision in *Kumho Tire Co.* v. *Carmichael*,[3] however, should provide insurers with a potent new weapon against the bad faith expert.

I. Â Background on *Kumho*

In *Kumho,* the Court unequivocally held that the federal trial courts' "general â€˜gatekeeping' obligation" under Federal Rule of Evidence 702 "applies not only to [expert] testimony based on â€˜scientific' knowledge, but also to testimony based on â€˜technical' and â€˜other specialized' knowledge."[4] Rule 702, the Court explained, "establishes a standard of evidentiary reliability" that "applies to all expert testimony."[5]

> [The Rule] requires a valid . . . connection to the pertinent inquiry as a precondition to admissibility. * * * And where such testimony's factual basis, data, principles, methods, or their application are called sufficiently into question * * *, the trial judge must determine whether the testimony has "a reliable basis in the knowledge and experience of [the relevant] discipline."[6]

The Court further held that "[t]he trial court must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable."[7] That means that the trial court may invoke some of the criteria of reliability identified by the Supreme Court in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*,[8] or it may replace or supplement those criteria with other factors.[9] The Court emphasized, however, that "[t]o say this is not to deny the importance of *Daubert*'s gatekeeping requirement. The objective of that requirement is to ensure the reliability and relevancy of expert testimony. It is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."[10] To ensure that this point is not lost on litigants and lower courts, Justice Scalia, joined by Justices O'Connor and Thomas, added in a concurrence:

> I join the opinion of the Court, which makes clear that the discretion it endorses C trial-court discretion in choosing the manner of testing expert reliability C is not discretion to abandon the gatekeeping function. I think it worth adding that it is not discretion to perform the function inadequately. Rather, it is discretion to choose among reasonable means of excluding expertise that is fausse and science that is junky. Though, as the Court makes clear today, the Daubert factors are not holy writ, in a particular case the failure to apply one or another of them may be unreasonable, and hence an abuse of discretion.11

Taken together, the majority opinion and concurrence send a strong message to bench and bar that Rule 702 imposes a substantial obstacle to the use in federal trials of questionable testimony by self-designated experts. That message should cause some serious rethinking about the role of "bad faith" experts.

II. Â Challenging the Bad Faith Expert After *Kumho*

In our experience, the three most common topics to which bad faith experts seek to testify are (1) the duties of

the insurer and why its conduct in the particular case breached those duties; (2) the insurer's motivations for its conduct; and (3) the impropriety of the insurer's overall claims handling practices. After *Kumho,* defense counsel should have strong arguments for precluding, or at least significantly limiting, testimony in each of these areas.

A. Â Global Challenges To Bad Faith Testimony

As indicated above, many courts have allowed expert testimony about the duties of a claims handler. Nevertheless, we believe that this subject is ripe for revisiting. Defense counsel should argue with renewed vigor that the issue of duty is one for resolution by the court and that expert testimony accordingly would not aid a properly instructed jury. Such testimony threatens not to "assist [but to] replace the fact finder,"[12] encroaching on functions that are reserved exclusively for the jury —namely, drawing commonsense inferences from evidence and deciding the ultimate issue (*i.e.,* whether the insurer has acted in bad faith).[13] Jurors are "capable of evaluating good and bad faith (just as they regularly determine what constitutes the conduct of a â€˜reasonable' person) by bringing their own common sense and life experience to bear."[14] They do not need an "expert" to pre-digest the evidence and feed them a verdict.[15] A witness's testimony that he or she discerns bad faith therefore fails to satisfy "the only true criterion" for admissibility —a capacity meaningfully to assist the jury.[16]

In addition to usurping the judge's and jury's functions, admission of expert "bad faith" testimony prejudices the jury by creating the impression that the court is shifting to the expert the responsibility for deciding the case[17] or elevating the expert to the improper status of a "super-juror."[18] As one federal court of appeals explained, "[b]y appearing to put the expert's stamp of approval on the [plaintiff's] theory, such testimony might unduly influence the jury's own assessment of the inference[s] that [are] being urged."[19] Or, put another way, unless an expert witness is limited to topics for which specialized knowledge (as opposed to common sense or moral judgment) is truly necessary, there is an unacceptable risk that his or her "evaluation of the commonplace *Â *Â *Â might supplant a jury's independent exercise of common sense."[20]

Yet that is exactly what the bad faith experts typically seek to do —supplant the jury's independent evaluation of evidence with their own result-oriented inferences. But an expert's personal beliefs ought not "substitute for [actual] ***evidence***" of a defendant's purported conduct.[21] The jury is entitled to the undigested version —first-hand accounts and documents — rather than the expert's subjective (and biased) version of documents and deposition transcripts that he or she has reviewed.

B. Â Challenges To The Propriety Of Particular Experts

Even if the highest court in the jurisdiction has held that expert testimony regarding an insurer's duties is ***generally*** admissible, defense counsel should preserve the contrary contention in the trial court and then move on to make arguments about why the particular expert should not be permitted to testify.[22] For example, what makes ***this*** particular witness qualified to dispense that knowledge? If his principal claim to expertise is his experience testifying in prior bad faith cases, that is not the kind of specialized knowledge that the drafters of Rule 702 had in mind.[23] If the putative expert has never handled a claim or been a regulator in the state whose law applies, what basis does she have for giving an opinion about the duties of an insurer in that state? It certainly should not be good enough for her to say that, after being retained, she read the state supreme court's leading bad faith cases.[24] Assuming that the expert has actual experience in the relevant state, defense counsel should argue forcefully that the expert should not be allowed to testify to the existence of duties that have not been recognized by the legislature, insurance commission, or state appellate courts.[25]

C. Â Challenges To Expert Testimony About The Insurer's Overall Practices

Even if the putative bad faith expert is permitted to testify about the duties of a claims adjuster, *Kumho* counsels strongly against allowing testimony about an insurer's overall practices. Typically, bad faith experts attempt to testify that the defendant has a general practice of cheating its insureds. They tend to base this testimony on two sources: (1) internal documents procured during discovery in the case in which they are being called, prior cases, or both; and (2) a review of the claims files in the case in which they are being called and prior cases in

which they were retained.

As for testimony about the insurer's internal documents, there is no need for an expert. It should suffice for plaintiffs' counsel to introduce the documents into evidence and then argue from those documents whatever inferences he or she wants the jury to draw. Drawing inferences from the defendant's documents simply is not the domain of an expert.[26] "Rule 702 â€˜does not afford the expert unlimited license to testify without first relating that testimony to some "specialized knowledge" on the expert's part."[27] The determination whether a set of documents indicates that the defendant insurer has a "policy" of valuing profits over fairness to claimants or of defrauding customers is not informed by a witness's professed expertise in claims adjusting. Such commonsense judgments regarding the prevalence of a policy or the existence of a corporate culture simply are not "beyond the ken of laymen," and no "specialized knowledge" will assist the jury in making them.[28]

It is well-established that an expert may not testify to "inference[s] the jury could draw on its own from evidence it is equally competent to assess."[29] For example, the Fifth Circuit recently addressed a proffer of "expert" testimony that was similarly comprised of subjective inferences derived from intelligible evidence in *First United Financial Corp.* v. *United States Fidelity & Guaranty Co*.[30] The plaintiff in that case had introduced the affidavits of banking experts, who, after "look[ing] at boxes of documents and the relationships" among several employees of the defendant bank, opined that one of the employees was "dishonest."[31] The Fifth Circuit affirmed the district court's exclusion of the proffered testimony. It explained that no expertise was required to infer from the documents that the officer was dishonest. This case is strong support for the contention that bad faith experts should not be allowed to draw inferences from an insurer's documents that the insurer has a practice of cheating its insureds.

Nor in the post-*Kumho* world should an expert be permitted to draw that conclusion about an insurer's general claims handling practices based upon a self-selected sample of the insurer's claims files. After *Kumho,* it is no longer possible for plaintiffs' lawyers to argue (at least in the federal courts) that, because the testimony of bad faith experts is not based on "scientific" knowledge, the *Daubert* factors for evaluating evidentiary reliability are inapplicable to such experts. Nevertheless, counsel seeking to exclude expert testimony concerning the claims handling practices of insurers must be prepared, after *Kumho*, to explain to trial judges why the *Daubert* factors (and possible other factors) are useful in evaluating the reliability of such testimony (although in our view the party offering the expert should bear the burden of persuading the court not to use the *Daubert* factors).[32] As we next explain, each of the *Daubert* factors is quite useful in this context. In addition to the *Daubert* factors, at least one other consideration should prove useful in resisting the admission of this kind of testimony.

As an initial matter, it is important to bear in mind that the *Daubert* factors can be conceptualized at different levels of generality. In other words, the factors are themselves somewhat flexible and, for this reason, they are adaptable to different types of expertise. This flexible quality can be useful to counsel in arguing for the broad applicability of the *Daubert* factors.

(1) Â Testing. The testing factor is aimed at determining whether a methodology is susceptible to substantiation or objective validation. If a methodology is incapable of being tested, then it is subjective in nature; and everything else being equal, a subjective and unsubstantiated technique should be regarded as less reliable than a technique capable of being tested. By the same token, if a methodology has been tested, the tests are likely to yield useful information concerning the method's reliability.[33] These rationales for the testing factor apply fully to all kinds of expert testimony, including testimony by bad faith experts regarding insurers' overall claims handling practices.

It is unclear whether the methodology of drawing conclusions from a selection of claims files — which is an overwhelmingly subjective process — is subject to testing at all. To the extent it is not, the testing factor would weigh strongly against allowing a witness to cloak his impressionistic and biased opinions about an insurer in the garb of expertise. But even if there were a way to test the accuracy of this methodology,[34] most bad faiths experts would fail the test. Because they have not been given free access to the insurer's files, bad faith experts must necessarily limit their review to claims files that they have received in the course of their litigation consulting practice. Such files are by their nature ones that the insured, at least, believes may have been mishandled since there would not otherwise have been a reason to involve a lawyer and, in turn, a bad faith expert. As such, the

claims files in the possession of the typical bad faith expert are necessarily both statistically insignificant as a percentage of the total number of claims files and inherently biased. As a consequence, the methodology of drawing conclusions from such files would surely flunk any test of statistical significance and sample selection. Both flaws are grounds for concluding that the bad faith expert's "methodology" is unreliable. As the Seventh Circuit has explained in the context of a discrimination suit:

> A plaintiff who wants a court to infer [bad motive] from the [defendant's] treatment of comparable cases has to analyze a goodly sample. One is an anecdote; and several cases are several anecdotes. *Â *Â * What a plaintiff * * * has to do is subject all of the [defendant's] decisions to statistical analysis [to discern a pattern].[35]

Several courts have excluded expert opinion testimony based on statistical sampling flaws similar to those suffered by the typical bad faith expert's "studies" of claims files.[36] In *Staggs* v. *Commonwealth of Kentucky*,[37] for example, the Supreme Court of Kentucky refused to admit "methodologically" flawed testimony by an art therapist, whose sampling of drawings by "normal" children was small and potentially biased. The court explained that the expert may have formed her general conclusions about "normal" children from drawings by only a few, perhaps atypical children.[38] Because there was "no evidence of the size of the population from which the samples had been selected, or the manner of selection," the study, and the expert opinion based upon it, were invalid.[39]

(2) Â Publication or Peer Review. This factor asks whether the witness or other experts in the field have endorsed the methodology in a published or peer-reviewed writing. By publishing a methodology in writing, an expert places his reputation on the line and opens up the technique to informed criticism by other experts — criticism that may uncover flaws. If a publication has been peer-reviewed, this provides an even stronger indication of a method's reliability. Moreover, "peer review" can occur independent of the process of publication.[40] Because this factor is tailored to separating true expertise from that which is "*fausse,*" there is no reason not to consider it when evaluating the reliability of a bad faith expert's methodology of drawing conclusions from samples of claims practices.

This factor, like the testing factor, weighs against admission of such testimony. In the cases in which we have been involved, no bad faith expert has ever suggested that the methodology of drawing conclusions about general claims handling practices from a selected sample of claims files has been subjected to "peer review" or publication. Indeed, the only crucible in which such "methods" have been tested is litigation — a forum which does not lend any credibility to the proffered testimony. As the Fourth Circuit has explained, "it would be absurd to conclude that one can become an expert simply by accumulating experience in testifying."[41]

(3) Â Error Rate/Existence or Maintenance of Standards Controlling Methodology. This factor (which is sometimes characterized as two separate factors) focuses on the accuracy of a technique or methodology and on its compliance with, or adherence to, accepted standards. Of course, if the error or accuracy rate of a technique is known, that information will be highly probative in evaluating reliability. On the other hand, if a technique's accuracy is unknown, this may (all else being equal) count against admissibility because it indicates that the technique is speculative in nature. The Supreme Court's statement in *Daubert* that the "potential" rate of error should be considered, moreover, instructs the district courts to examine aspects of the methodology that may render its use susceptible to error. And the existence or maintenance of standards controlling the technique is a factor adaptable to many disciplines — at least those disciplines that truly involve expertise.

The methodology of discerning the existence of a practice of improper claims handling from a sample of claims files is far too amorphous to have any "known rate of error." But more generally, there are simply no standards or criteria that can be applied to the subjective methodology of personal inference-drawing that these bad faith experts employ. Accordingly, this factor too weighs against admission of expert testimony that the insurer has a general practice of cheating on claims.

Nor, in our view, is there any reason for declining to apply this factor in the bad faith context. After all, it was regarded as a valid factor for evaluating the reliability of an engineering expert's subjective methodology of determining the cause of a tire malfunction from a visual/tactile inspection of the tire in *Kumho.* It is hard to see

why it is not equally relevant to assessing the reliability of a bad faith expert's testimony.

(4) Â General Acceptance. In *Daubert*, the Supreme Court explained that "[w]idespread acceptance" of a methodology "can be an important factor in ruling particular evidence admissible" because "a known technique which has been able to attract only minimal support within the community * * * may properly be viewed with skepticism."[42] Although in some cases "general acceptance" can signify a threshold through which novel techniques pass on their way to acceptability, in other cases the factor can target, more broadly, the extent to which a technique in all of its particulars is used by experts in a certain field. That seems to be the meaning endorsed by the Supreme Court in *Kumho*.

Broadly understood, the general acceptance factor can be readily — and usefully — applied to all types of experts, including "bad faith" experts who wish to testify about an insurer's claims handling practices. As with the other factors, this one weighs against admission of expert testimony that an insurer has a general practice of cheating on claims. The "community" should be interpreted to include both plaintiff-side and defendant-side bad faith experts. The latter group almost certainly would deny the validity of any non-random sampling of claims files, and object vigorously to a sampling that is inherently biased toward rare examples of bad practices. Perhaps most telling is the fact that, when litigation consultants are excluded, no relevant "community" of experts in bad faith insurance practices exists.

(5) Â Independence of expert. Several courts have suggested that "a very significant fact to be considered" in making the admissibility determination is "whether the experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying."[43] There can be little doubt that the typical bad faith expert falls on the wrong side of that line.

In short, application of the *Daubert* and other factors demonstrates the impropriety of allowing bad faith experts to impugn an insurer's overall business practices based on a self-selected sample of claims files.

D. Â Challenges To Testimony About The Insurer's Motivations.

Defense counsel also should vigorously oppose any attempt by a bad faith expert to testify about the insurer's motivations or state of mind. Unless the expert is a former member of the insurer's upper management (in which case he or she might more properly be characterized as a fact witness), what basis could she have for basing an opinion about the insurer's motivations for the particular claims determination under challenge? "Simply put, [such experts] ha[ve] not been shown to be capable of testifying as to the mental [processes]" of a company or its agents.[44] Indeed, it is difficult to conceive of ***any*** expert who might be qualified to assume the role of mind-reader as these bad faith experts claim to do.[45] As one court has colorfully put it, testimony about another person's unarticulated state of mind "seems more suited to the mind-reader's booth on a carnival midway than to the witness box in a courtroom."[46]

The reason for the prohibition against such testimony is not difficult to discern: such so-called experts bring to the question of the defendant's motivations "little more than *Â *Â * a subjective opinion."[47] The question of an insurer's ill intent falls squarely within the realm of ordinary human experience and no "enlightenment from those having a specialized understanding"[48] of insurance adjustment procedures will assist jurors in deciding it. For these reasons, at least one court has held inadmissible "expert" testimony regarding an insurer's state of mind.[49]

Conclusion

As Justice Scalia pointed out in his *Kumho* concurrence, courts need to be vigilant to prevent the tainting of trials with "expertise that is *fausse*." In the wake of *Kumho,* the time is now right to question the assumption that bad faith is a valid area for expert testimony and to resist the increasingly brazen attempts of bad faith experts to express conclusions about the overall business practices and the subjective motivations of insurers.

Reprinted from *Mealey's Litigation Report: Insurance Bad Faith,* Oct 5, 1999, at 22. **Editor's Note:** Mr. Tager and Mr. Untereiner are partners and Ms. Penner is a senior associate (who will become partner on

January 1) in the appellate practice group of Mayer, Brown & Platt in Washington, D.C. Mr. Tager and Ms. Penner have extensive experience in, among other things, insurance bad faith litigation. Mr. Untereiner has litigated numerous challenges to the admissibility of expert testimony, including representation of the prevailing manufacturer in *Kumho Tire Co.* v. *Carmichael,* 119 S. Ct. 1167 (1999). [Note:Â Eileen Penner became a partner at Mayer Brown on January 1, 2000. Alan Untereiner is no longer at the firm.] Return to Article

1. See, e.g., *Campbell* v. *State Farm Mut. Auto. Ins. Co* ., No. 90162 (Okla. Ct. Civ. App. Nov. 3, 1998) (reprinted in 12 MEALEY'S LITIGATION REPORT: BAD FAITH (Nov. 17, 1998)) (holding that trial court should not have permitted expert to testify about insurer's motivations). Return to Article

2. The most notorious example is *Campbell* v. *State Farm Mutual Automobile Insurance Co*., a Utah third-party bad faith case, in which two putative bad faith experts testified at length to their opinion that State Farm has a company-wide practice of cheating on claims. The jury evidently bought that testimony, returning a punitive damages verdict of $145 million, that has since been reduced by the trial court to $25 million. *See Utah Jury Awards $147.65 Million in Auto Case,* 10 MEALEY'S LITIGATION REPORT: BAD FAITH (Aug. 22, 1996); *Utah District Judge Reduces $147.6 Million Award to $25 Million,* 11 MEALEY'S LITIGATION REPORT: BAD FAITH (Dec. 23, 1997). Both parties' appeals are pending in the Utah Supreme Court. Mr. Tager is one of the counsel for State Farm. Return to Article

3. 119 S. Ct. 1167 (1999). Return to Article

4. *Id*. at 1171. Return to Article

5. *Id*. at 1174, 1175 (quoting *Daubert* v. *Merrell Dow Pharmaceuticals, Inc* ., 509 U.S. 579, 590 (1993)). Return to Article

6. *Id*. at 1175 (quoting *Daubert* , 509 U.S. at 592). Return to Article

7. *Id*. at 1176. Return to Article

8. 509 U.S. 579 (1993). These criteria include whether the expert's theory or technique (I) "can be (and has been) tested"; "has been subjected to peer review and publication"; "has a high known or potential rate of error"; (iv) is subject to "standards controlling the technique's operation"; and (v) enjoys "general acceptance" within a "relevant scientific community." *Id* . at 592-594. Return to Article

9. *Kumho*, 119 S. Ct. at 1175-1176 Return to Article

10. *Id*. at 1176. Return to Article

11. *Id*. at 1179 (Scalia, J., concurring) (emphasis in original). Return to Article

12. *First United Fin. Corp*. v. *United States Fidelity & Guar. Co* ., 96 F.3d 135, 136 (5th Cir. 1996). Return to Article

13. *See also United States* v. *Scop,* 846 F.2d 135, 140 (2d Cir. 1988) (district court erred in admitting expert opinions that defendants had engaged in "manipulation" and "fraud" because those opinions "were calculated to 'invade the province of the court to determine the applicable law and to instruct the jury as to that law'"); *Yannacopoulos* v. *General Dynamics Corp* ., 75 F.3d 1298, 1302 (8th Cir. 1996) (expert testimony that usurps jury's function to evaluate evidence and draw conclusions inadmissible). Return to Article

14. *Thompson* v. *State Farm Fire & Cas. Co* ., 34 F.3d 932, 939 (10th Cir. 1994). Return to Article

15. *See, e.g., id.* at 941; *Kooyman* v. *Farm Bureau Mut. Ins. Co*., 315 N.W.2d 30, 37 (Iowa 1982); *American Mut. Ins. Co.* v. *Bittle*, 338 A.2d 306, 310 (Md. Ct. Spec. App. 1975); *Hart-Anderson* v. *Hauck*, 748 P.2d 937, 941-943 (Mont. 1988); *Kulak* v. *Nationwide Mut. Ins. Co* ., 351 N.E.2d 735, 740 (N.Y. 1976). Return to Article

16. 7 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 29 (Chadbourn rev. 1978). See Fed. R. Evid. 702. For the same reason, courts have excluded the testimony of purported experts on "business ethics" in commercial disputes. Illustrative is *Paley* v. *Federal Home Loan Mortgage Corp*., 1994 WL 327659 (E.D. Pa. July 7, 1994), a case arising out of a contract for the sale of land and involving (among other things) claims of breach of a covenant of good faith and fair dealing, breach of fiduciary duty, and bad-faith conduct. In *Paley* , the district court granted the defendants motion to exclude the testimony of an expert on "business ethics," explaining:

> Plaintiffs have produced a report prepared by W. Michael Hoffman, Ph.D. entitled "Report of Business Ethics Expert" and have identified Hoffman as an expert witness in this trial. The standard for expert testimony is whether "scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. The subject matter at issue is well within the knowledge, experience, and understanding of the ordinary jury. Expert opinion on the issue of bad faith and breach of fiduciary duty is not necessary to assist the fact finder in this action.

Id. at *4. Return to Article

17. 1 MCCORMICK ON EVIDENCE 12, at 27 (1992) [hereinafter MCCORMICK]. Return to Article

18. *Haas* v. *Abrahamson,* 705 F. Supp. 1370, 1375 (E.D. Wis. 1989). Return to Article

19. *United States* v. *Montas* , 41 F.3d 775, 784 (1st Cir. 1994). Return to Article

20. *Scott* v. *Sears, Roebuck & Co* ., 789 F.2d 1052, 1055 (4th Cir. 1986). Return to Article

21. *First United* , 96 F.3d at 136 (emphasis added). Return to Article

22. Note that the line of argument suggested in this subsection is not directly based on *Kumho*, which addresses the expert's methodologies rather than his or her qualifications. However, in view of the general message of skepticism toward paid experts that the Supreme Court seemed to be sending in *Kumho*, attacks on qualifications are likely to be taken more seriously in future cases. Return to Article

23. See *Thomas J. Kline, Inc*. v. *Lorillard, Inc* ., 878 F.2d 791, 800 (4th Cir. 1989) (one does not "become an expert simply by accumulating experience in testifying"). Return to Article

24. *See, e.g., Taylor v. Watters* , 655 F. Supp. 801, 805 (E.D. Mich. 1987) ("A course of self-study is not adequate * * * to create an expert."). Return to Article

25. *See, e.g., Herbert v. Lisle Corp*., 99 F.3d 1109, 1117 (Fed. Cir. 1996) (citation omitted) ("Incorrect statements of law are no more admissible through 'experts' than are falsifiable scientific theories."); *Carapellucci* v. *Town of Winchester* , 707 F. Supp. 611, 619-620 (D. Mass. 1989) (noting the "uncontrollable risk of unfair prejudice if the jury is allowed to hear an expert opinion that a defendant's conduct constitutes negligence, or gross negligence, or violates a minimal standard, when the expert may be applying an erroneous definition of the legal standard" and accordingly refusing to consider an expert's opinion, which was based on a "faulty legal premise," in ruling on a motion for summary judgment); *Justice* v. *Carter*, 972 F.2d 951, 956 (8th Cir. 1992) ("The district court did not abuse its discretion in not admitting expert testimony which was based upon an inapplicable interpretation of the law."); *Scalia* v. *Lafayette* Life Ins. Co., 1995 WL 631841, at * 19 n.4 (D.N.J. Oct. 23, 1995) (disregarding expert affidavit and noting that it "expresses a legal opinion which is contrary to New Jersey law, *viz*., that the insurers because they had

the opportunity to obtain further medical history, they were under a duty to do so"); *Federal Realty Inv. Trust* v. *Pacific Ins. Co.*, 760 F. Supp. 533, 538 (D. Md. 1991) (because standard to which experts would testify was "wrong as a matter of law," court granted motion in limine to prohibit experts from testifying about allocation of defense costs); *Exxon Corp*. v. *Superior Court*, 60 Cal Rptr. 2d 195, 202 (Cal. Ct. App. 1997) ("the court is not bound by an expert opinion that is speculative or conjectural or that is based on an incorrect legal theory"); *Hacker* v. *Holland*, 570 N.E.2d 951, 959 (Ind. Ct. App. 1991) (reversing because expert's testimony "was an improperly admitted incorrect statement of law"); *Franch* v. *Ankney*, 670 A.2d 951, 958 (Md. 1996) (because opinions of experts were "based on an incorrect interpretation of Maryland law, the trial court was fully justified in striking the testimony"); *Greenspan* v. *Norfolk County*, 161 N.E. 894, 895 (Mass. 1928) (holding that motion to strike expert testimony should have been granted where expert based land valuation on legally incorrect assumption); *Nevins* v. *Great Atl. & Pac. Tea Co*., 559 N.Y.S.2d 539, 540-541 (N.Y. App. Div. 1990) (trial court should have charged jury to disregard expert testimony on industry standards insofar as testimony conflicted with legal standard of care); *Doolittle* v. *City of Everett*, 786 P.2d 253, 262 (Wash. 1990) (en banc) (stating that expert testimony "was entirely premised on an incorrect legal principle" and, therefore, "must be disregarded"). Return to Article

26. See generally *United States* v. *Benson*, 941 F.2d 598 at 603 (7th Cir. 1991) ("An expert's opinion is helpful only to the extent that * * * [it] is an opinion informed by the witness' expertise * * *."); *Mid-State Fertilizer Co*. v. *Exchange Nat'l Bank of Chicago*, 877 F.2d 1333, 1340 (7th Cir. 1989) (observing that "ukase in the guise of expertise is a plague in contemporary litigation" and advising that "[j]udges should not be buffaloed by unreasoned expert opinions" consisting of such subjective inferences); *Viterbo* v. *Dow Chem. Co*., 826 F.2d 420 (5th Cir. 1987) (rejecting expert testimony that consisted of "little more than * * * a subjective opinion"); *Textron, Inc*. v. *Barber-Colman Co*., 903 F. Supp. 1546, 1552 (W.D. N.C. 1995) ("not every opinion offered by an expert is an expert opinion"). Return to Article

27. *Textron*, 903 F. Supp. at 1552 (quoting *United States* v. *Johnson*, 54 F.3d 1150, 1157 (4th Cir. 1995)). Return to Article

28. MCCORMICK 13, at 54. See Mid-State Fertilizer, 877 F.2d at 1340 (rejecting an economist's opinions on the ground that he failed to conduct any analytic study, but instead simply "examined materials produced in discovery and drew inferences from the record"); *Textron*, 903 F. Supp. at 1553 ("'expert' testimony [that] concerns nothing more than inferences to be drawn from the record, * * * is not 'expert' in any meaningful sense" and should be excluded); *City of Tuscaloosa* v. *Harcros Chems., Inc*., 877 F. Supp. 1504, 1526 (N.D. Ala. 1995) (same). Return to Article

29. *United States* v. *Weiner*, 3 F.3d 17, 21-22 (1st Cir. 1993). See *Benson*, 941 F.2d at 604 (expert testimony which "consists of nothing more than drawing inferences from the evidence that [the expert is] no more qualified than the jury to draw" is inadmissible); *TRW Title Ins. Co.* v. *Security Union Title Ins. Co.*, 887 F. Supp. 1029, 1032 (N.D. Ill. 1995) (same). See also *Mercado* v. *Ahmed*, 974 F.2d 863, 870-871 (7th Cir. 1992). Return to Article

30. 96 F.3d 135 (5th Cir. 1996). Return to Article

31. *Id*. at 136. Return to Article

32. See *Kumho*, 119 S. Ct. at 1175 ("[W]e can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in *Daubert*, nor can we do so for subsets of cases categorized by category of expert or kind of expertise."). Return to Article

33. The lower courts have shown considerable flexibility in applying the "testing" factor to various types of expert witnesses. For example, in product liability cases involving claims of design defect, courts have considered whether an engineering expert has "tested" the alternative design he has endorsed. *See, e.g., Cummins* v. *Lyle Indus.*, 93 F.3d 362, 368-370 (7th Cir. 1996); *Pestel* v. *Vermeer Mfg. Co.*, 64 F.3d 382, 384 (8th Cir. 1995); *Stanczyk* v. *Black & Decker, Inc.*, 836 F. Supp. 565, 566 (N.D. Ill. 1993). Return to Article

34. The validity of a sampling methodology can be tested by reference to standard concepts of statistics about sample sizes, selection of samples, etc. In addition, the expert's conclusions could be tested by assembling a random and statistically significant sample of claims and seeing whether they too support the expert's inferences. Of course, since the process is a subjective one, the question remains as to who would perform the test. To our knowledge, there is no independent organization in existence that does this sort of testing. Return to Article

35. *Kuhn* v. *Ball State Univ., 78 F.3d 330, 332 (7th Cir. 1996). Accord Haskell* v. *Kaman Corp., 743 F.2d 113, 121 (2d Cir. 1984).* Return to Article

36. See, e.g., *DeLuca* v. *Merrell Dow Pharm.*, 911 F.2d 941, 947-956 (3d Cir. 1990) (finding that a combination of "sampling error[s]" and "[f]aulty data collection" justified exclusion of expert opinion); *Evans* v. *Philadelphia Housing Auth.*, 1995 WL 154872 (E.D. Pa. Mar. 31, 1995) (excluding an expert opinion based upon a small, biased sample); *Washington* v. *Vogel*, 880 F. Supp. 1545, 1547 (M.D. Fla. 1995); *City of Tuscaloosa*, 877 F. Supp. at 1526; *Gray* v. *Russell Corp.*, 681 So. 2d 310, 314 (Fla. Dist. Ct. App. 1996) (excluding expert testimony regarding pattern and practice because it was not based on "properly-gathered, formulated and analyzed statistical proof"). See also *Kuhn*, 78 F.3d at 333 (dismissing as "anecdot[al]" an opinion based on inadequate sample size); *TK-7 Corp.*, 993 F.2d at 732; *Duffee* v. *Murray Ohio Mfg. Co.*, 879 F. Supp. 1078, 1086 (D. Kan. 1995) (explaining that such testimony "is devoid of any meaningful and reliable factual basis"). Return to Article

37. 877 S.W.2d 604 (Ky. 1993). Return to Article

38. *Id*. at 606. Return to Article

39. *Id*. Return to Article

40. See *Ruffin* v. *Shaw Indus., Inc.*, 149 F.3d 294, 299 (4th Cir. 1998) (government scientists evaluated competing toxicological studies). Return to Article

41. *Thomas J. Kline*, 878 F.2d at 800. See also *Buckman* v. *Bombardier Corp.*, 893 F. Supp. 54, 556 (E.D.N.C. 1995) (rejecting the argument that a witness's "testimony and experiments in several cases" constitutes "some evidence of general acceptance" of expert witness's theories in the relevant community). Return to Article

42. 509 U.S. at 594 (internal quotations omitted). Return to Article

43. *Daubert* v. *Merrell Dow Pharms.*, Inc., 43 F.3d 1311, 1317 (9th Cir. 1995). *See also Pries* v. *Honda Motor Co.*, 31 F.3d 543, 546 (7th Cir. 1994) ("We find it comforting to see experts with analyses derived independently, rather than parroting a consistent (but often bogus) theory concocted by counsel."). Return to Article

44. *Sassafras Enterprises, Inc.* v. *Roshco, Inc.*, 915 F. Supp. 1, 8 (N.D. Ill. 1996). Return to Article

45. *See id.* Return to Article

46. *SEC* v. *Handgis*, 1995 WL 133769, at *1 (S.D.N.Y. 1995). Return to Article

47. *Viterbo*, 826 F.2d at 421. Return to Article

48. Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 418 (1952). Return to Article

49. *See Campbell, supra,* note 2. *See also DePaepe* v. *General Motors Corp*., 141 F.3d 715, 720 (7th Cir.

1998) (because expert "lacked any scientific basis for an opinion about the motives of GM's designers," trial court erred in allowing him to testify that automobile manufacturer had reduced the amount of padding in its sun visors in order to save money); *United States* v. *Clapp*, 46 F.3d 795 (8th Cir. 1995) (district court properly excluded "expert" who planned to testify to defendant's lack of intent to defraud); *United States* v. *Evans*, 910 F.2d 790, 803 (11th Cir. 1990) (district court properly excluded expert testimony about defendant's intent and understanding of the illegality of the operation because those issues are within the competence of the jury), *aff'd*, 504 U.S. 255 (1992); *Sassafras Enterprises*, 915 F. Supp. at 8 (expert on "some matters having to do with pizza stones" is not qualified as a "mindreader," "capable of testifying as to the mental reactions" of "other persons") (emphasis in original); *Smith* v. *Colorado Interstate Gas Co.*, 794 F. Supp. 1035, 1044 (D. Colo. 1992) (excluding testimony that defendant's conduct was motivated by a discriminatory intent because (1) that issue was within the competence of the jury and (2) the testimony sought to direct the result in the case); *Romano* v. *State*, 847 P.2d 368, 391 (Okla. 1993) (prison chaplain not entitled to speculate whether the defendant's beliefs were sincere or merely "jailhouse religion"). Return to Article

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