

# **THE ADMISSIBILITY OF EXPERT EVIDENCE IN THE SEVENTH CIRCUIT AFTER *DAUBERT***

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## I. INTRODUCTION

This article examines the Seventh Circuit's approach to the admission of expert evidence under Rule 702 of the Federal Rule of Evidence as construed by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. \_\_\_\_\_, 113 S.Ct. 2786, 2791, 125 L.Ed.2d 469 (1993).

Since the adoption of the Federal Rules of Evidence, the Seventh Circuit's construction of Rule 702 has been similar to the construction placed upon it by the Supreme Court in *Daubert*. Prior to *Daubert*, the Seventh Circuit held that Rules 702 and 703 govern the admissibility of expert evidence.<sup>1</sup> It further held that the proffered expert evidence must meet the "general acceptance" test.<sup>2</sup> Under the Seventh Circuit's pre-*Daubert* construction of the Rules 702 and 703, a witness qualified as an expert was allowed to offer opinion testimony where the subject matter was beyond the ken of the ordinary layman, the data underlying the witness' opinion was of a type reasonably relied upon by experts in the particular field, and the witness' technology or methodology was "sufficiently established to have gained general acceptance in the particular field to which it belongs."<sup>3</sup> The court further required that the opinions elicited not be speculative, but be based upon specialized knowledge.<sup>4</sup>

The court has read *Daubert* to require more intense scrutiny of proffered expert evidence than it previously applied under Rule 702. Consistent with *Daubert*'s directive, the court has emphasized that the trial court, in its role as "gatekeeper," must closely examine the proffered expert's qualifications and methodology and insure that the expert possesses genuine "scientific, technical, or other specialized knowledge" that "will assist the trier of fact to understand the evidence or to determine a fact in issue." Rule 702, Fed. R. Evid. In each case where it has applied the analytical framework announced in *Daubert*, it has

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<sup>1</sup> See e.g. *United States v. Tranowski*, 659 F.2d 750, 754 (1981).

<sup>2</sup> *Id.* 659 F.2d at 755-756, citing, *Frye v. United States*, 54 App.D.C. 46, 293 F. 1013 (1923).

<sup>3</sup> *Id.* 659 F.2d at 754-756, quoting, *Frye*, 293 F. at 1014.

<sup>4</sup> See e.g. *United States v. Davis*, 772 F.2d. 1339, 1343-1344 (7th Cir. 1985); *United States v. West*, 670 F.2d 675, 683 (7th Cir. 1982).

found the proffered expert evidence properly excluded or improperly admitted.<sup>5</sup> In short, the Seventh Circuit has held that *Daubert* not only empowers, but obligates the trial judge to keep "junk science" out of the courtroom.<sup>6</sup>

## II. *DAUBERT v. MERRELL DOW PHARMACEUTICALS, INC.*

### A. *Daubert's Construction Of Federal Rule Of Evidence 702*

In *Daubert*, the Supreme Court was asked to "determine the standard for admitting expert scientific testimony in a federal trial." *Id.* 113 S.Ct. at 2791. It held that Rule 702 of the Federal Rules of Evidence governs the admissibility of expert testimony in the federal courts and superseded the "general acceptance" standard<sup>7</sup> announced in *Frye v. United States*, 54 App.D.C. 46, 293 F. 1013 (1923).<sup>8</sup>

The Court next articulated the proper standard to be applied under the rule. Rule 702 provides:

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of opinion or otherwise.

The Court construed the rule, as it would any statute, by focusing on its express language. It held that to be admissible under Rule 702, testimony from a qualified expert must meet two distinct requirements. First, it must be "scientific, technical, or other specialized

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<sup>5</sup> See Section III, \_\_\_\_, *ante*.

<sup>6</sup> See *Wilson v. City of Chicago*, 6 F.3d 1233, 1238 (7th Cir. 1993).

<sup>7</sup> The *Frye* test derives from the following passage:

"Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, *the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.*"

54 App.D.C. at 47, 293 F. at 1014 (emphasis added).

<sup>8</sup> The Court reasoned that since the text of Rule 702 does not require "general acceptance," the drafting history does not mention *Frye* or indicate an intent to assimilate the "general acceptance" standard, and rigid application of the "general acceptance" standard "would be at odds" with the "liberal thrust" and the "general approach of relaxing traditional barriers to "opinion" testimony" embodied in the Federal Rules of Evidence, the *Frye* test is incompatible with the Rules and should not be applied in federal trials. *Daubert*, 113 S.Ct. at 2794, quoting, *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169, 109 S.Ct. 439, 450, 102 L.Ed.2d 445, (1988).

knowledge."<sup>9</sup> Second, it must "assist the trier of fact to understand the evidence or to determine a fact in issue." *Daubert*, 113 S.Ct. at 2795. In short, the proffered expert evidence must be reliable and must be relevant. *Id.*

The Court further found that Rule 702 contemplates "some degree of regulation of the subjects and theories about which an expert may testify." *Id.* 113 S.Ct. at 2795. It cast the trial judge in the role of "gatekeeper." The Court summarized its holding as follows:

Faced with the proffer of expert scientific testimony, then, the trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. ***This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether the reasoning or methodology properly can be applied to the facts in issue.***

*Id.* 113 S.Ct. at 2796 (emphasis added; footnote omitted). The Court further stated:

The inquiry envisioned by Rule 702 is, we emphasize, a flexible one. Its overarching subject is the scientific validity--*i.e.*, the evidentiary relevance and reliability--of the principles that underlie a proposed submission. ***The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.***

*Id.* 113 S.Ct. at 2797 (emphasis added; footnote omitted).

In *Daubert*, the district court awarded Merrell Dow summary judgment after it held plaintiffs' proffered experts' testimony inadmissible under the "general acceptance" standard announced in *Frye*. *Daubert*, 113 S.Ct. 2792. The Ninth Circuit also applied the *Frye* test and affirmed. *Id.* The Supreme Court vacated the award of summary judgment and remanded the action. *Id.* at 2799. It directed the lower courts to consider the admissibility of plaintiffs' expert evidence under its construction of Rule 702. *Id.* It provided the lower courts with guidelines for determining whether Rule 702's requirements had been satisfied. The Court wrote that "a key question" to be answered in determining whether a theory or technique is scientific knowledge, *i.e.*, scientifically valid, is whether it has been tested. *Daubert*, 113 S.Ct. at 2796. Additional pertinent considerations the Court identified include: whether the theory or technique has been subjected to peer review and publication; the known or potential rate of error; and whether the technique or theory had gained "general acceptance." *Id.* 113 S.Ct. 2797.

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<sup>9</sup> In *Daubert*, the Court was faced with a proffer of "scientific" evidence. The Court was careful to point out, however, that "Rule 702 also applies to 'technical, or other specialized knowledge.'" *Id.* 113 S.Ct. at 2795, fn. 8.

## B. *Daubert's* Facts

In *Daubert*, minor plaintiffs brought a state court products liability action against Merrell Dow in which they alleged their birth defects were caused by their mothers' ingestion of Bendectin, a prescription anti-nausea drug marketed by Merrell Dow. Merrell Dow removed the suit to federal court on diversity grounds.

Merrell Dow moved for summary judgment. It contended that Bendectin does not cause birth defects in humans and that plaintiffs would be unable to come forward with admissible evidence to the contrary. Merrell Dow submitted an affidavit of a physician and epidemiologist "who is a well-credentialed expert on the risks from exposure to various chemical substances. (footnote omitted)" *Id.* at 2791. In his affidavit, the expert stated that he reviewed all available literature on Bendectin and human birth defects, which consisted of more than 30 published studies involving over 130,000 patients. None of the studies found Bendectin to be a human teratogen, *i.e.*, a substance capable of causing malformations in fetuses. Based upon his review of the studies, the expert concluded that maternal use of Bendectin during the first trimester of pregnancy had not been shown to be a risk factor for human birth defects. *Id.*

Plaintiffs countered with the testimony of eight impressively credentialed experts. *Id.* The experts opined that Bendectin can cause birth defects. They relied upon animal studies that found a link between Bendectin and malformations; pharmacological studies of the chemical structure of Bendectin that purported to show similarities between the structure of the drug and that of other substances known to cause birth defects; and the "reanalysis" of previously published epidemiological studies. *Id.* 113 S.Ct. at 2791-92.

The district court excluded the testimony under *Frye*. It reasoned that, in light of the vast body of epidemiological data concerning Bendectin, expert opinion not based upon epidemiological evidence is inadmissible to establish causation. It further held that the experts' "reanalysis" of published epidemiological data was inadmissible because it had not been published or subjected to peer review. *Daubert*, 727 F.Supp. at 575.

The Ninth Circuit also applied the "general acceptance" standard and affirmed. It found that plaintiffs' experts' scientific technique diverged "significantly from the procedures accepted by recognized authorities in the field . . . , [and therefore] cannot be shown to be 'generally accepted as a reliable technique.'" *Daubert*, 951 F.2d at 1130. In support of its conclusion, the court pointed out that other courts considering the risks of Bendectin refused to admit reanalyses of epidemiological data that had been neither published nor subjected to peer review. The Court viewed the reanalyses as "particularly problematic in light of the massive weight of the original published studies supporting [defendant's] position, all of which had undergone full scrutiny from the scientific community." *Id.* at 1130.

### III. APPLICATION OF RULE 702 IN THE SEVENTH CIRCUIT

#### A. Pre-*Daubert* Construction Of Rule 702

Prior to *Daubert*, the Seventh Circuit held that Rules 702 and 703 of the Federal Rules of Evidence governed the admissibility of expert evidence. See e.g. *United States v. Tranowski*, 659 F.2d 750, 754 (1981). As part of its analysis under the rules, it required the proffered evidence to satisfy the "general acceptance" test. *Id.* 659 F.2d at 755-756, citing, *Frye*, 293 F. at 1014. Thus, for expert evidence to be admissible prior to *Daubert*, a proponent of expert evidence was required to: (1) qualify the witness as an expert; (2) establish the subject matter about which the witness would testify was beyond the ken of the ordinary layman; (3) demonstrate the data underlying the witness' opinion was of a type reasonably relied upon by in the particular field; and (4) show the witness' technology or methodology was "sufficiently established to have gained general acceptance in the particular field to which it belongs." *Tranowski*, 659 F.2d at 754-756, quoting, *Frye*, 293 F. at 1014. But see *Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1308 (7th Cir 1987)("Experience and knowledge establish the foundation for an expert's testimony; the accuracy of such testimony is a matter of weight and not admissibility."), citing, *Robinson v. Watts Detective Agency*, 685 F.2d 729, 739 (1st Cir. 1982), cert. denied, 459 U.S. 1105, 103 S.Ct. 728, 74 L.Ed.2d 953 and 459 U.S. 1204, 103 S.Ct. 1191, 75 L.Ed.2d 436 (1983). The court further held that Rule 702 required that the opinions elicited be based upon the witness' specialized knowledge rather than speculation. See e.g. *United States v. Davis*, 772 F.2d. 1339, 1343-1344 (7th Cir.), cert denied, 474 U.S. 1036, 106 S.Ct. 603, 88 L.Ed.2d 581 (1985); *United States v. West*, 670 F.2d 675, 683 (7th Cir. 1982).

During the several years preceding *Daubert*, the Seventh Circuit expressed concern about the district courts' apparent willingness to receive sub-standard expert testimony. It observed:

The professional expert witness who testifies with scant regard for the truth is an old problem in tort as in other areas of litigation. "Experts are nowadays often mere paid advocates or partisans of those who employ and pay them, as much as the attorneys who conduct the suit. There is hardly anything, not palpably absurd on its face, that cannot now be proved by some so-called 'experts.'" (Citation omitted.)

*Albers v. Church of the Nazarene*, 698 F.2d 852, 858 (1983). Underlying the court's concern was its belief that the admission of unreliable expert testimony offends the judicial process. It reasoned that inaccurate and unreliable testimony from a witness upon whom the trial court has placed its imprimatur as an "expert," greatly undermines the truth-seeking function of the court. The court wrote:

...[T]he district court must pay special attention to expert testimony. Because experts are given special latitude to testify based on hearsay and third-hand observations and to give opinions. . . courts have cautioned that an expert must be qualified as an expert, provide testimony that will assist the jury and

rely only on evidence on which a reasonable expert in the field would rely. (Citations omitted.)

*United States v. Lundy*, 809 F.2d 392, 395 (7th Cir. 1987). See also *Deltak Inc. v. Advanced Systems, Inc.*, 574 F.Supp. 400, 406 (N.D. Ill. 1983), *vacated on other grounds*, 767 F.2d 357 (7th Cir. 1985) ("The importance of safeguarding the integrity of the [judicial] process requires the trial [or appellate] judge, when he believes that an expert's testimony has fallen below professional standards, to say so, as many judges have done."), *quoted with approval in, Mid-State Fertilizer Co. v. Exchange National Bank*, 877 F.2d 1333, 1340 (7th Cir. 1989)).<sup>10</sup>

The Seventh Circuit admonished the district courts to "insure that expert testimony is in fact expert opinion, not merely opinion given by an expert." *Lundy*, 809 F.2d at 396. Similarly, the court emphasized its view that "an expert who supplies nothing but a bottom-line supplies nothing of value to the judicial process." *Mid-State Fertilizer* 877 F.2d at 1339.

## B. Post-*Daubert* Application Of Rule 702

In *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090 (7th Cir. 1994), the Seventh Circuit stated:

We have interpreted *Daubert* to require that the district court undertake a two-step inquiry. *Daubert* first "directs the district court to determine whether the expert's testimony pertains to scientific knowledge. This task requires that the district court consider whether the testimony has been subjected to the scientific method; it must rule out 'subjective belief or unsupported speculation'." *Porter [v. Whitehall Laboratories, Inc.]*, 9 F.3d [607,] 613 (7th Cir. 1993) (*quoting Daubert*, [509] U.S. at \_\_\_\_\_, 113 S.Ct. at 2795). Second, the district court must "determine whether the evidence or testimony assists the trier of fact in understanding the evidence or in determining a fact at issue. That is, the suggested scientific testimony must 'fit' the issue to which the expert is testifying."

*Id.* at 616 (footnote omitted). Previously, in *Wilson v. City of Chicago*, 6 F.3d 1233 1238 (7th Cir. 1993), the court observed:

....[t]he Federal Rules of Evidence have, it is true, liberalized the standards for qualifying expert witnesses. (Citation omitted)...But the consequence of this liberality is not, or at least should not be, a free-for-all. The elimination of formal barriers to expert testimony has merely shifted to the trial judge the responsibility for

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<sup>10</sup> The *Daubert* court echoed this concern when it pointed out that the wide latitude given to experts under Rules 703 (expert's opinions need not be based on admissible evidence) and 705 (expert need not disclose underlying facts or data prior to giving an opinion) "is premised on an assumption that an expert's opinion will have a reliable basis in the knowledge and expertise of his discipline." *Id.*, 113 S.Ct. at 2796.

keeping "junk science" out of the courtroom. *Daubert*], 509 U.S. at \_\_\_\_\_, 113 S.Ct. at 2798-99.] It is a responsibility to be taken seriously. If the judge is not persuaded that the so-called expert has genuine knowledge that can be genuinely helpful to the jury, he should not let him testify.

*Id.*, at 1238-39. More recently, in *Bammerlin v. Navistar International Transportation Corp.*, 30 F.3d 898 (7th Cir. 1994), the court succinctly, and accurately, summed up the essence of *Daubert's* teaching: "A district judge should assure himself, before admitting expert testimony, that the expert knows whereof he speaks." *Id.* at 901.

## 1. Rule 702 Requires That Opinions Derive From Scientific Knowledge

In *Porter v. Whitehall Laboratories, Inc.*, 9 F.3d 607 (7th Cir. 1993), *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090 (7th Cir. 1994), and *Bradley v. Brown*, No. 94-2467 (7th Cir., Dec. 13, 1994) the expert evidence proffered was the same as that involved in *Daubert*, namely, expert evidence on the issue of medical causation. In each case, the appellate court affirmed the exclusion of the evidence on the grounds it was speculative. Thus, it did not qualify as "scientific knowledge," and would not assist the trier of fact.

In *Porter*, plaintiff's decedent fractured a toe at work which required surgery. He was given Motrin, a prescription drug, and Advil, for pain. Both medications contained ibuprofen. He subsequently died of renal failure. Plaintiff brought a products' liability action against the manufacturers of the ibuprofen-containing drugs alleging that decedent's ingestion of ibuprofen caused his renal failure and death. Prior to his death, however, decedent was diagnosed with two types of rapidly progressive glomerulonephritis ("RPGN"). It was shown both types of RPGN lead to end-stage renal failure in a significant number of cases where ibuprofen was not used. *Id.* 9 F.3d at 610. Ibuprofen was not shown to be a cause of RPGN. *Id.* Additionally, decedent was diagnosed with interstitial nephritis which had been linked both to ibuprofen ingestion and found to occur as a secondary result of glomerulonephritis. *Id.* There was no scientific evidence that interstitial nephritis will progress to RPGN. *Id.*

Defendants moved for summary judgment on the grounds that plaintiff could not show a causal nexus between decedent's ingestion of ibuprofen and his development of RPGN, the cause of decedent's acute renal failure. They further argued that there was no evidence that interstitial nephritis, even if ibuprofen induced, could result in RPGN. *Id.* To establish causation, plaintiff tendered four medical experts, each of whom had stated that ibuprofen caused decedent's renal failure. *Id.* at 611.

In granting defendants' motion, the district court held that plaintiff's medical experts' testimony was speculative and therefore, not scientific knowledge as required under Rule 702. The court noted that all of plaintiffs' experts agreed that there is no scientific data establishing a causal link between ibuprofen and the conditions which purportedly led to plaintiffs' renal failure. *Id.* Three of the experts conceded that their opinions were

theoretical or, as one physician testified, a "curb-side" observation based solely on a temporal relationship. *Id.* at 614. None of the other experts could support their opinions with personal research or other scientific evidence. *Id.* at 611-612. The Seventh Circuit affirmed and held that expert testimony which is merely speculative is neither reliable nor relevant and thus properly excluded under Rule 702.

Initially, the court noted that while *Daubert* had not yet been decided at the time the district court made its ruling, it nonetheless correctly anticipated the approach employed by the Supreme Court. It held, moreover, that the district court properly fulfilled its gatekeeping function when it concluded that, "[i]f experts cannot tie their assessment of data to known scientific conclusions, based on research or studies, then there is no comparison for the jury to evaluate and the experts' testimony is not helpful to the jury." *Id.* at 614.

One of the experts conceded that she was not giving "an analytical, scientific opinion." *Id.* at 614. Another admitted that he could not state his opinion that ibuprofen caused decedent's renal failure to a reasonable degree of medical certainty. *Id.* A third expert conceded that his causation opinion was based on subject belief alone, an "hypothesis, the proof of which remains to be made." *Id.* at 615. The appellate court found that the medical experts' testimony was merely speculative because it "was not well-grounded in the scientific method. (footnote omitted)" *Id.* at 614. Thus, it was unreliable and did not qualify as scientific knowledge. The trial court, therefore, properly held the evidence inadmissible, and insufficient to raise a genuine issue of material fact on the issue of causation. *Id.* at 615-616.

The Seventh Circuit also rejected two of plaintiff's experts under the relevancy prong of the *Daubert* analysis, also characterized by the Supreme Court as "fit." *Id.* at 616. Specifically, it found plaintiff's expert pharmacologist's admission that it was impossible for him to apply generally accepted methodology in arriving at his causation opinion, rendered his testimony irrelevant. *Id.* Similarly, it found a medical expert's concession that he could only speculate as about the chronology of decedent's disease process precluded him from applying his causation theory, under which the timing of the development of interstitial lesions was critical. *Id.* at 616. Accordingly, his testimony was likewise irrelevant. *Id.*

In *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090 (7th Cir. 1994), a nuclear plant worker brought an action against a public utility alleging that he developed cataracts after he was negligently exposed to unsafe doses of radiation. His proffered expert, his treating physician, testified that by simply observing cataracts he could determine whether they were radiation-induced. The physician conceded, however, that his methodology did not comport with generally accepted practices, his theory was contrary to data contained in published studies, and that he did not do any private studies or otherwise test his hypothesis. *Id.* at 1106-1107. The appellate court affirmed summary judgment, finding that the expert's testimony had no scientific basis. In the absence of such a showing, plaintiff could not prove causation. *Id.* at 1107.

In *Bradley v. Brown*, No. 94-2467 (7th Cir., Dec. 13, 1994), the court again encountered expert medical testimony on the issue of causation. There, office workers were exposed to pesticides after their office had been "fogged." They sued the individual who applied the pesticides claiming, among other things, that they developed multiple chemical sensitivity ("MCS"). *Id.* at 2-3. Plaintiffs offered the testimony of two clinical ecologists to establish the causation element of their *prima facie* case. While defendant acknowledged that the experts were well qualified, he moved to preclude their causation testimony on the ground that the opinions lacked a sufficient scientific basis. *Id.* at 4. The trial court agreed. The Seventh Circuit affirmed.

It noted that, "[d]istrict court judges have significant responsibility in determining whether expert testimony is relevant and helpful." *Id.* at 5.<sup>11</sup> The court pointed out that the most significant factor in making this determination is whether the scientific theory has been subjected to the scientific method, *i.e.*, whether it has been tested. *Id.* at 7. The experts' theories failed to pass muster under *Daubert* because their opinions about MCS's cause were merely hypothetical; they could not explain why a particular individual contracted chemical sensitivity, and the methodology supporting their conclusions was merely anecdotal. *Id.* at 8. The Seventh Circuit found that the district court correctly concluded that the "[the doctors'] opinions regarding whether the plaintiffs' exposure caused their symptoms would be entirely too subjective and speculative [and]...a far cry from the tested hypothesis foreseen as the basis of "scientific knowledge" testified to under Rule 702." *Id.* at 8 (citation omitted). A second impairment to admissibility was that the available clinical ecology "peer review" data on the etiology of MCS had not progressed beyond the hypothetical stage. *Id.* at 8.

## 2. Rule 702 Requires Genuine Knowledge

The Seventh Circuit's decision in *Wilson v. City of Chicago*, 6 F.3d 1233 (7th Cir. 1993), underscores Rule 702's requirement that the trial judge insure that "the so-called expert has genuine knowledge that can be genuinely helpful to the jury, [otherwise,] he should not let him testify." *Id.* at 1238-1239. Thus, while a witness may possess expertise, the proponent of the testimony must demonstrate that such expertise is germane to the issues in the case.

In *Wilson*, plaintiff, who admitted to murdering two Chicago police officers, brought a civil rights action against the City of Chicago and the police officers who allegedly tortured him after his arrest. *Id.* at 1236. Plaintiff sought to introduce expert testimony from a pathologist that plaintiff's description of the physical pain and emotional distress induced by the alleged electroshock treatment he purportedly underwent was consistent with the

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<sup>11</sup> The district court has discretion whether to admit or to exclude expert testimony. Its decision will not be reversed unless "manifestly erroneous." *Cella v. United States*, 998 F.2d 418, 423 (7th Cir. 1993), *citing*, *Salem v. United States Lines Co.*, 370 U.S. 31, 82 S.Ct. 1119, 8 L.Ed.2d 313 (1962).

scientific understanding of the effects of electroshock and hence unlikely to have been fabricated. *Id.* at 1238. The pathologist "studied torture on the side." *Id.* 6 F.3d at 1238. The district court found that he lacked expertise in the physiology of torture. The Seventh Circuit agreed and found that the witness' education, training, and experience did not provide him with the requisite medical or scientific knowledge. *Id.* at 1237. His education and training as a pathologist presumably provided him with expertise in postmortems; it did not provide him with expertise in neurology, psychiatry, or physiology, however. Similarly, his experience did not provide adequate foundation for his opinions. He studied torture as an avocation, albeit a serious one, and spent several hours every week studying torture and interviewed a number of electroshock victims. *Id.* at 1239. Based upon his experience, however, all the witness could testify to was that the plaintiff's description of the effects of electroshock treatments was consistent with that given by other electroshock victims. *Id.* at 1239. Thus, his opinions did not rest upon "genuine" scientific knowledge drawn from his education, training, or experience. *Id.* See also *Carroll v. Otis Elevator Co.*, 896 F.2d 210, 212 (7th Cir. 1990) (Pre-*Daubert* case where the court held whether a witness possesses sufficient qualifications is determined by "comparing the area in which the witness has superior knowledge, skill, experience, or education with the subject matter of the witness's testimony.").

### 3. Rule 702 Applies To Cases Involving Technical Or Other Specialized Knowledge

#### a. Accounting

In *Frymire-Brinati v. KPMG Peat Marwick*, 2 F.3d 183 (1993), the Seventh Circuit applied *Daubert's* construction of Rule 702 to a case involving an expert with "other specialized knowledge," namely, an accountant. *Frymire* involved a securities fraud action against an accounting firm arising out of its audit of the financial statements of a corporation in which plaintiffs had invested. *Id.* at 185-186.

At trial, the district court allowed plaintiffs' accounting expert to opine that in conducting the audit, the defendant accounting firm violated generally accepted auditing standards by certifying that it stated the corporate accounts according to generally accepted accounting principles. According to plaintiff's expert, the corporations investments in the partnerships at issue were not worth what defendant represented them to be worth. *Id.* at 186. The expert offered his own valuations of the partnership interests. However, he "conceded that his valuations were not 'market values' at all but were 'a fairly simple pass at what the magnitude of the problem was.'" *Id.* And, while he stated that his valuations were arrived at using a discounted cash flow analysis, he "conceded that he did not employ the methodology that experts in valuation find essential." *Id.* The Seventh Circuit held that the trial judge erred in admitting the expert's testimony without undertaking "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts at issue." [*Daubert*,] 113 S.Ct. at 2790." *Id.* at 186-187. In light of plaintiff's

expert's concessions, it found the methodology he employed in formulating his valuations inadequate under Rule 702. *Id.* at 187.

## b. Engineering

In *Bammerlin v. Navistar International Transportation Corp.*, 30 F.3d 898 (7th Cir. 1994), a products liability action, the Seventh Circuit applied *Daubert* to a case involving "technical knowledge." The district court allowed two of plaintiff's engineering experts to opine that an over-the-road truck was defective and unreasonably dangerous because its seat belt assembly did not comply with various provisions of the Federal Motor Vehicle Safety Standards ("FMVSS"). *Id.* at 899-900. The experts based their opinions on their respective interpretations on the FMVSS and testing they performed. *Id.* at 900-901. The jury returned a verdict for plaintiff and defendant appealed.

On appeal, the court held that the testimony was improperly admitted on several grounds. First, it held that the meaning of the FMVSS is a matter of law for the court; not an issue of fact to be decided by the jury. Thus, it is not a proper subject for expert testimony. *Id.* at 900. Second, the experts' tests were unreliable since their test protocols did not conform to those specified by the National Highway Transportation Safety Administration. Their failure to abide by the proper protocol was not, as the district court found, "simply a credibility issue." *Id.* at 901. Third, the experts' failed to conduct or rely on tests which compared the failure rate of one method of attachment of the safety belt system versus another, the core issue in the case. The court found that absent such testing, their opinions would not be helpful to the jury in determining whether the vehicle was defective as that term is defined under Indiana law since the jury was left to speculate as to the adequacy of the methods of attachment of the seat belt assembly. *Id.* at 901-902.

In *Pries v. Honda Motor Co., Ltd.*, 31 F.3d 543 (7th Cir. 1994), plaintiff sustained injuries in a roll-over car accident. She brought a products liability against the manufacturer of the automobile. Plaintiff alleged that vehicle was defective because the seat belt mechanism permitted the belt to become slack when the car rolled over. *Id.* at 544. The trial court awarded defendant summary judgment ruling she could not complain about the seat belts design in light of her statement, made to paramedics who treated her at the scene, that she was not wearing a seat belt at the time of the accident. *Id.* at 544. The appellate court reversed finding that plaintiff produced physical evidence of seat belt use sufficient to raise a genuine issue of material fact. *Id.* at 544.<sup>12</sup>

The court also addressed several other issues raised, including whether plaintiff's expert biomechanical engineer should be allowed to testify at trial. *Id.* at 545. The expert, who was also a professor, opined that the safety belt latch was defective because it was *possible* for objects to strike and open it during an accident. *Id.* His opinion rested, in part,

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<sup>12</sup> Specifically, plaintiff submitted expert testimony from an industrial design consultant that the seat belt showed signs of stress of the kind produced during an accident. *Id.* at 544.

on a test performed by plaintiffs' attorney during which he dropped a similar latch on a hard surface to see whether it would open. During several of the drops, the latch did open. The biomechanical engineer was asked about what forces had caused the latch to open and whether such forces were commonly achieved in a crash. He conceded he did not know. The Seventh Circuit found that his unsupported opinions did not rise to the level of scientific evidence as required under Rule 702, and were therefore insufficient to defeat summary judgment on the issue of whether the buckle was defectively designed. *Id.*

A district court applied *Daubert* to exclude testimony from an engineer in *Stanczyk v. Black & Decker, Inc.*, 836 F.Supp. 565, 567-568 (N.D.Ill. 1993). Plaintiff sustained injuries while using a miter saw and brought a products liability action against the manufacturer alleging that the guard was defectively designed. Plaintiff's expert, a mechanical engineer and former employee of the defendant manufacturer, was "an experienced designer of saws and guards." *Id.* at 566. He had previously testified as an expert witness. At deposition he testified he devised a "concept" which would lower the blade guard from approximately 23 inches above the table to 1/16th or 1/8th of an inch above the table." *Id.* 836 F.Supp. at 566-567. He conceded that his "engineering analysis" consisted of spending approximately one hour thinking about his concept. *Id.* He did not test his theory, however. He did not offer a prototype to support his concept. He did not submit his concept for peer review or publication. His concept did not comport with prevailing industry practices, and therefore, had not gained general acceptance. Finally, his alternative design was contrary to applicable design standards, including those promulgated by independent testing agencies. *Id.* at 566-567. The district court granted the manufacturer's motion to exclude the expert's testimony ruling that the expert's opinions did not pass muster under *Daubert* since "his concept is barely defined, utterly unproven and not documented at all." *Stanczyk*, 836 F. Supp. at 568.

In *Roback v. V.I.P. Transport, Inc.*, No. 91 C 5902, slip op. (N.D.Ill, Sept. 30, 1994),<sup>13</sup> plaintiffs in a negligence action sustained injuries when a tractor-trailer rig collided with their vehicle while they were stopped in traffic on an interstate highway. *Id.* slip op. at 2-3. Defendants sought to introduce testimony of a computer systems engineer and human factors consultant. The district court granted plaintiffs' motion *in limine* to exclude both witnesses.

Defendants' computer systems engineer described his occupation as "the investigation of vehicles that are alleged to have some function that the client wants investigated." *Id.* at 10. The court found that the witness lacked relevant credentials. Contrary to defendants' representation, he was not a professional engineer. Moreover, he had no substantial previous experience with tractor-trailer vehicles' electrical systems, and had obtained his masters degree in electrical engineering nearly 30 years ago. His only experience the district court found potentially relevant was his employment with a computer company in the

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<sup>13</sup> Roback is presently on appeal to the Seventh Circuit (No. 94-3857).

1960s. In addition, the court found that expert's methodology scientifically invalid. *Id.* at 12. The expert testified that he gathered the data upon which he based his opinions with a computer system he designed and configured. He conceded the system had never undergone peer review scrutiny, had never been meaningfully tested, was not generally accepted within the engineering community. *Id.* The court further found that defendants offered no evidence of the potential rate of error or the existence of standards applicable to the methodology employed. Consequently, it held the expert's testimony failed to adequately meet the reliability prong of the *Daubert* analysis. *Id.* at 12.

The court also found that the systems analyst's testimony did not meet *Daubert's* relevancy requirements. *Id.* at 12-13. The expert's primary function was to verify whether the truck malfunctioned shortly before the accident. The court found this fact of little consequence. The truck's operator had allegedly experienced similar malfunctions previously, and was therefore on notice of a problem with the cruise control mechanism before the day of the accident. *Id.* Accordingly, the court declined to abdicate its "gatekeeping" responsibility by allowing the expert to testify. *Id.* at 13.

### **c. Human Factors Consultant**

The *Roback* court also excluded defendants' human factors expert, primarily because his testimony lacked relevancy. *Id.* at 9-10. First, it found that the subject matter upon which the expert was to testify, namely, whether a driver "confronted with a significant distraction would have a diminished ability to perceive," was "well within human experience," and not a proper subject of expert testimony. *Id.* at 8. The court described the proffered opinion as "simplistic and circular." *Id.* at 8.<sup>14</sup> Second, the court found that whether the driver testified he was or was not distracted, the expert's testimony would add nothing. *Id.* His opinion bore solely upon the driver's credibility; it would merely accredit or discredit the driver's testimony.<sup>15</sup>

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<sup>14</sup> The district court paraphrased the expert's opinion as follows: a distraction can distract a person and if a distraction does distract a person while driving a vehicle the distracted person is not as able to perceive events as the person would were the person not distracted. The court continued, "[t]o merely articulate the conclusion shows its ludicrous nature as 'expert' testimony." *Id.* at 8-9.

<sup>15</sup>Not only did the court find that the proposed testimony irrelevant, it believed that the expert "was hired to be nothing more than a pleasant-looking, white-haired, hired advocate whose purpose is to confuse the issues." *Id.* at 8.

Second, the court found the expert's testimony unreliable in light of defendants' failure to even attempt to show that either of the four factors articulated in *Daubert*, testing, peer review, error rate or compliance with recognized standards, and general acceptance, had been satisfied. *Id* at 9.

#### IV. CONCLUSION

The Supreme Court's construction of Rule 702 in *Daubert* is similar to the interpretation the Seventh Circuit employed before that decision was handed down. Not surprisingly, the Seventh Circuit has embraced the *Daubert* decision. Its application of the decision thus far is a clear signal to the trial judges in the circuit, as well as litigants, that "junk science" and the "advocate expert" have no place in the courtroom. While the Supreme Court found that Rule 702 presents a more lenient and flexible standard for the admissibility of expert testimony than did the "general acceptance" standard, the Seventh Circuit has read *Daubert* to require trial judges to scrutinize proffered expert testimony with greater intensity.

It is important to remember, however, that the Seventh Circuit and the district courts in the circuit have applied *Daubert* in only a handful of cases, many of which were litigated or tried before it was decided. Litigants, particularly plaintiffs, and more specifically products liability plaintiffs, most likely did not anticipate the heightened scrutiny their experts were forced to undergo. They undoubtedly had grown accustomed to the court viewing challenges to expert qualifications and methodology as matters of credibility rather than admissibility. *Daubert's* long term effect and full impact will not become measurable until the bar has had an opportunity to attempt to conform their expert's testimony to *Daubert's* requirements.